COMMONWEALTH vs. KHALID KALILA.

No. 22-P-817

Suffolk. September 12, 2023. – November 30, 2023.

Present: Vuono, Singh, & Englander, JJ.

Mayhem. Assault and Battery by Means of a Dangerous Weapon. Jury and Jurors. Practice, Criminal, Challenge to jurors, Empanelment of jury, Execution of sentence, Jury and jurors, Sentence, Stay of proceedings, Voir dire.

Indictments found and returned in the Superior Court Department on June 28, 2018.

The cases were tried before Michael D. Ricciuti, J.

J.W. Carney, Jr., for the defendant.
Darcy Jordan, Assistant District Attorney (Lynn Feigenbaum, Assistant District Attorney, also present) for the Commonwealth.

ENGLANDER, J. The defendant was convicted by a jury of mayhem, assault and battery by means of a dangerous weapon, and violation of constitutional rights with bodily injury, arising from a physical confrontation that he had with a security guard at a restaurant and lounge in the Seaport area of Boston, during

which the security guard was seriously injured. The security guard (victim) is Black, and witnesses testified that during the confrontation the defendant used racial slurs in reference to the victim.

This appeal involves the selection of the jury, and of one juror in particular -- juror no. 32. Juror no. 32 was a Black male of roughly the same age as the victim. During jury selection the defendant sought to use a peremptory challenge to strike juror no. 32. When the judge, sua sponte, asked defense counsel the reason, counsel stated that the juror's mother worked for the Boston Police Department, that the prosecution would be calling Boston police witnesses as part of its case, and that the defense intended to challenge the quality of the police investigation.

The judge refused to strike the juror. The judge expressly found that the reason defense counsel provided was "genuine," but then found that it was not "adequate" -- referring to the juror selection standards set forth in Commonwealth v. Soares, 377 Mass. 461, cert. denied, 444 U.S. 881 (1979), and its progeny. See Commonwealth v. Maldonado, 439 Mass. 460, 464-465 (2003). The juror accordingly was seated for trial, and the jury convicted the defendant. A few weeks later, at a hearing on the defendant's motion to stay execution of sentence, the judge again addressed his reasoning in denying the peremptory

challenge, at one point stating that "here I think I was saying . . . that the real reason [for the defendant's challenge] was race."

On appeal the defendant argues that the judge erred in refusing to strike the juror, and that the error is considered "structural" under our case law. Our review of the precedent leads us to the same conclusion, and accordingly, the judgments must be vacated and the verdicts set aside.

Background. 1. The crime. The evidence at trial showed that in the early morning of January 21, 2018, the defendant ended a night of celebration at the Empire restaurant and lounge (Empire) in the Seaport area of Boston. The defendant became involved in a physical altercation with another patron and, as a result, was ejected from the premises. As he was being escorted out, the defendant struck an Empire security guard in the face with a glass the defendant had been holding in his hand. Certain witnesses, including another Empire employee, heard the defendant use racial slurs toward the victim. Other witnesses could not recall any such statements. The victim sustained serious injuries and was transported to the hospital, where he underwent facial surgery. He has permanent scars and has lost feeling in part of his face.

2. The jury selection process. The ten-day trial occurred in May of 2021. During empanelment, defense counsel challenged

juror no. 32, a thirty-six year old Black male whose mother worked as a civilian in the internal affairs division (IAD) of the Boston Police Department -- the same police department that had arrested the defendant and investigated the case. At the time juror no. 32 was challenged, only four jurors had been seated -- one Black woman, one white man, and two white women.

In response to the trial judge's request for grounds, defense counsel stated that juror no. 32's "mother works for the Boston Police Department, and that would create . . . a bad situation if we are challenging the credibility of the Boston Police."[1] The judge noted that the defense's proffered ground "didn't seem to play a role in [juror no. 32's] colloquy," and asked the Commonwealth for its views. The Commonwealth responded that there had been "other jurors with relatives [in] law enforcement who are actual law enforcement officers who have been seated without challenge, and . . . all of the answers that [juror no. 32] offered to the Court suggest[] that [the family connection to law enforcement] wouldn't have any impact on his ability to serve in this case." At this point, the judge brought juror no. 32 back and inquired whether his mother's

[1] Prior to asking counsel for the "grounds" for his challenge, the judge did not explicitly make any finding suggesting that there may have been an improper basis for the defendant's challenge. See Commonwealth v. Sanchez, 485 Mass. 491, 493 (2020).

employment would affect his impartiality, to which juror no. 32 responded, "[T]hat would not play a role."

