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SJC-12724

COMMONWEALTH vs. LAWRENCE L. HEYWOOD.

Suffolk. September 9, 2019. - January 30, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher,  
& Kafker, JJ.

Assault and Battery. Jury and Jurors. Handicapped Persons.  
Practice, Criminal, Jury and jurors, Empanelment of jury,  
Assistance of counsel.

Complaint received and sworn to in the Roxbury Division of the Boston Municipal Court Department on October 21, 2015.

The case was tried before Debra A. DelVecchio, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Joseph Maggiacomo, III, for the defendant.  
Cailin M. Campbell, Assistant District Attorney, for the Commonwealth.

The following submitted briefs for amici curiae:  
Emily L. Levenson, of Maryland, & Richard M. Glassman for National Federation of the Blind & others.  
Jonathan M. Albano for Boston Bar Association.

BUDD, J. The defendant, Lawrence L. Heywood, was convicted of assault and battery causing serious bodily injury in violation of G. L. c. 265, § 13A (b), in connection with an incident in which the defendant, without warning, punched the victim in the face. He now appeals, claiming that it was error for a blind individual to serve on the jury. The defendant further argues that the evidence presented at trial was insufficient to support a finding of serious bodily injury.

We transferred the defendant's appeal to this court on our own motion. We discern no error with respect to the seating of the blind juror. Additionally, we conclude that the Commonwealth presented sufficient evidence for a jury to find that the defendant's action resulted in the victim suffering serious bodily injury. We therefore affirm the defendant's conviction.<sup>1</sup>

Background. We summarize the facts the jury could have found, reserving some details for later discussion. The defendant and the victim knew each other through an adult basketball team. At a league event in May 2015, while the victim was talking to another individual, the defendant, without warning, punched the victim in the right cheek, just below his

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<sup>1</sup> We acknowledge the amicus brief submitted by the National Federation of the Blind, National Federation of the Blind of Massachusetts, and Disability Law Center; as well as the amicus letter submitted by the Boston Bar Association.

eye. As a result, the victim suffered a fractured orbital bone and cheekbone, and retinal bleeding. He required surgery to repair the structure of his face, which involved inserting two titanium plates into his face to hold the bones in place. To avoid "significant discomfort" in cold temperatures due to the titanium plates, the victim must apply warm compresses to his face. As a result of either the assault or the subsequent surgery, the victim also suffered nerve damage to his cheek; consequently, he can "barely feel" the right side of his face.

Discussion. 1. Juror competency. "A criminal defendant is entitled to a trial by an impartial jury pursuant to the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights." Commonwealth v. Williams, 481 Mass. 443, 447 (2019). "Fundamental to the right of an 'impartial' jury is the requirement that jurors be competent and qualified" (citation omitted). Commonwealth v. Susi, 394 Mass. 784, 786 (1985). "The failure to grant a defendant a fair hearing before an impartial jury violates even minimal standards of due process." Id.

Here, during the jury voir dire, juror no. 6 indicated to the judge that, although he was blind, his disability would not be an impediment to serving as a juror, and that he could access the evidence if a fellow juror described photographic evidence to him. After determining that jury service would not otherwise

be a hardship, the judge empanelled juror no. 6 without objection.

The defendant argues that his right to a fair and impartial jury was violated because the blind juror was unable to see the physical evidence, and had to have the documentary evidence read to him. The defendant faults the judge for failing to strike the juror for cause, and faults his trial counsel for failing to object to the empanelment of the juror.

As an initial matter, we note that the defendant failed to object contemporaneously to the seating of the juror who the defendant now claims was unqualified to serve. Where a defendant has been denied an impartial jury, and the issue is properly preserved, the error is structural and requires reversal without a showing of actual prejudice. See Williams, 481 Mass. at 454; Commonwealth v. Hampton, 457 Mass. 152, 163 (2010). However, "[w]here a defendant fails to challenge a juror for cause, the questions of the impartiality of that juror and the adequacy of voir dire are waived." Commonwealth v. McCoy, 456 Mass. 838, 842 (2010). See Commonwealth v. Zakas, 358 Mass. 265, 268 (1970). Therefore, any error is reviewed for a substantial risk of a miscarriage of justice. See Commonwealth v. Marinho, 464 Mass. 115, 118 (2013). Here, there was no such risk, as the defendant's claim lacks merit.

"We afford a trial judge a large degree of discretion in the jury selection process." Commonwealth v. Vann Long, 419 Mass. 798, 803 (1995), and cases cited. See Commonwealth v. Lopes, 440 Mass. 731, 736 (2004) ("The scope of voir dire rests in the sound discretion of the trial judge . . ."). This discretion extends to a judge's determination whether a juror is competent to serve. See Susi, 394 Mass. at 787. An abuse of discretion is a "clear error of judgment in weighing the factors relevant to the decision, . . . such that the decision falls outside the range of reasonable alternatives" (quotations and citations omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). The judge did not abuse her discretion in finding juror no. 6 competent to serve despite the juror's blindness.

