SJC-12378

COMMONWEALTH vs. JESSIE WILLIAMS.

Middlesex. September 14, 2020. - January 20, 2021.

Present: Lenk, Gaziano, Cypher, & Kafker, JJ.[1]

Homicide. Jury and Jurors. Practice, Criminal, Jury and jurors, Deliberation of jury, Fair trial, Motion to suppress, Admissions and confessions, Voluntariness of statement. Constitutional Law, Jury, Fair trial, Admissions and confessions, Voluntariness of statement, Waiver of constitutional rights. Fair Trial. Evidence, Admissions and confessions, Voluntariness of statement.

Indictments found and returned in the Superior Court Department on August 15, 2013.

A pretrial motion to suppress evidence was heard by Kathe M. Tuttman, J., and the cases were tried before Laurence D. Pierce, J.

Jeffrey L. Baler for the defendant.
Jamie Michael Charles, Assistant District Attorney, for the Commonwealth.

[1] Justice Lenk participated in the deliberation on this case prior to her retirement.

CYPHER, J. On July 3, 2013, Joseph Puopolo was shot and killed and Mario Fiume was shot and seriously injured. A jury convicted the defendant, Jessie Williams, of murder in the first degree on a theory of felony-murder for the killing of Puopolo, with the predicate offense being armed robbery and armed assault in a dwelling. The defendant also was convicted of assault and battery by means of a dangerous weapon causing serious bodily injury to Fiume and possession of a firearm. On appeal, the defendant argues that (1) the motion judged erred in denying his motion to suppress statements; (2) the trial judge erred in declining to conduct a voir dire of an allegedly sleeping juror and subsequently allowing that juror to deliberate; and (3) the trial judge abused his discretion in excusing a juror who professed an inability to begin deliberations anew after the discharge of another juror. We conclude that the motion judge properly denied the defendant's motion to suppress where the defendant knowingly and voluntarily waived his Miranda rights multiple times and did not unambiguously invoke his right to counsel. We further conclude that the juror was dismissed for reasons not entirely personal to him and that the juror's dismissal was prejudicial, and we therefore vacate the judgments entered against the defendant. Accordingly, we do not reach the sleeping juror issue, as it is unlikely to arise on retrial.

1. Background. We summarize the facts that the jury could have found, reserving pertinent facts for the discussion of the defendant's arguments. In addition, we reserve the facts that the motion judge found, as well as the facts we found from our own review of the defendant's recorded interview, for the discussion of the defendant's motion to suppress.

a. The murder. On the evening of July 2, 2013, the defendant's cousin, Eugene Tate, had arranged to buy marijuana from dealer Mario Fiume. Tate went to Fiume's home to make the purchase, but the deal did not occur. Later that night, Tate called Steven Piro, a friend of Fiume's and often the middleman in his marijuana sales, and told Piro that he wished to complete the sale. Piro, accompanied by another associate, George Tecci, picked up Tate and the defendant at a gasoline station near Fiume's house. Piro drove the men to Fiume's house in his car.

On arrival at Fiume's house, the defendant entered the garage, where Fiume conducted his drug sales, with Piro. Fiume was present with his friend Joseph Puopolo. After examining the marijuana, the defendant told Fiume that Tate, whom he referred to as his cousin, also would like to see the marijuana before they purchased it. Piro brought Tate and Tecci into the garage from the car; the defendant then left the garage and reentered with money in hand. Fiume, who also was holding money, told the defendant to pay or leave. The defendant then asked Tate if

they should "do it," and both men brandished guns. The defendant pointed his gun at Fiume and demanded that he turn over the money and marijuana.

After Fiume attempted to strike the defendant, the defendant forced him into a corner of the garage and shot him at close range. At around the same time that the defendant shot Fiume, Tate shot Puopolo. The defendant and Tate fled on foot with the marijuana. Puopolo went upstairs to get help, where he collapsed. When police arrived, Puopolo had no detectable pulse.

In the days following the murder, police recovered surveillance video from the gasoline station where Piro and Tecci had picked up the defendant and Tate before driving them to Fiume's house. The video footage showed the defendant getting into Piro's car. A detective familiar with the defendant identified him in the video recording. Additionally, police recovered surveillance video from outside Fiume's home. The video footage captured the defendant and Tate arriving at Fiume's home in Piro's car at around midnight and fleeing on foot shortly after.

