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SJC-12845

COMMONWEALTH vs. KHAMAL McCALOP.

Suffolk. January 9, 2020. - September 24, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Firearms. Jury and Jurors. Practice, Criminal, Jury and jurors, Deliberation of jury, Sentence, Plea, Postconviction relief, New trial.

Indictments found and returned in the Superior Court Department on August 6, 2015.

The cases were tried before Linda E. Giles, J., and a motion for a new trial, filed on February 4, 2019, was considered by her.

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

Kathryn Karczewska Ohren for the defendant.
Erin D. Knight, Assistant District Attorney, for the Commonwealth.

[1] Chief Justice Gants participated in the deliberation on this case and authored this opinion prior to his death.

GANTS, C.J. It is a fundamental tenet of our system of justice that a conviction cannot stand if the defendant proves that the jury's deliberations were infected by racial or ethnic bias. See Commonwealth v. Laguer, 410 Mass. 89, 97-98 (1991). This case concerns the obligation of a judge promptly to address an allegation of racial bias when it is presented. Here, immediately after the entry of a guilty verdict in the defendant's case, defense counsel was approached by a deliberating juror who stated that she was surprised to see the amount of racism vocalized during the deliberations by several of the jurors who voted to find the defendant guilty. Defense counsel promptly filed a motion to obtain juror names and contact information to investigate the juror's claims prior to the scheduled jury-waived trial on two sentencing enhancements. We conclude that the judge erred by not promptly allowing this motion.

After the judge criticized defense counsel for having brought the motion and disparaged its merits, the judge asked the prosecutor if a plea offer that had earlier been discussed would "still be on the table" if the defendant were to withdraw his motion. Under that offer, the prosecutor would agree to nol pros the sentencing enhancement with the longer minimum mandatory sentence in return for the defendant's guilty plea to the sentencing enhancement with a lesser minimum mandatory and a

joint recommendation regarding the imposition of sentence. The prosecutor conferred with his supervisor and obtained approval of the plea offer. The defendant then withdrew the motion, pleaded guilty to one of the sentencing enhancements, and, in response to the judge's inquiry, agreed to waive his right to raise the issue presented in the motion.

The defendant later moved, unsuccessfully, to vacate his guilty plea to the sentencing enhancement, claiming that it was involuntary because he was coerced into pleading guilty by the judge and unfairly deprived of his opportunity to explore the possibility of racial bias in the verdict. We conclude that the judge's error in not promptly allowing the motion for jurors' names and contact information, and in disparaging its merits, compounded by the judge's inducement of the defendant to waive his right ever to raise the issue of racial bias among the jurors, so tainted the guilty plea that it cannot stand. A guilty verdict arising from racial or ethnic bias not only poses a substantial risk of a miscarriage of justice but also, "if left unaddressed, would risk systemic injury to the administration of justice." Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017). Therefore, where a defendant makes a good faith claim that a deliberating juror reported that racial bias infected the jury's deliberations, a judge may not

condition acceptance of a guilty plea to a sentencing enhancement upon a waiver of that claim.

Background. 1. Facts. We summarize the relevant evidence at trial in the light most favorable to the Commonwealth. At approximately 9:45 A.M. on May 13, 2015, Boston police officers were driving in an unmarked police vehicle when they received a radio call requesting they look for a "white Mercedes [sport utility vehicle (SUV)]" with a particular license plate number in the Blue Hill Avenue area. The officers spotted the vehicle as it turned onto Blue Hill Avenue, but before they could activate their lights and sirens to conduct a traffic stop, the vehicle increased its speed and cut in and out of traffic. Believing that the driver was attempting to flee, the officers activated their lights and sirens and initiated what became a high-speed chase.

The defendant, who was the driver of the SUV, struck several other vehicles while attempting to evade the officers. After the SUV turned the wrong way down a one-way street, it crashed into another vehicle parked at an intersection. The defendant then got out of the SUV and took off running, holding a black firearm in his hand. The officers followed the defendant on foot. The defendant ran around the back side of a house, where the officers temporarily lost sight of him, but he was eventually apprehended behind the house.