Defense counsel then renewed his challenge. The following colloquy between the judge and defense counsel ensued:

> The court: "I'm going to overrule the challenge. . . . [Juror no. 32 has] been completely straightforward in the answers he's given . . . . I find that he is able to be completely impartial with respect to this issue, and that his mother's work would not impact his ability to continue."
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> Defense counsel: "Your honor has given a great summary of why [juror no. 32] can't be challenged for cause, but I'm not challenging him for cause, I'm challenging him with a peremptory challenge, and . . . as long as I have a basis that's real, I can use a peremptory on him."
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> The court: "Unless I find it's not adequate."
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> . . .
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> Defense counsel: "I'm specifically referring to the fact that his mother works with the Boston Police Department every single day, and those two police officers, their testimony is going to be challenged . . . . If he had been white and his mother worked at the Boston Police Department, I would have challenged him."
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> . . .
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> The court: "I'm not challenging your genuineness. This is a [B]lack male, [thirty-six], from the Dorchester neighborhood of Boston. In order for me to find this challenge doesn't violate Soares, it must be both adequate and genuine. I find your reason is genuine, I don't find it's adequate. . . . I just don't see why a [B]lack individual who has no hesitation about hearing the evidence from a Boston

> Police Officer versus a witness should be challenged on this basis."[2]

Juror no. 32 was seated over the defendant's objection.

During empanelment, the defendant exercised five additional peremptory challenges -- four of white women and one of a white man. He did not exercise peremptory challenges on juror no. 17, a white woman whose father was a former police officer in another State, or juror no. 21, a white man who hesitated before answering that he would not "weigh the testimony of a police officer any differently from that of a civilian." At the conclusion of empanelment, the jury consisted of nine white individuals, and five Black individuals.

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[2] During empanelment, the judge reaffirmed his conclusion that defense counsel's challenge was genuine several times, e.g.:

(1) Defense counsel: "[I]f you are saying that because I objected to that juror because his mother works for Boston Police that I was making a racist challenge, I object to that, Your Honor."

The court: "Well, and that's why I found your reason genuine."

(2) The court: "I found that your reason was genuine. I found it was overruled under the other prong of Soares, which is whether it's adequate."

(3) The court: "I was not saying then or now that [defense counsel] is anything but a[n] honest lawyer, and not that he was a racist. What I concluded was that the explanation was not adequate under Soares."

3. The defendant's motion to stay execution of sentence. After four days of jury deliberations, the defendant was convicted of all charges. After he was sentenced, the defendant then filed a motion to stay execution of his sentences under Mass. R. Crim. P. 31, as appearing in 454 Mass. 1501 (2009), in which he argued that he had a strong issue for appeal because his peremptory challenge of juror no. 32 had been erroneously denied. See Commonwealth v. Nash, 486 Mass. 394, 404 (2020). The trial judge held a hearing on the defendant's motion (stay hearing), and the judge began the hearing by revisiting his reasons for denying the peremptory challenge. The judge acknowledged that he made a finding at trial that the reasons defense counsel gave for the challenge were genuine and that defense counsel "was telling me what he genuinely thought and that he's not a racist." The judge went on, however, to expound on his views of the peremptory challenge:

> "I was surprised by the strike. I thought it was substantively weak. I was surprised that the ground raised, that his mother worked for [the Boston Police Department], wasn't raised in the questioning. And what troubled me about that was his mother worked as a civilian and in the Internal Affairs Division; it would seem to me . . . someone in the Internal Affairs [Division] . . . wouldn't show favoritism towards police but might have the opposite impact: the IAD investigates police for wrongdoing. . . . I thought it was inconsistent with the lack of a strike on Juror 17, the white female whose father had been a police officer."

The judge then acknowledged that his statements at trial may have been less than clear, and indicated that his concern had been that the challenge was the result of "implicit bias":

> "I found that there was very little ground to support the ground offered by the defense. . . . I found that the objection wasn't reasonably specific to that juror; that -- although I thought and believe [defense counsel] to have been telling the truth, that the strike was an unintended instance of unintended bias, and that that was within the scope of Soares."