Both the defendant's and Tate's fingerprints were found on separate interior door handles of Piro's car, which was left at Fiume's house after the murder. Additionally, a cigarette butt with the defendant' deoxyribonucleic acid on it was recovered

from Fiume's driveway. The defendant was arrested in the East Boston section of Boston on July 7, taken to the State police barracks at Logan International Airport, and later transported to the Stoneham police department.

b. The interrogation. The defendant was interviewed at the Stoneham police station. Before the start of the interview, police read the defendant a Miranda form and video recording consent form. After the defendant agreed to the videorecorded interview, police again advised him of his Miranda rights, this time on video, and the defendant signed and initialed the Miranda form, indicating that he understood. The defendant agreed to speak with police.

Police then began interrogating the defendant. Initially, the defendant denied having any involvement in the murder. Eventually, the defendant admitted to being in the car with Tate. The defendant told police that he and Tate had planned to steal the drugs that night but it did not go as intended. Finally, he admitted to shooting Fiume during the course of the robbery.

c. Jury deliberations. After one day of deliberations, a juror was excused for health reasons. An alternate juror was selected randomly, and the jurors began deliberations anew. The next day, another juror was absent due to difficulty commuting to court in a snowstorm. Over the defendant's objection, the

trial judge excused that juror, and a second alternate juror was selected. The judge instructed the jury, for the second time in two days, "to set aside and disregard all your past deliberations and to begin deliberations anew." The defendant moved for a mistrial, arguing that, during those instructions, "[a]t least four [jurors] put their heads down, shook their heads, put their hands to their foreheads, shaking their heads in a 'no' fashion." The defendant argued that their frustrations would affect their ability to be fair. The judge denied the motion.

After the jurors began deliberations again, juror no. 11 submitted to the trial judge a note stating:

> "I fully feel at this point I am not capable of starting over the deliberations with an unbiased opinion nor able to engage in a discussion with any of the fellow jurors. There are still charges that need to be reviewed and I don't feel as though I can fairly make a decision based on the firm belief I currently hold. Also, at this point I know the other members are waiting on me so I don't think I would be able to have an open discussion without feeling [j]udged."

The defendant argued that the sentiments expressed in the note were not unique to this particular juror, and that the jury could not begin anew without bias. Therefore, he argued, there was manifest necessity for a mistrial; the prosecutor said that he did not "disagree completely."

The trial judge inquired of the juror in the presence of both parties. The juror said, "I can't . . . start over and do

this. I've already made up my decision. I already know specific jurors in there that I disagree with, so going in there with a new person who has to start over. . . . I already know what I'm going to say and it's going to be biased and it's not fair for me to be in there." He also indicated that he could not "fully look at everything" and make his decision again. The judge reminded the juror that he had taken an oath, but the juror insisted that he could not carry it out because he had "already done it and [he did not] want to go in there and talk to anyone." The judge repeatedly pressed the juror as to why he could not carry out his oath; the juror repeatedly said that he could not start over and he had already "made up [his] decision." The judge informed the juror that he did not have to "completely erase everything from [his] mind," but the juror continued to stress his inability to deliberate anew.

The following colloquy occurred between the juror and the trial judge:

> The juror: "And I know how it goes in there and I don't think I can, you know, fairly go in there and have a discussion with all these people when I've already done one part. There's more I need to do and I already know what I'm going to do so I just don't think it would be just for me to go in there and do that."
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> The judge: "Part of my instructions . . . was that you should determine the facts based solely on a fair consideration of the evidence. Sir, do you feel you could do that?"
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> The juror: "I guess."

> The judge: "You feel that you could be fair and impartial?"
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> The juror: "I mean, I don't exactly, like, in terms of fair and impartial, I mean, yes, I'm obviously fair, but I just don't think I can go in there and do this and look at everything again and go through and read everything because . . . I already know what I'm going to decide."
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> The judge: "Do you feel you could engage in deliberations and not be swayed by prejudice or sympathy by personal likes or dislikes, sir?"
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> The juror: "Yes."
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> The judge: "And you could consider the evidence in a calm and a dispassionate and analytical manner?"
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> The juror: "I wouldn't say calm."
>
> The judge: "Do you have a conflict today? Do you need to be someplace else today?"
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> The juror: "No."
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> The defendant then reiterated his motion for a mistrial.