The officers conducted a search of the defendant but did not find a firearm.[2] After a search of the surrounding area, an officer spotted a black firearm "on the corner of the ledge" of the roof of the house near where the defendant had been apprehended. One of the officers identified the firearm as the one he had seen the defendant holding when the defendant fled from his vehicle. The firearm contained eight rounds of ammunition in its magazine. No latent fingerprint of the defendant was found on the firearm.

2. Jury trials. A Suffolk County grand jury returned four indictments against the defendant: possession of a firearm, in violation of G. L. c. 269, § 10 (a); possession of ammunition, in violation of G. L. c. 269, § 10 (h); possession of a loaded firearm, in violation of G. L. c. 269, § 10 (n); and negligent operation of a motor vehicle, in violation of G. L. c. 90, § 24 (2) (a).

At the defendant's first jury trial in the Superior Court, he was convicted only of negligent operation of a motor vehicle. The jury were unable to reach a unanimous verdict regarding the remaining three indictments, and the judge declared a mistrial as to those charges. The judge deferred sentencing on the

[2] Through a more thorough search of the defendant at the police station, the police seized a black cellular telephone from him.

negligent operation charge until all the charges were resolved. A different Superior Court judge presided over the defendant's retrial on the remaining three indictments. After a two-day trial, the jury found the defendant guilty on each of the indictments on February 2, 2017.

Defense counsel later attested that, after he left the court house following the verdict, two jurors waited for him in the courtyard and asked to speak with him to express their concerns about the trial. One was a deliberating juror; the other was an alternate juror. Both jurors were visibly upset, and the deliberating juror was crying. The deliberating juror stated that the deliberations began with an even six-to-six split, but the jurors slowly changed their votes to guilty due to comments made by other jurors, until she was the last person at the end of the day "holding on" to a not guilty vote. When she told her fellow jurors that she wished to return the next day to continue deliberations, they started yelling at her and "forced her" to change her vote to guilty. She also told defense counsel that she was surprised to see the amount of racism expressed and vocalized during the deliberations by several of the jurors who were voting to find the defendant

guilty, and that she believed racism changed some of the jurors' votes to guilty.[3]

3. Sentencing enhancements. After the guilty verdicts, the defendant was arraigned on two sentencing enhancement charges related to his conviction of unlawful possession of a firearm: an enhancement as a second and subsequent offender under G. L. c. 269, § 10 (d), based on his conviction in 2000 of unlawful possession of a firearm; and an enhancement as an offender with a prior conviction of a serious drug offense under G. L. c. 269, § 10G (a), based on his conviction in 2003 in Federal court of distribution of a class B substance.[4] The defendant pleaded not guilty to both sentencing enhancements and waived his right to a jury trial on these charges. The judge ordered the defendant held without bail and scheduled the jury-waived trial on the sentencing enhancement charges for February 7, 2017, at 2 P.M. The judge directed the prosecutor to have the relevant police

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[3] The mother of the defendant's children, who was with defense counsel after the verdict, also submitted an affidavit attesting to the same information, although the copy in the record does not have a signature.

[4] "We characterize a person who is subject to sentencing under [G. L. c. 269, § 10G,] after being convicted of the unlawful carrying of a firearm as an 'armed career criminal' only where the defendant has three prior convictions of a violent crime or serious drug offense." Commonwealth v. Richardson, 469 Mass. 248, 252 n.8 (2014), citing Commonwealth v. Anderson, 461 Mass. 616, 626 n.10, cert. denied, 568 U.S. 946 (2012).

officer present for the trial unless the parties "work[ed] out some resolution."

On February 7, prior to the scheduled sentencing enhancement trial, the defendant filed a motion for a mistrial and a motion for disclosure of the jurors' names and "contact information."[5] The defendant supported these motions with the affidavit of defense counsel, which described defense counsel's encounter with the jurors after trial.

When the 2 P.M. sentencing enhancement trial was scheduled to begin, the prosecutor informed the judge that the police officer witness was not available that day because he had been called in to service for the "duck boat" parade, which celebrated the New England Patriots victory in the Super Bowl. Defense counsel objected to a continuance, noting that the parade had ended well before 1 P.M., and there was no reason the officer could not be available for the hearing. The judge allowed the continuance and gave defense counsel the option of rescheduling to Wednesday or Thursday of that week. Defense counsel requested that the trial be delayed until the following week because he had "literally no availability" for the

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[5] Because the guilty verdicts had already been entered, the motion for a mistrial should have been fashioned as a motion for a new trial. See Commonwealth v. Fredette, 56 Mass. App. Ct. 253, 257 n.8 (2002).

remainder of the week.[6] The judge denied the request, stating that the trial "has to be this week," because she had to conduct a full-week evidentiary hearing the next week.