During jury empanelment, the judge conducted an individual voir dire of juror no. 6 to evaluate the juror's ability to serve. The juror responded affirmatively when the judge asked him if he would "feel comfortable" with having another juror describe the photographic evidence and, with regard to testimony from witnesses, whether he would be able to "follow along" without assistance. The judge satisfied herself that the juror was competent and qualified to serve.

This decision was entirely appropriate. Because the identification of the perpetrator was not in question, the jury had to determine only whether the victim suffered serious bodily

injury. As the injuries suffered by the victim were not visible at the time of trial, the ability to see the victim's face during his testimony was not essential to reaching a verdict. Similarly, because of the internal nature of the injuries and subsequent surgery, photographs of the victim's face taken close in time to the assault would not have assisted the jury in determining whether the victim suffered serious bodily injury as defined by G. L. c. 265, § 13A (c). On the other hand, the juror had appropriate access to the testimony of the victim and the medical records, which were directly relevant to the question whether the victim suffered serious bodily injury.<sup>2</sup> Here, the medical records, rather than the photographs, provided the critical evidence upon which the jury could find serious bodily injury. Because in this instance the photographic evidence would not have materially assisted the jury in

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<sup>2</sup> The defendant contends that the fact that jurors described photographic evidence and read documentary evidence to the juror who was impaired visually resulted in a verdict based on extraneous information. We disagree. "An extraneous matter is one that involves information not part of the evidence at trial . . . ." Commonwealth v. Guisti, 434 Mass. 245, 251 (2001). Here, the photographs and medical documents were admitted in evidence, and the victim described the photographs during his testimony. A fellow juror's descriptions of the admitted evidence did not constitute extraneous evidence. See id. Although perhaps not ideal (see note 6, infra), the solution crafted with input from juror no. 6, and implemented without objection by the parties, provided satisfactory access to the evidence allowing the juror to participate effectively in deliberations.

determining serious bodily injury, seating juror no. 6 was well within the judge's discretion. Contrast Susi, 394 Mass. at 786 (empanelment of blind juror constituted reversible error where identification of perpetrator was contested, and ability to compare visually physical evidence was required).

Further, the judge's voir dire inquiry to determine juror no. 6's competency to serve was mandated by G. L. c. 234A, § 3, which ensures that the right to participate in jury service is extended to all eligible citizens, including those with physical disabilities. The statute provides in pertinent part:

"All persons shall have equal opportunity to be considered for jury service. All persons shall serve as jurors when selected and summoned for that purpose except as hereinafter provided. No person shall be exempted or excluded from serving as a grand or trial juror because of race, color, religion, sex, national origin, economic status, or occupation. Physically handicapped persons shall serve except where the court finds such service is not feasible. The court shall strictly enforce the provisions in this section." (Emphases added.)

G. L. c. 234A, § 3.

This statutory protection against discrimination in jury selection dovetails well with a defendant's right to a fair jury of his or her peers, an essential component of which is being able to select jurors from a fair and representative cross section of the community. See Batson v. Kentucky, 476 U.S. 79, 86 (1986); Taylor v. Louisiana, 419 U.S. 522, 528 (1975); Commonwealth v. Soares, 377 Mass. 461, 478, cert. denied, 444

U.S. 881 (1979). Because a cross section of the community necessarily includes, among others, citizens with disabilities,<sup>3</sup> the defendant's right to a fair jury trial and the protection against discrimination in jury selection work in tandem.

General Laws c. 234A, § 3, creates a presumption of competency for all jurors, including those with disabilities, who then must be evaluated on a case-by-case basis to determine whether service is "feasible." See Susi, 394 Mass. at 788. Here, the judge's individual voir dire and subsequent seating of juror no. 6 followed the case-by-case determination specifically required by G. L. c. 234A, § 3. See generally Adjartey v. Central Div. of the Hous. Court Dep't, 481 Mass. 830, 848-849 (2019) (if litigant requests accommodation for disability and court determines litigant has disability, court shall provide reasonable accommodations determined on case-by-case basis).

We note that such case-by-case determinations may also be required by Title II of the Federal Americans with Disabilities Act of 1990 (ADA), which provides:

"[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or

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<sup>3</sup> In 2016, approximately 11.7 percent of individuals living in the Commonwealth had a physical disability. Massachusetts Rehabilitation Commission, Massachusetts & U.S. Disability Facts & Statistics: 2017, <https://www.mass.gov/files/documents/2018/08/30/MRC-Disability-Fact-Sheet-2017.pdf> [<https://perma.cc/H988-6FZK>].



activities of a public entity, or be subjected to discrimination by any such entity."