The defendant argued that the juror could not remain on the jury due to lack of impartiality, but the juror also had expressed that he held a minority view among the jurors and so could not be excused from the jury. The trial judge denied the motion, and the defendant subsequently requested that the juror remain on the jury. The judge then further inquired of the juror, who again said that he was unable to begin deliberations anew, and indicated that he had shared his concerns with the foreperson. The juror stated that he would "try [his] best" to follow the judge's instructions, but was not "a hundred percent" confident

he would be successful. The juror also said, "[N]ow I'm the guy that's stalled this process." He further stated, "[T]hey're sitting in the room and they know that there's one juror missing which is myself . . . . And that's just a side issue aside from what I said before." Based on this conversation, the judge excused the juror and a third alternate was selected. The jury returned a verdict later that day.

2. Discharge of deliberating juror no. 11. a. Standard of review. "The discharge of a deliberating juror is a sensitive undertaking and is fraught with potential for error. It is to be done only in special circumstances, and with special precautions." Commonwealth v. Tiscione, 482 Mass. 485, 489 (2019), quoting Commonwealth v. Connor, 392 Mass. 838, 843 (1984). General Laws c. 234, § 26B, provided for the substitution of a deliberating juror if "a juror dies, becomes ill, or is unable to perform his duty for any other good cause shown to the court."[2] See Mass. R. Crim. P. 20 (d) (3), 378 Mass. 889 (1979). "[A] juror properly may be discharged 'only [for] reasons personal to [that] juror, having nothing whatever to do with the issues of the case or with the juror's

[2] General Laws c. 234, § 26B, was repealed by St. 2016, c. 36, § 1, effective May 10, 2016, several months after the defendant's trial occurred. In any event, this court has interpreted the current applicable statute, G. L. c. 234A, § 39, to be synonymous. See Tiscione, 482 Mass. at 489 & n.5 (2019).

relationship with his [or her] fellow jurors.'" Tiscione, supra at 489, quoting Connor, supra at 844-845. "Allowing discharge only for personal reasons ensures that such action will not 'affect the substance or the course of the deliberations.'" Commonwealth v. Swafford, 441 Mass. 329, 336 (2004), quoting Connor, supra at 845 n.4.

To determine whether good cause exists for dismissal, "a judge must hold a hearing with the juror in question." Tiscione, 482 Mass. at 490. "At the hearing, the issues of the case and the juror's relationship to his fellow jurors are not to be discussed. If the 'problem' juror is questioned, the judge should preliminarily inform him that he cannot be discharged unless he has a personal problem, unrelated to his relationship to his fellow jurors or his views on the case. Unless the juror indicates a belief that he has such a problem, all questioning should cease" (citation and footnote omitted). Connor, 392 Mass. at 845. We defer to the judge's factual findings where they are not clearly erroneous. See Commonwealth v. Tennison, 440 Mass. 553, 560 (2003).

b. Analysis. Here, the trial judge properly held a hearing to question the juror in both parties' presence. During the hearing, the juror repeatedly stated he was not able to begin deliberations anew. Although the juror indicated that his decision-making process remained fair and impartial, he claimed

to be "biased" in that his decision already was made and he would not be able to start the deliberative process again. Ultimately, the judge dismissed the juror because he found that the juror was unable to follow the judge's instructions. We conclude that the juror's inability to begin deliberations anew was at least in part colored by his relationship with the other jurors and was not entirely personal to him. Accordingly, dismissal of the juror was error.

In determining whether a reason is personal to a specific juror, we previously have considered whether the reason relates to burdens in a juror's life outside of deliberations, or whether a juror exhibits abnormal idiosyncratic behavior or extreme emotional distress such that the juror cannot fulfill his or her duty. See Swafford, 441 Mass. at 337; Commonwealth v. Leftwich, 430 Mass. 865, 873-874 (2000). In some cases, extreme emotional distress, even if in part due to deliberations, may be considered a personal problem if it exceeds the level of distress that typically accompanies deliberations. See Leftwich, supra. See also Commonwealth v. Freeman, 442 Mass. 779, 788 n.10 (2004) (dismissal of juror proper where judge found juror was "enormously upset" and unable to give defendant "fair and impartial and reasoned evaluation of evidence"). Similarly, if a juror's conduct has roots in interactions with other jurors during the course of

deliberations but the juror's response is idiosyncratic, such behavior may constitute a reason for dismissal that is personal to that juror. See Swafford, supra.