Defense counsel then asked the judge to consider sentencing the defendant right then, at the hearing. The judge replied that she could not sentence the defendant then because he was facing the sentencing enhancement charges on which he had earlier been arraigned. Defense counsel then suggested that the Commonwealth might not choose to move forward on the sentencing enhancement charges if the parties could come to a plea agreement.

In the discussion that followed, it emerged that the prosecutor had received permission from his supervisors to nol pros the § 10 (d) sentencing enhancement in exchange for the defendant's plea to the § 10G enhancement and a joint recommendation regarding the defendant's sentence. However, after the prosecutor told his supervisors of the newly filed motions, they withdrew their permission, saying that they were "concerned" and wanted to look over the motions before moving

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[6] Following the verdict, when a trial date for the sentencing enhancements was being scheduled, defense counsel had told the judge that he had "a terrible schedule next week, both with morning appearances and 2:00 P.M. appearances out of the county."

forward. Upon learning this, the judge told defense counsel, "Good going . . . . You just upset this applecart."

The judge also expressed doubts that she could entertain the defendant's motion for juror names and contact information for two reasons: first, because defense counsel was not permitted to talk to a juror about the jury's deliberative process; and second, because "[t]his is inherently the kind of subject that a court should never inquire about -- the internal decision-making process of a jury." Despite defense counsel's protestation that he did not make such an inquiry of the juror, the judge told defense counsel, "So, if you expected relief in this regard, I'm going to tell you right now . . . I'll hear argument on it, but I have grave doubts that you're entitled to any kind of relief given what you said to me in this motion."[7]

Returning to the issue of a possible plea agreement, the judge, through discussion with the prosecutor, confirmed that the § 10 (d) sentencing enhancement required a minimum mandatory sentence of five years,[8] and that the § 10G sentencing

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[7] Defense counsel later told the judge that he neither approached the jurors nor asked them a single question. Instead, he said, they approached him and he listened to what they said. The judge responded, "I'm not saying that you violated any rules here . . . but . . . what that juror told you may not be something that I could even inquire about."

[8] Under G. L. c. 269, § 10 (d), a defendant convicted of the illegal possession of a firearm who has a prior conviction for a

enhancement carried a minimum mandatory sentence of three years and a maximum sentence of fifteen years. The judge also confirmed with the prosecutor that, until the defendant's motions had been filed, the prosecutor had had permission to nol pros the § 10 (d) sentencing enhancement in exchange for an agreed-upon sentence "along the lines of four to five" years in State prison on the unlawful possession of a firearm conviction with the § 10G sentencing enhancement. The judge also confirmed with defense counsel that the defendant would be agreeable to such a plea agreement.[9]

The judge next asked the prosecutor whether, if the defendant were to withdraw his motions, the four- to five-year sentence offer would "still be on the table." The prosecutor agreed to ask his supervisors for permission to enter into such a plea agreement. The judge then asked defense counsel whether the defendant would be withdrawing his motions if the prosecutor

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like offense "shall be punished by imprisonment in the state prison for not less than five years nor more than seven years." The sentence may not be suspended, and the defendant may not receive any deduction from his sentence for good conduct. Id.

[9] In discussing the resurrection of the plea agreement, defense counsel interjected that he "felt a duty" both to his client and to the court to bring the allegations to the court's attention, and that he had not approached the jurors on his own. The judge responded that she was not faulting defense counsel for bringing the motions, but "was just suggesting that it may amount to a hill of beans."

were to obtain that permission. Defense counsel said that he "would absolutely suggest" that to his client.