42 U.S.C. § 12132. A "public entity" includes "any State or local government" and any department or agency thereof. See 42 U.S.C. § 12131.

Under Title II of the ADA and the regulations implementing it, public entities may be required to implement a variety of measures to prevent exclusion or discrimination on the basis of disability. Such measures may include, among others, making reasonable modifications to policies and practices, removing architectural and communication barriers, and providing auxiliary aids and services. See 42 U.S.C. §§ 12131, 12132; 28 C.F.R. §§ 35.104, 35.130(b)(1)(i), 35.130(b)(7)(i), 35.160(b)(1)(2018).<sup>4</sup>

Although at least one court has held that a court's "policy of categorical exclusion of all blind persons" from jury service violates the ADA, see Galloway v. Superior Court of D.C., 816 F. Supp. 12, 19 (D.D.C. 1993), we are not aware of any cases clarifying how Title II of the ADA and its implementing regulations apply to individualized determinations of juror

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<sup>4</sup> A public entity need not make a modification if it can demonstrate that the modification "would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7)(i) (2018).

competency.<sup>5</sup> Without attempting to determine what specific procedures Title II of the ADA and its associated regulations require to determine the competency of a juror who is blind, we note that the judge here clearly complied with the ADA. The judge conducted an individualized voir dire of juror no. 6 and determined that he was competent to serve. Furthermore, the judge furnished, with the input and approval of juror no.6, auxiliary services allowing him to serve while another juror described the visual evidence.<sup>6</sup> See 28 C.F.R. § 35.160(b)(2) (2018) ("In determining what types of auxiliary aids and services are necessary, a public entity shall give primary

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<sup>5</sup> In Tennessee v. Lane, 541 U.S. 509, 531 (2004), the United States Supreme Court held that Title II of the ADA applies to State courts with regard to ensuring that litigants with disabilities have equal access to judicial services. In Lane, the Court held that the ADA requires State courts to take "reasonable measures to remove architectural and other barriers to accessibility," but that courts need not "employ any and all means to make judicial services accessible to persons with disabilities." Id. at 531-532. Unlike Lane, which involved a litigant who was "denied the benefits of the services" of a court, id. at 513, this case involves "participation in . . . [the] activities of a public entity," namely, the ability to participate as a juror in the adjudication of cases. See 42 U.S.C. § 12132.

<sup>6</sup> Although the accommodation provided to juror no. 6 satisfied the ADA, other accommodations for jurors who are blind or have a visual impairment may be preferable to having another juror describe visual evidence. For instance, the ADA's implementing regulations list a variety of potential visual auxiliary aids and services, including qualified readers, Brailled materials and displays, and screen reader software. See 28 C.F.R. § 35.104 (2018).

consideration to the requests of individuals with disabilities"). There was no error.

Furthermore, because there was no error, trial counsel was not ineffective for failing to object to the seating of juror no. 6. See Commonwealth v. Lessieur, 472 Mass. 317, 327 (2015) (no ineffective assistance where counsel failed to object to properly admitted evidence). See also Commonwealth v. Carroll, 439 Mass. 547, 557 (2003) (failure to pursue futile tactic does not constitute ineffective assistance of counsel); Commonwealth v. Vieux, 41 Mass. App. Ct. 526, 527 (1996), cert. denied, 520 U.S. 1245 (1997) (same).

2. Sufficiency of the evidence. General Laws c. 265, § 13A (b) (i), provides for an enhanced penalty for conviction of an assault and battery that causes "serious bodily injury." Although the defendant disputes neither that he struck the victim nor that the victim was injured, he argues on appeal, as he did at trial, that there was insufficient evidence from which the jury could conclude that he caused serious bodily injury to the victim.<sup>7</sup> The question, then, is whether, in viewing the

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<sup>7</sup> An unsigned motion for a required finding of not guilty based on an unspecified insufficiency of the evidence appears in the record but apparently was not argued. At any rate, "[c]onvictions based on insufficient evidence 'are inherently serious enough to create a substantial risk of a miscarriage of justice.'" Commonwealth v. Melton, 436 Mass. 291, 294 n.2 (2002), quoting Commonwealth v. McGovern, 397 Mass. 863, 867-868 (1986).

evidence in the light most favorable to the Commonwealth, the jury could have found that the victim suffered serious bodily injury as a result of the assault and battery beyond a reasonable doubt. See Commonwealth v. Bin, 480 Mass. 665, 674 (2018), quoting Commonwealth v. Latimore, 378 Mass. 671, 677 (1979).