After further discussion, the judge concluded that "here I think I was saying, although it wasn't intended, that the real reason was race." As to ruling on the motion to stay the defendant's sentence, the judge acknowledged that the defendant had presented a sufficiently significant appellate issue likely to satisfy the standard in Nash, 486 Mass. at 404, but denied the motion on the grounds that the defendant presented an "extreme risk of flight." The defendant now appeals from his convictions.[3]

Discussion. The question presented is whether the judge erred in denying defense counsel's attempted peremptory

[3] The defendant separately appealed the denial of his motion to stay execution of sentence. After a single justice of this court denied the motion to stay, a divided panel of this court affirmed the denial, without opining on the merits of the defendant's argument regarding the denial of his peremptory challenge. See Commonwealth v. Kalila, 102 Mass. App. Ct. 108 (2023). The Supreme Judicial Court has granted further appellate review with respect to the appeal from the denial of the motion to stay.

challenge of juror no. 32. There is a considerable body of Massachusetts law addressing the proper and improper use of peremptory challenges. In its seminal opinion in Soares, the Supreme Judicial Court vacated the defendants' convictions of murder in the first degree, where the prosecution had used thirteen peremptory challenges to exclude every prospective Black juror but one from sitting on the petit jury. Soares, 377 Mass. at 473, 492-493. The court concluded that the resulting petit jury violated the requirement, drawn from art. 12 of the Massachusetts Declaration of Rights, that a "jury be drawn from a fair and representative cross section of the community." Id. at 478, 488. In so holding, however, the court took pains to "preserve a legitimate and significant role for the peremptory challenge." Id. at 485.

> "Toward the end of 'eliminat[ing] extremes of partiality on both sides,' and of assuring the parties 'that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise,' peremptory challenges may be used to eliminate prospective jurors whose unique relationship to the particular case raises the spectre of individual bias. Both parties retain wide discretion to exercise peremptory challenges in this manner." (Footnotes omitted.)

Id., quoting Swain v. Alabama, 380 U.S. 202, 219 (1965).

The cases following Soares have teased out the process trial judges must follow in separating proper peremptory challenges from those that are discriminatory and thus improper.

"We generally presume that peremptory challenges are made and used properly during jury selection." Commonwealth v. Mason, 485 Mass. 520, 529 (2020). The presumption of propriety is rebuttable, however, where "the totality of the relevant facts gives rise to an inference of discriminatory purpose." Commonwealth v. Sanchez, 485 Mass. 491, 511 (2020), quoting Johnson v. California, 545 U.S. 162, 168 (2005). The question whether a proposed strike is discriminatory and thus improper can be raised by a party or, as here, can be raised by the trial judge sua sponte. Commonwealth v. LeClair, 429 Mass. 313, 322 (1999).

Once the trial judge determines that there is a sufficient basis to contest a peremptory challenge, the burden shifts to the party exercising the challenge to articulate a bona fide nondiscriminatory explanation for it. See Commonwealth v. Gonzalez, 99 Mass. App. Ct. 161, 165 (2021). To be bona fide, an explanation must satisfy two tests -- it must be both "genuine" and "adequate." Id., quoting Mason, 485 Mass. at 530. As the Supreme Judicial Court explained in Maldonado, 439 Mass. at 464-465:

> "The determination whether an explanation is 'bona fide' entails a critical evaluation of both the soundness of the proffered explanation and whether the explanation (no matter how 'sound' it might appear) is the actual motivating force behind the challenging party's decision. In other words, the judge must

> decide whether the explanation is both 'adequate' and 'genuine.'
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> "An explanation is adequate if it is 'clear and reasonably specific,' 'personal to the juror and not based on the juror's group affiliation' (in this case race), and related to the particular case being tried. Challenges based on subjective data such as a juror's looks or gestures, or a party's 'gut' feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination. An explanation is genuine if it is in fact the reason for the exercise of the challenge. . . . An explanation that is perfectly reasonable in the abstract must be rejected if the judge does not believe that it reflects the challenging party's actual thinking." (Citations and footnote omitted.)

As described above, in this case the judge expressly found that the explanation proffered by defense counsel was "genuine." The judge made that finding with respect to juror no. 32 several times during jury empanelment; indeed, he repeated the genuineness finding at the stay hearing. As articulated in Maldonado, this means that the judge found that defense counsel's concerns about juror no. 32's mother's affiliation with the Boston Police Department were "in fact the reason" for the challenge. Maldonado, 439 Mass. at 465. Nevertheless, the judge rejected the peremptory challenge, ruling that defense counsel's stated grounds were not "adequate." He reasoned:

> "[The challenge] must be clear and reasonably specific [and] personal to the juror and not based on the juror's group affiliation, and related to the particular case being tried. I just don't see why a [B]lack individual who has no hesitation about hearing

> the evidence from a Boston Police Officer versus a witness should be challenged on this basis."