In the present case, the juror first alluded to his relationship with other jurors in his note and then on multiple occasions during the colloquy. In his note, he wrote that he did not feel "able to engage in a discussion with any of the fellow jurors." He also wrote, "I know the other members are waiting on me so I don't think I would be able to have an open discussion without feeling [j]udged." During the colloquy, the defendant said, "I already know specific jurors in there that I disagree with." He also stated: "I don't think I can . . . fairly go in there and have a discussion with all these people when I've already done one part." The juror repeatedly framed his inability to begin anew in the context of his relationship with other jurors. He expressed a concern for what other jurors would think of him when he said he would feel "judged" if he resumed deliberations. He also expressed some concern, although it is unclear of what nature, about the fact that several jurors disagreed with him. Finally, he expressed his hesitancy to "have a discussion with all these people." These statements, when considered together, suggest that the juror's refusal to begin anew was influenced by his relationship with his fellow jurors.

After defense counsel expressed concern about whether the juror could be a minority in the jury room based on his initial note and his references to the other jurors during the colloquy, the trial judge held the second colloquy. The judge specifically addressed the juror's note where he expressed concern that the other jurors were "waiting on him" and wrote, "I don't think that I would be able to have an open discussion without feeling [j]udged." During the second colloquy, the juror continued to speak about his refusal to begin deliberations anew in the context of his relationship with other jurors. He stated, "[T]hey're all waiting for me so it's just going to be hard for me to go in there and feel comfortable having a conversation with anyone in that room."

The Commonwealth argues that the juror's comments relating to the other jurors did not preclude the trial judge from determining that the juror's inability to follow instructions was personal to him. In these circumstances, we disagree. The Commonwealth's reliance on Leftwich and Swafford in support of this argument is misplaced. In both Leftwich and Swafford, the juror was unable to perform his or her duties because of a problem that was personal to that juror. See Swafford, 441 Mass. at 337; Leftwich, 430 Mass. at 873-874.

In Leftwich, 430 Mass. at 873-874, a juror properly was dismissed after she informed the judge that she was having

difficulty breathing due to stress. There, the judge found that physical manifestations of stress would prevent the juror from continuing to deliberate fairly. Id. at 872. Although there was some indication that the juror's extreme emotional distress was, at least in part, due to deliberations, the stress the juror was feeling far exceeded the normal hardships of serving on the jury. Id. Her physical manifestation of that stress likely would prevent her from properly carrying out her duties. Id. Further, there was "nothing in the record to indicate that the jury were at an impasse, or that the juror's statements were 'euphemisms' for the fact that the juror was 'persistent in asserting a minority position during deliberations.'" Id. at 874, quoting Connor, 392 Mass. at 846.

Similarly, in Swafford, 441 Mass. at 337, we concluded that it was proper to dismiss a juror where she displayed reclusive behavior and repeated statements that she could not be fair and impartial. There, the combination of the juror's abdicatory behavior and her professed inability to be fair was not "in any normal sense the product of her relationship to her fellow jurors." Id.

Here, the juror did not allege any outside stress. He did not have any apparent health issues that prevented him from carrying out his duties, nor did he exhibit idiosyncratic behavior or extreme emotional distress. When asked if there

were any outside reasons why he did not want to be there, he unequivocally said no. Although the juror claimed that he was biased because he could not erase the conclusions he already had made and begin deliberations anew, he also stated that his decision-making process was, and would continue to be, fair and impartial. Contrast Commonwealth v. Long, 419 Mass. 798, 804 & n.5 (1995) (juror's statements that he "would hope" he could be fair to Cambodian defendant indicated ethnic bias and judge's failure to excuse juror for cause was reversible error). Most importantly, the juror repeatedly explained his inability to begin deliberations anew in the context of his relationship with the other jurors.

Our rationale here is akin to our decision in Tiscione, 482 Mass. 485. There, we concluded that if a juror's refusal to continue deliberations even in part is based on events that took place in the jury room, it is error to discharge that juror. Id. at 490. The juror explained several of her outside sources of stress, such as her father's dementia. Id. at 487. Nonetheless, the juror's initial statement that she did not want to return to deliberation because other members of the jury were being argumentative and it upset her was sufficient to conclude that her distress was not based on personal issues alone. Id. at 490. Similarly, in this case, because we conclude that the juror's inability to follow instructions was at least in part

rooted in his relationship with other jurors, we cannot say that the juror was unable to perform his duties because of a problem that was personal solely to him.