"Serious bodily injury" is defined under G. L. c. 265, § 13A, as "bodily injury that results in [1] a permanent disfigurement, [2] loss or impairment of a bodily function, limb or organ, or [3] a substantial risk of death." G. L. c. 265, § 13A (c). See Commonwealth v. Scott, 464 Mass. 355, 357 (2013) (statute sets forth "three distinct routes for establishing serious bodily injury"). Here, we conclude that the evidence was sufficient to establish beyond a reasonable doubt that the victim suffered a permanent disfigurement as well as the impairment of a bodily function.

a. Permanent disfigurement. The statute does not define the phrase "permanent disfigurement." "When a statute does not define its words we give them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose. . . . We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions."

Commonwealth v. Bell, 442 Mass. 118, 124 (2004), quoting Commonwealth v. Zone Book, Inc., 372 Mass. 366, 369 (1977).

"Permanent" is defined as "continuing or enduring (as in the same state, status, or place) without fundamental or marked change," synonymous with the words "lasting" or "stable." Webster's Third New International Dictionary 1683 (1993).

"Disfigurement" is "the state of being disfigured," that is, to be "ma[d]e less complete, perfect, or beautiful in appearance or character." Id. at 649. Hence, a permanent disfigurement is a significant and enduring injury that affects the appearance or the character of a person's bodily integrity. See generally Commonwealth v. Jean-Pierre, 65 Mass. App. Ct. 162, 163 (2005) (word "permanent" modifies only "disfigurement" in G. L. c. 265, § 13A [c]).

The defendant argues that a permanent disfigurement occurs only when there is a visible, significant, and permanent change in a person's outward appearance or, in the alternative, scarring. We disagree. Although the trier of fact certainly may consider visible evidence, the fact an injury can be or was concealed or repaired does not preclude a finding of permanent disfigurement. See State v. Alvarez, 240 Or. App. 167, 171 (2010) ("we decline to hold that an injury is not disfiguring merely because, by limiting his or her fashion or style options, the victim can conceal it"). See also Fisher v. Blankenship,

286 Mich. App. 54, 66-67 (2009) (injury need not be visible to be disfigurement).

Here, we conclude that the evidence presented at trial was sufficient for the jury to have found permanent disfigurement. The medical records and the victim's testimony detailed the number and extent of the fractures which compromised the integrity of the victim's face. The computed tomography scan of the victim's face and jaw showed a "blowout" fracture of his right orbital socket, as well as fractures to his cheekbone and other facial bones. The victim testified that there was a visible indentation in his face after the defendant's punch. The medical records indicate that surgery was required to correct and repair the anatomical structure of the victim's face. The operative report noted that the fracture was mobile and required the surgeons to affix titanium plates to the bones in the victim's face to hold the bone structure together and to ensure that the bones remained stable. Although the titanium plates conceal the visible evidence of the disfigurement, they are attached permanently to the bones in the victim's face. Therefore, the evidence was sufficient for a reasonable and rational jury to have found a permanent disfigurement.

b. Impairment of a bodily function. "Impairment of a bodily function" similarly is not defined in the statute; however, we previously interpreted the phrase to mean "a part or

system of the body [that] is significantly impeded in its ability to fulfil its role." Scott, 464 Mass. at 359. Unlike disfigurement, an impairment of a bodily function need not be permanent to constitute serious bodily injury. Marinho, 464 Mass. at 118.

Here, according to the medical records and the victim's testimony at trial, the nerve damage in the victim's right cheek resulted in chronic numbness in that area of his face. He described the lack of sensation as feeling like he had been given novocaine. The inability of the affected nerves to communicate properly with the brain indicates an impairment of a bodily function, namely, the victim's peripheral nervous system. See Coronado v. State, 654 So. 2d 1267, 1270 (Fla. Dist. Ct. App. 1995); Bright v. State, 986 So. 2d 1042, 1045, 1049 (Miss. Ct. App. 2008); Commonwealth v. Burwell, 42 A.3d 1077, 1078 (Pa. Super. 2012). We note that, based on the evidence presented, it was unclear whether the numbness that the victim experienced was a result of the physical assault (delayed onset), surgery, or a combination of the two. However, "[t]he Commonwealth may establish causation in an assault and battery case by proving beyond a reasonable doubt that the defendant either directly caused or directly and substantially set in motion a chain of events that produced the serious injury in a natural and

continuous sequence" (quotations and citation omitted).

Marinho, 464 Mass. at 119.

We conclude, therefore, that in addition to permanent disfigurement, there was sufficient evidence for a rational jury to find that the defendant caused impairment of a bodily function.

Judgment affirmed.