The contours of the plea agreement were then more precisely articulated: if the defendant were to withdraw his motions and plead guilty to the § 10G sentencing enhancement on the unlawful possession of a firearm conviction, the prosecutor would enter a nolle prosequi on the § 10 (d) sentencing enhancement, move to dismiss the conviction of unlawful possession of ammunition as duplicative of carrying a loaded firearm, and recommend a sentence of no less than four and no more than five years in State prison on the § 10G conviction, and a sentence of probation for two years on and after this custodial sentence on the conviction of unlawful carrying of a loaded firearm. The defendant would join the prosecutor in making this recommendation.[10]

After a brief recess, the prosecutor confirmed that he had permission for this recommendation, and the defendant confirmed that he would withdraw his motions. The judge asked the defendant if he understood that, by withdrawing the motions, he

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[10] The judge later stated, ultimately without objection, that she intended to sentence the defendant to a probationary term of two years on his conviction of negligent operation of a motor vehicle, to be served concurrently with the other probationary term.

could not "raise this issue any longer." The defendant said that he did.

The defendant then pleaded guilty to the § 10G sentencing enhancement, and the judge conducted a plea colloquy with the defendant. The judge again informed the defendant that by pleading guilty to the § 10G sentencing enhancement, he was waiving his right to pursue the motions he filed that day. When the judge asked whether anyone had "forced, threatened or pressured" him in any way to plead guilty to this offense, the defendant answered, "no." The defendant agreed that he was pleading guilty to this indictment "willingly and voluntarily," and defense counsel agreed that his client's guilty plea was made "knowingly, willingly, and voluntarily" after he had discussed with his client "all aspects of his case."

Defense counsel informed the judge that he would leave the notice of appeal in the file "for the protection of the defendant's rights." The judge agreed that he could do so, noting that "arguably [the defendant] has the right to appeal his conviction for the loaded firearm." After the judge sentenced the defendant in accordance with the terms of the plea agreement, the defendant filed a notice of appeal.

5. Motion for a new trial. On February 4, 2019, the defendant, now represented by appellate counsel, filed a motion for a new trial in which he asked the judge to vacate his guilty

plea, his withdrawal of the motions for a mistrial and for disclosure of jurors' names and contact information, and his relinquishment of appellate rights. In his motion, supported by affidavits from the defendant and his trial counsel, the defendant asserted that each of these decisions were made involuntarily because the defendant and defense counsel "panicked" when the judge rebuked defense counsel for speaking with a juror and were "unnerved" by the judge's frustration that the postverdict motions had caused the plea offer to be withdrawn, by the judge's attempt to resurrect the plea agreement, and by the judge's declared intent to schedule the § 10G trial for a date when defense counsel was unavailable. The defendant claimed that, but for his panic at sentencing and the judge's interference, he would never have withdrawn his motions or pleaded guilty to the § 10G sentencing enhancement.

The judge denied the defendant's motion without an evidentiary hearing. The judge explained that her statement, "Good going, [defense counsel]. You just upset this applecart," was "blunt," but it was "borne out of [her] concern that [defense counsel's] precipitous motions were drawing the ire of [the prosecutor] and his superiors and, in turn, leading to the possible derailment of a charge concession by the Commonwealth." She noted that some of her comments, such as, "I don't want anyone to feel pressured," and her urging of the parties to

"approach this dispassionately," "paint the picture of me as a peacemaker, not a bully." She declared that her "efforts to resurrect the Commonwealth's previous offer of four to five years, at which offer [defense counsel] and his client leapt," and her suggestion that the defendant be placed on probation for the other two convictions "do not suggest a judge who was out to, in [appellate counsel's] words, 'thwart judgment.'"

The judge also declared that her "skepticism over the propriety" of the defendant's motions "was well-founded." She found that defense counsel intended "in major part" to investigate the jury's deliberative process, an inquiry which she said was prohibited. The judge recognized that "juror bias is a legitimate subject for post-verdict inquiry," citing Commonwealth v. McCowen, 458 Mass. 461, 497 (2010), and Laguer, 410 Mass. at 97, but she noted that the defendant had yet to furnish an affidavit from the deliberating juror "attesting to her alleged claim of racism permeating the deliberations" and therefore the defendant "cannot meet even his initial burden of proving that the jury were exposed to racially charged language or stereotypes."