The judge erred in rejecting the peremptory challenge of juror no. 32 on adequacy grounds. Defense counsel's explanation met the Maldonado test -- it was clear, specific to the facts of juror no. 32, and not based on group affiliation. Indeed, our courts have previously acknowledged that the affiliation of a juror's family member with law enforcement can be an adequate basis for a peremptory challenge. For example, in Commonwealth v. Green, 420 Mass. 771, 776-777 (1995), the Supreme Judicial Court overturned a conviction where the judge had improperly refused defense counsel's attempts to strike two Black jurors. As to one of those jurors, the reason defense counsel advanced was that the juror's "father and brother were Boston police officers, and the credibility of witnesses who were Boston police officers would be an issue at trial." Id. at 774-775. The Green court ruled that this reason met the adequacy requirement, that the peremptory challenge had been improperly rejected, and that the juror should not have been seated. See id. at 776-778. See also Gonzalez, 99 Mass. App. Ct. at 166.

If the record before us consisted solely of the statements made during the jury selection process, this case would be controlled by the Green decision. The Commonwealth, however, relies heavily on the judge's statements during the stay

hearing, asserting that in denying the challenge the judge actually had "conclude[ed] [that] the defendant's strike was clearly directed at juror no. 32's race and group affiliation." The Commonwealth points to the judge's statement, at the stay hearing, that "there was very little ground to support the ground offered by the defense," and that the strike was "substantively weak." The Commonwealth also argues that defense counsel did not strike two other jurors who arguably had a bias toward law enforcement -- juror no. 17, whose father was a former police officer, and juror no. 21, who hesitated when asked whether he would weigh a police officer's testimony differently.

The thrust of the Commonwealth's arguments is that the judge actually found that defense counsel's explanation was not "genuine" -- that the "real reason" for the strike was not the juror's mother's affiliation with the Boston police, but rather the juror's race. And indeed, this appears to be what the trial judge meant by his statements at the stay hearing. At that stay hearing the trial judge acknowledged confusion between the "genuineness" and "adequacy" tests, and indicated that his concerns about "implicit bias," which he discussed at the stay hearing, might fit more correctly under the "genuineness" test, rather than under "adequacy." Put differently, it appears that the judge was stating that he actually determined that the

reasons given for the strike were not the real reasons -- that is, not genuine.

We of course give deference to the fact finding of trial judges, who see and hear the witnesses and the counsel in real time in the court room. See Commonwealth v. Scott, 467 Mass. 336, 344 (2014); Commonwealth v. Leavitt, 21 Mass. App. Ct. 84, 85 (1985). Restraint, in the review of fact finding, is fundamental to an appellate judge's role. And we often defer to a trial judge's findings (or clarifications) even when they are provided after the fact -- for example, in response to a motion for a new trial. See Commonwealth v. Brescia, 471 Mass. 381, 387-388 (2015) (deferring to findings in connection with motion for new trial); Commonwealth v. Walker, 443 Mass. 213, 224 (2005) (deferring to findings regarding claim of ineffective assistance of counsel); Commonwealth v. Robbins, 431 Mass. 442, 446-447 (2000) (deferring to findings with respect to motion to withdraw guilty plea); Commonwealth v. Farnsworth, 76 Mass. App. Ct. 87, 92 (2010) (deferring to findings regarding previously denied motion to suppress).[4]

The difficulty in this case, however, is that the judge's statements at the stay hearing are not easily reconciled with

[4] Although deference to retrospective findings is ordinarily appropriate, we acknowledge the concern that a judge's retrospective findings could be influenced by a desire to preserve a result or to avoid a determination of error.

the statements he made when he denied the defendant's peremptory challenge during empanelment. And during empanelment, the judge erred; the reasons for the strike advanced by defense counsel were adequate, and (given the finding of genuineness) should have resulted in allowing the peremptory challenge. Under the circumstances, we cannot agree that the judge's statements at the stay hearing can cure this error. In the first place, we do not agree with the judge's suggestion that there is a lack of clarity as to the definitions of "genuineness" and "adequacy"; those concepts are distinct, and well described in Maldonado, 439 Mass. at 464-465. If the judge determined that the strike was actually the product of implicit bias -- that is, it was based upon race -- he needed to find the reasons given were not genuine at the time they were advanced (i.e., during the empanelment process). Here, the clear findings during empanelment that the ground advanced by defense counsel was "genuine" mean that the defendant's peremptory challenge of juror no. 32 had to be permitted.