We briefly address the defendant's argument that the juror's professed inability to start deliberations anew was "a mere assertion of [his] inability to abide by his oath," and, therefore, was not a ground for his dismissal. See Connor, 392 Mass. at 846 ("A juror's mere assertion of inability to abide by his oath does not establish the 'good cause' required by the statute"). The Commonwealth counters that the trial judge held multiple hearings with the juror and articulated a compelling reason for the juror's dismissal that was beyond just his mere refusal to carry out his duty. We note that whether the juror's assertion that he was unable to abide by his oath was "mere euphemism[] for the truth," id. at 846, goes to the question of prejudice, addressed infra. See Commonwealth v. Torres, 453 Mass. 722, 732 (2009). See also Connor, supra at 843 ("Great care must be taken to ensure that a lone dissenting juror is not permitted to evade his responsibilities").

We agree with the Commonwealth, however, that this case is distinguishable from Connor, 392 Mass. at 846, where the trial judge erred in discharging a juror after he stated he could not abide by his oath. There, the judge failed to conduct any inquiry of the juror to determine whether he may have been a

lone dissenting juror attempting to evade responsibilities. Id. Nonetheless, the fact that the trial judge thoroughly inquired of the juror in this case is not dispositive where the substance of the colloquies failed to prove that the juror's problem was personal to him.[3]

Connor is, however, instructive as to how a judge should conduct an inquiry of a "problem" juror. See Connor, 392 Mass. at 845. We reiterate that before the "'problem' juror is

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[3] It is a difficult question whether a juror's professed inability to start deliberations anew by itself would constitute a reason personal to him or her rather than a mere frustration. As we have acknowledged repeatedly, frustration does not equal bias. Commonwealth v. Mutina, 366 Mass. 810, 819 (1975) ("Despite his good will, maturity, acumen and sense of civic responsibility and despite his willingness to accept and his efforts to apply judicial instructions, the juror comes to the court room complete with that knowledge and those experiences, expectations, fears and frustrations which have shaped his character and attitudes. Quite apart from questions of obvious bias or admitted prejudice, no juror enters into his temporary judicial service stripped of his background and emotions. To hold otherwise would be to defy human experience"). It is not entirely clear that the juror was unable to perform his duties. Although the juror was resolute in the fact that he could not follow instructions, he also indicated that his decision-making process would remain fair and impartial.

Given the facts of this case, it is not surprising that a juror would be frustrated with the prospect of beginning deliberations anew for the second time. In fact, defense counsel noted that several other jurors appeared exasperated when the trial judge informed them they would be required to start anew. In any event, because this juror's inability to follow instructions was couched in his relationship with the other jurors, we need not consider whether his reluctance to start deliberations anew in and of itself was a mere frustration that would not be considered "good cause" for dismissal.

questioned, the judge should preliminarily inform him that he cannot be discharged unless he has a personal problem, unrelated to his relationship to his fellow jurors or his views on the case. Unless the juror indicates a belief that he has such a problem, all questioning should cease." Id. Here, the trial judge conducted two thorough colloquies but failed to inform the juror preliminarily that he could not be discharged unless he had a personal problem.

We acknowledge the difficulty a judge often faces in determining how to deal with a "problem juror." It is not always clear at the outset whether a juror's problem is of a personal nature. It is no easy task for a judge to "discuss the juror's concerns generally," and do so "without delving into deliberations." Tiscione, 482 Mass. at 492, citing Commonwealth v. McCowen, 458 Mass. 461, 487-489 (2010). The preliminary inquiry seeks to remedy this problem. We take this opportunity to provide some additional guidance for a judge who must speak with a juror alone during deliberations. We suggest that in addition to posing the preliminary inquiry previously discussed, the judge also tell the juror that the judge cannot speak with the juror regarding the deliberations or regarding the juror's relationship with the other jurors during deliberations. For example, in this case, the judge might say, "I am going to ask you a question. I cannot ask you, and you cannot tell me about

your deliberations or relationship with the other jurors during deliberations. If you answer my question referencing either, I will have to interrupt you." We emphasize that the moment a juror suggests that there may be a disagreement among the jurors, the judge must interrupt the juror and firmly reiterate that the juror must not reveal any information regarding deliberations. The judge may need to interrupt the juror multiple times to give the same instruction.