Finally, the judge noted that she conducted a full colloquy with the defendant regarding his change of plea to the § 10G sentencing enhancement, and that, as part of the colloquy, both the defendant and his counsel affirmed that the defendant

changed his plea knowingly, willingly, and voluntarily. The judge found that these affirmations "mitigate against their claims that the defendant's withdrawal of his motions and entry into a guilty plea were rendered involuntary by [her] words." The defendant timely appealed the judge's denial of the motion for new trial, and we transferred the case to this court on our own initiative.

Discussion. 1. Allegations that the jury deliberations were tainted by racism. Because the judge's response to the defendant's motions for a mistrial and for juror names and contact information is intertwined with the defendant's claim that his plea was involuntary, we begin there. "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. Heywood, 484 Mass. 43, 44 (2020), quoting Commonwealth v. Williams, 481 Mass. 443, 447 (2019). "The presence of even one juror who is not impartial violates a defendant's right to trial by an impartial jury." McCowen, 458 Mass. at 494, quoting Commonwealth v. Vann Long, 419 Mass. 798, 802 (1995). Racial bias in the jury system is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." Pena-Rodriguez, 137 S. Ct. at 868. While "[a]ll forms of improper bias pose

challenges to the trial process," id. at 869, racial and ethnic bias "implicate[] unique historical, constitutional, and institutional concerns," id. at 868. To "prevent a systemic loss of confidence in jury verdicts," id. at 869, where a defendant submits a motion raising the possibility that he "did not receive a trial by an impartial jury, which was his fundamental right, [it] cannot be ignored," Laguer, 410 Mass. at 97. See Pena-Rodriguez, supra ("A constitutional rule that racial bias in the justice system must be addressed -- including, in some instances, after the verdict has been entered -- is necessary to prevent a systemic loss of confidence in jury verdicts"). In fact, to ignore concerns about the influence of racial bias in the jury room "might well offend fundamental fairness" (quotation omitted). Commonwealth v. Tavares, 385 Mass. 140, 155 n.25, cert. denied, 457 U.S. 1137 (1982).

Therefore, when defense counsel, in good faith, attests that a deliberating juror told counsel after the verdict that racist statements were made by one or more jurors during the course of deliberations, the judge must give the defendant a fair opportunity to obtain an affidavit from that juror setting forth with some specificity who among the jurors made statements reflecting racial bias and, to the best of his or her memory, the statements that were made. See McCowen, 458 Mass. at 494; Laguer, 410 Mass. at 97. Here, the defendant moved for juror

names and contact information so that his attorney could "follow up" with the deliberating juror with whom he spoke and investigate that juror's claim that racism infected the jury's deliberations and influenced their verdict. The judge in this case erred in not promptly allowing that motion and in disparaging its merits.

Once a motion permitting investigation into the allegation is allowed, the process proceeds as we described in McCowen, 458 Mass. at 494-497. If the defendant submits an affidavit from a juror "alleging that a juror (or more than one juror) made a statement to another juror that reasonably demonstrates racial or ethnic bias, and the credibility of the affidavit is in issue, the trial judge should conduct a hearing to determine the truth or falsity of the affidavit's allegations." Id. at 494. "In evaluating claims of juror bias, a judge . . . must first determine whether the defendant has satisfied his burden of proving by a preponderance of the evidence that the challenged statements that possibly reflect racial or ethnic bias were actually made by the juror." Id. at 494-495. "Where juror testimony is needed to ascertain whether the racist statement was made, a judge may inquire of the jurors whether the statement was made but may not inquire into their subjective thought process, such as their reasons for concluding that the defendant was guilty, the content of their deliberations, or the

effect of the statement at issue on their thought process." Id. at 494 n.35.

If "one or more of the challenged statements are shown to have been made," then the judge must "determine whether the defendant has proved by a preponderance of the evidence that the juror who made the statements was actually biased because of the race or ethnicity of a defendant, victim, defense attorney, or witness." McCowen, 458 Mass. at 495. Generally, this requires the judge to determine the "precise content and context of the statement to determine whether it reflects the juror's actual racial or ethnic bias, or whether it was said in jest or otherwise bore a meaning that would fail to establish racial bias." Id. at 496. But "[i]n some instances, the statement made by the juror may establish so strong an inference of a juror's actual bias that proof of the statement alone may suffice." Id., quoting Laguer, 410 Mass. at 94, 98-99 ("if alleged statement -- '[T]he goddamned spic is guilty just sitting there; look at him. Why bother having the trial' -- were made by juror, judge must find actual ethnic bias"). If the judge finds that the juror's statements reflected actual bias, then the defendant is "entitled to a new trial without needing to show that the juror's bias affected the jury's verdict." McCowen, supra.