We accordingly conclude that the judge erred in refusing to strike juror no. 32. Under the case law, the remedy for the erroneous denial of even a single peremptory challenge is that the conviction must be vacated, the error being regarded as "structural." No prejudice need be shown. See Green, 420 Mass.

at 778; Gonzalez, 99 Mass. App. Ct. at 168. The judgments are vacated, and the verdicts are set aside.

So ordered.

ENGLANDER, J. (concurring). I write separately to note that although the judge erred here, if I were deciding this case unconstrained by precedent I would not vacate the defendant's convictions. The precedents establish a per se rule -- error in the treatment of a peremptory challenge requires that the judgment be vacated, without further consideration of the circumstances. See Commonwealth v. Green, 420 Mass. 771, 776 (1995). But it is not at all clear to me why the error at issue -- the improper denial of a peremptory challenge -- should be regarded as "structural."[1]

Peremptory challenges are a creature of statute; they are not a fundamental right. See Rivera v. Illinois, 556 U.S. 148, 158 (2009); Commonwealth v. Hampton, 457 Mass. 152, 163-164 (2010). Here the judge expressly found that juror no. 32 was impartial, and he was not excluded from the jury. This case thus is light years different from Commonwealth v. Soares, 377 Mass. 461, cert. denied, 444 U.S. 881 (1979), where potential jurors were excluded and the concern was that the jury were not chosen from a fair cross section of the community. Here, in contrast, the defendant was tried by an impartial jury from

[1] Structural error has been described as "error that 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" Commonwealth v. Hampton, 457 Mass. 152, 163 (2010), quoting Washington v. Recuenco, 548 U.S. 212, 218-219 (2006).

which no member of a protected group had been improperly excluded -- it just was not the jury that the defendant wanted.

It is basic to appellate practice that in most instances, a finding of error does not automatically require that a judgment be overturned. An appellate remedy that overturns a criminal jury verdict is a significant remedy -- it comes with costs to the parties, the witnesses, and the system. In many instances, a complete retrial is required. For good reason, then, as a general rule we do not overturn such verdicts absent a showing that an error resulted in material prejudice. See, e.g., Commonwealth v. Seino, 479 Mass. 463, 466-468 (2018) (violation of confrontation clause right under Sixth Amendment to United States Constitution and art. 12 of Massachusetts Declaration of Rights harmless under circumstances); Commonwealth v. Depina-Cooley, 95 Mass. App. Ct. 218, 222 (2019) (violation of grand jury secrecy did not warrant dismissal of indictments where no prejudice shown); Commonwealth v. Duffy, 62 Mass. App. Ct. 921, 923 (2004) (erroneous admission of evidence not prejudicial under circumstances).

I recognize that the Supreme Judicial Court has several times stated that the erroneous denial of a peremptory challenge is "reversible error without a showing of prejudice" -- as it did in dicta in Hampton, 457 Mass. at 164. The court based that statement on the "time-honored importance of peremptory

challenges," id. at 165, and despite the holding of the United States Supreme Court, in Rivera, that an erroneous denial of a peremptory challenge was not structural error under Federal law. Rivera, 556 U.S. at 161. Regardless, I suggest it is time to revisit the rule. As this case illustrates, the progeny of Soares have defined a juror selection process that is complicated and difficult for trial judges to administer, and fraught with the potential for error. In light of this, we should be all the more careful only to overturn convictions where the error is such that it contravenes significant systemic norms. Here, as noted above, the defendant received a fair trial before an impartial jury from which no member of a protected group had been improperly excluded.[2]

[2] Another reason for the per se rule may be the (unspoken) concern that there is no means for evaluating whether an improperly denied peremptory challenge had an impact on the outcome of the trial. We of course do not (and should not) inquire into the details of jury deliberations, and even if we could, it would be impossible to determine whether the inclusion or exclusion of a single juror had any impact at all. See Commonwealth v. DiBenedetto, 94 Mass. App. Ct. 682, 685 (2019); Commonwealth v. Lassiter, 80 Mass. App. Ct. 125, 130 (2011). In my view, however, asking whether the improper inclusion of the juror impacted the result is the wrong question; rather, we should acknowledge that in these circumstances the error resulted in no systemic harm.