Where the defendant has proved that the challenged statements were made, but failed to prove that the statements reflected actual bias, "the judge still must determine whether the statements so infected the deliberative process with racially or ethnically charged language or stereotypes that it prejudiced the defendant's right" to an impartial jury. Id. at 496-497. The defendant "bears the initial burden of proving, by a preponderance of the evidence, that the jury were exposed to statements that infected the deliberative process with racially or ethnically charged language or stereotypes." Id. at 497. "If the defendant meets this burden, the burden then shifts to the Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the jury's exposure to these statements." Id.

In this case, the judge did not allow the defendant's motion for juror names and contact information so that defense counsel could locate the deliberating juror with whom he spoke and investigate her allegations.[11] Instead, the judge unfairly rebuked defense counsel for initiating a postverdict discussion

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[11] In rare cases, the jury list may need to be or has already been impounded for safety reasons. See Commonwealth v. Silva, 448 Mass. 701, 709 (2007). In such cases, the defendant may still gain access to the requested information, but a judge may choose to consider what restrictions, if any, to place on the dissemination of juror information to protect the jurors' personal safety and security. Here, there is nothing in the record to indicate that the jury list was impounded.

with the juror, claiming that counsel's conduct violated the guidelines for juror contact that this court established in Commonwealth v. Moore, 474 Mass. 541, 551-553 (2016). Those guidelines, which require an attorney who wishes to "initiate postverdict contact with jurors" to give written notice to opposing counsel five business days "before contacting any juror," do not apply where a juror initiates postverdict contact with the attorney, as the defense attorney attested happened here. Id. at 551. See Commonwealth v. Solis, 407 Mass. 398, 404 (1990) ("Alleged improprieties may, of course, be disclosed by a concerned juror").

The judge was correct that some of the information provided by the deliberating juror, specifically the juror's claim that the other jurors gave her a "hard time" when she said she wanted to return the next day to continue deliberations and that they "forced her" to change her vote to guilty, would not be appropriate areas of inquiry and, even if true, would not be admissible in considering a motion for a new trial. See Moore, 474 Mass. at 552 (affidavit from juror must not focus on "the substance of the jury's deliberations or the individual or collective thought processes of the juror or the jury as a whole"); Commonwealth v. Fidler, 377 Mass. 192, 198 (1979) (even when investigating allegations of extraneous influences on jury, our rule "does not permit evidence concerning the subjective

mental processes of jurors, such as the reasons for their decisions").

But that would not justify discouraging defense counsel from exploring a ground that might require a new trial, specifically the claim that the jury deliberations were tainted by racial bias.[12] Nor was it fair for the judge, in denying the defendant's motion for a new trial on the sentencing enhancements, to find support for that denial from the defendant's failure to provide an affidavit from the deliberating juror, when the judge did not provide defense counsel with the juror's contact information that would have enabled the defendant to obtain such an affidavit.

If the defendant wishes to explore whether he has grounds to move for a new trial on the underlying firearms conviction based on the allegation that racial bias tainted the jury's deliberations, the defendant may again file a motion for juror names and contact information, and this time, the judge should allow the motion. Defense counsel then, following the protocol

[12] A defendant's good faith claim that a jury's verdict might be tainted by racial bias also would not justify a prosecutor's withdrawal of a plea offer because the Commonwealth, too, has a substantial interest in ensuring that jury verdicts are free from bias. We note that the prosecutor in this case did not declare that his authority to make the plea offer had been withdrawn because of the newly-filed postverdict motions; he simply declared that his supervisors wanted to review the motions before moving forward.

for contacting jurors as set out in Moore, 474 Mass. at 551-553, may investigate the allegations of racial bias made by the deliberating juror and seek affidavits from that juror and any others who may shed light on the allegations.

2. Voluntariness of the guilty plea. A motion to withdraw a guilty plea is properly treated as a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). Commonwealth v. Lavrinenko, 473 Mass. 42, 47 (2015), quoting Commonwealth v. DeJesus, 468 Mass. 174, 178 (2014). We review a motion judge's conclusion to deny a motion for new trial "only to determine whether there has been a significant error of law or other abuse of discretion." Lavrinenko, supra, quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986). The defendant argues that his motion for a new trial should have been granted and his guilty plea to the § 10G sentencing enhancement vacated because the plea and his withdrawal of his postverdict motions were involuntary.[13] The

[13] At oral argument, the Commonwealth declared that the judge did not abuse her discretion in finding the defendant's plea to the sentencing enhancement to be voluntary, but it did not object to the defendant pursuing his claim that the verdict in the second jury trial was tainted by racism by filing a motion for a new trial. Indeed, the Commonwealth stated that it would "welcome" such a motion for a new trial because the Commonwealth, too, has a substantial interest in ensuring that jury verdicts are free from bias. The Commonwealth's concession, although welcome, does not affect our analysis of the defendant's motion to vacate his guilty plea, which must

defendant states that his plea was involuntary because he "panicked" based on the judge's critical response to his postverdict motions and her reproach of defense counsel for "upset[ting] this applecart." We conclude that the judge abused her discretion in determining that the defendant's plea was voluntary and denying his motion for a new trial as to the § 10G enhancement.

We understand why the defendant chose to plead guilty to the § 10G enhancement. The record reflects that, before the hearing, the defendant explored with the prosecutor the possibility of a plea that would both spare him from the five-year minimum mandatory sentence he would receive if he were found guilty of the sentencing enhancement under § 10 (d) and protect him from the risk of an even longer sentence. The defendant then decided to file the postverdict motions that, if granted, would cause his firearm convictions to be vacated.[14] It is fair to say that the judge's response to those motions would lead a reasonable defense attorney to believe that there was no significant chance that the judge would order a new trial on those grounds. Because there is nothing in the record to

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focus on what happened at the time of the plea, not on a concession made by the Commonwealth on appeal at oral argument.

[14] These motions could not affect his conviction of negligent operation of a motor vehicle, because that verdict arose from his first trial.

suggest that the defendant had a credible defense to the sentencing enhancements, it was a reasonable defense strategy, given the judge's response to those motions, to attempt to resurrect the plea agreement that defense counsel had earlier explored.

We also understand why the judge believed that she had not coerced the plea. The impetus for the judge's entry into the plea conversation came from defense counsel; it was not initially raised or suggested by the judge. The judge, believing that the defendant's motions were "leading to the possible derailment of a charge concession by the Commonwealth," proceeded to try and "resurrect the Commonwealth's previous offer of four to five years" by urging the defendant to withdraw his postverdict motions. Defense counsel told the judge that he would "absolutely" suggest the deal to his client, and the defendant agreed to withdraw these motions in order to obtain the benefit of the plea bargain he had sought previously.

The judge never threatened the defendant with a harsher sentence if he were to pursue his motions. In fact, the judge's words reflect that she was hoping to spare the defendant from a longer minimum mandatory sentence rather than threatening him with a longer sentence. Contrast Letters v. Commonwealth, 346 Mass. 403, 404-406 (1963) (guilty plea coerced where trial judge threatened defendant with consecutive life sentences unless he

pleaded guilty). The judge knew the Commonwealth's burden to prove the sentencing enhancement charges was "not onerous" and did not want the Commonwealth to withdraw a plea offer and proceed to trial on the sentencing enhancements because of motions that might amount to a "hill of beans." The judge's vocal skepticism regarding the defendant's postverdict motions was improper, as discussed supra, but that supports her assertion that she was seeking to prevent the defendant from serving extra time in prison, rather than seeking to deny him due process.

However, even though the defense counsel acted reasonably under the circumstances and the judge believed that she was helping rather than hurting the defendant, the fact remains that the guilty plea was tainted by the judge's error in not granting the defendant's motion for juror names and contact information, and in disparaging its merits. We might have permitted the plea to stand if the defendant, after pleading guilty, was free to pursue his claim that the jury's deliberations had been infected with racial bias through a motion for a new trial. But the judge expressly elicited from the defendant during the plea colloquy a commitment not only to withdraw the postverdict motions but also to never pursue those motions again. In effect, the judge conditioned the plea on the defendant's promise forever to waive his claim that he was denied his

fundamental right to an unbiased jury because the jury deliberations were infected with racial bias.

A justice system that is committed to equal justice for persons of all races and ethnicities, and to the protection of a defendant's fundamental right to a fair trial, cannot permit a plea to be conditioned on the waiver of such a claim, even if the waiver is part of a plea bargain. A defendant may waive the right to a trial by jury but, once the right is invoked, a defendant may not waive his or her right to a verdict that is untainted by racial or ethnic bias. See Heywood, 484 Mass. at 44, quoting 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"). Contrast Commonwealth v. Hardin, 476 Mass. 1011, 1012 (2016) (defendant's "argument that the complaint fails to state a crime raises an issue of subject matter jurisdiction, which may be raised at any time, . . . and which cannot be waived" through guilty plea [citation omitted]). We therefore vacate the defendant's guilty plea and order a new trial as to the sentencing enhancements.

We recognize that vacating the defendant's guilty plea and allowing a new trial on the sentencing enhancements also unwinds the plea agreement and releases the Commonwealth from its obligation to nol pros the § 10 (d) enhancement, with its five-

year minimum mandatory sentence. Under our holding in Commonwealth v. Richardson, 469 Mass. 248, 254 (2014), the defendant may be sentenced only on one of the charged enhancement statutes. So, should the defendant choose not to pursue a motion for a new trial on the underlying firearms conviction, or should that motion be denied, the Commonwealth may choose to leave its nolle prosequi intact and proceed to trial only on the § 10G enhancement. Where the current district attorney "welcomes" the defendant having a fair opportunity to explore whether racial bias, in fact, did infect the jury's deliberations, we trust that she will not seek to penalize the defendant for attempting to preserve that opportunity. We therefore need not address whether it would be permissible for a district attorney in these circumstances to prosecute the sentencing enhancement that was previously nol prossed.

3. Sufficiency of evidence of conviction of unlawful possession of a loaded firearm. The defendant also argues that his conviction of unlawful possession of a loaded firearm should be reversed because no reasonable trier of fact could conclude beyond a reasonable doubt that the defendant knew that the firearm was loaded. In order to convict a defendant of unlawful possession of a loaded firearm under G. L. c. 269, § 10 (n), the Commonwealth is required to prove that the defendant knew that the firearm he possessed was loaded with ammunition.

Commonwealth v. Brown, 479 Mass. 600, 608 (2018). The Commonwealth concedes that the evidence at trial, even when viewed in the light most favorable to the Commonwealth, fell short of such proof. Where there was insufficient evidence as to an essential element of the crime charged, the defendant's conviction under § 10 (n) must be reversed and vacated.

Conclusion. The defendant's guilty plea to the § 10G sentencing enhancement for his conviction of unlawful possession of a firearm is vacated, and a new trial is ordered as to that sentencing enhancement. The defendant's conviction of unlawful possession of a loaded firearm under § 10 (n) is vacated, and the case is remanded to the Superior Court for entry of a judgment of not guilty as to that indictment. The defendant may renew his motion in the Superior Court for juror names and contact information, which shall now be granted. If the evidence so warrants, the defendant may bring a motion for a new trial as to his underlying firearm conviction, alleging that the jury's deliberations were tainted by racial bias.[15]

[15] If a motion for a new trial is brought, it shall be heard by a judge other than the trial judge. Although we are confident that the trial judge would resolve the motion fairly and in accordance with law, in view of her statements concerning the postverdict motions when they were first filed, we believe that assigning the motion to a different judge would "serve the interests of promoting the appearance that justice will be administered impartially." Commonwealth v. Coleman, 390 Mass. 797, 810 n.15 (1984). See Commonwealth v. Henriquez, 440 Mass.

So ordered.

1015, 1016 (2003); Commonwealth v. Lebron, 23 Mass. App. Ct. 970, 972 (1987). That assigned judge should also preside over any resulting new trial on the sentencing enhancement and impose an appropriate sentence on the defendant.