In any event, the trial judge's failure to give the juror any such preliminary advisements in this case does not affect our decision today. The question whether the juror was seeking to evade his duties as a potential minority juror, of course, remains relevant to our prejudice analysis.

c. Prejudice. Having concluded that the discharge of the juror was error, we now consider whether the error was prejudicial to the defendant. General Laws c. 234A, § 74, provides that any "irregularity" with respect to discharging or managing jurors will not lead to vacatur unless the error is preserved by objection and the "objecting party has been specially injured or prejudiced thereby." Here, the error is of constitutional dimension and was preserved by a timely objection. Accordingly, we review to determine whether it was harmless beyond a reasonable doubt. See Tiscione, 482 Mass. at

493, citing Commonwealth v. Vinnie, 428 Mass. 161, 163, cert. denied, 525 U.S. 1007 (1998).

Considering the events that took place before and after the juror's replacement, and the substance of the colloquies and of the juror's initial note, we conclude that discharging the juror was not harmless beyond a reasonable doubt. Although the trial judge was satisfied that the juror's comments did not indicate that he was a minority opinion on the jury or that the jury was at an impasse, we are not. The judge found that the juror's comments with regard to the other jurors related only to the fact that he currently was stalling deliberations by speaking with the judge, and had nothing to do with his initial inability to continue deliberations. We disagree.

In the initial note that juror gave to the trial judge, he wrote that he was not "able to engage in a discussion with any of the fellow jurors" and that other jurors were "waiting on [him]" such that he would not "be able to have an open discussion without feeling [j]udged." Because this note was passed immediately after the jurors were sent to deliberate and before the juror substantially had delayed the deliberation process, it is not entirely clear that the juror merely was referring to stalling the deliberations at that time.

Without question, the trial judge tried to get to the root of this issue. After defense counsel expressed concern over

whether the juror could be a minority in the jury room based on his initial note and his references to other jurors during the colloquy, the judge held the second colloquy. During the colloquy, the juror stated, "They're all waiting for me so it's just going to be hard for me to go in there and feel comfortable having a conversation with anyone in that room." He further protested, "[N]ow I'm the guy that's stalled this process." The judge asked the juror to clarify what he meant by "stalling this process" and the juror said, "[T]hey're sitting in the room and they know that there's one juror missing which is myself . . . . And that's just a side issue aside from what I said before."

Although we "defer to a judge's assessment of a juror's demeanor," Swafford, 441 Mass. at 336, we also emphasize that a trial judge "has at most a limited discretion to determine that the facts show an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality" (citation omitted). Connor, 392 Mass. at 846-847. While the juror may well have been concerned about stalling the process, he also stated that this was just a "side issue." We cannot for certain, from this record, discern whether the defendant was taking a minority position on the jury. It is, however, apparent that he disagreed with at least some of the jurors, where he stated, "I already know specific jurors in there that I disagree with."

In Torres, 453 Mass. at 733, this court concluded that a juror's reported inability to deliberate was not a "mere euphemism" for the assertion of a minority position. There, the juror repeatedly stated that she wanted to go home, refused to consider certain evidence, and said that she believed the criminal justice system was corrupt. See id. at 727, 728-729. Moreover, in Torres, the foreperson gave the judge a note regarding the juror's behavior only forty-five minutes into the deliberations, making it "unlikely that the jury were at an impasse." Id. at 733, quoting Commonwealth v. Francis, 432 Mass. 353, 369 (2000). "[T]here was no danger that a dissenting juror was allowed to evade her responsibilities." Commonwealth v. Garrey, 436 Mass. 422, 431 (2002). Unlike in Torres, the juror in this case had spent a relatively significant amount of time deliberating. The jury had deliberated for one full day, not including the full day before the jury were reconstituted for the first time and deliberations began anew. Because we conclude that the juror's reluctance to begin deliberations anew was at least in part influenced by his relationship with the other jurors, and because we know he disagreed with at least some of the jurors, it is possible that the juror held a minority view or the jury were at an impasse.[4] Accordingly, "in

[4] As in Tiscione, 482 Mass. at 492, "[w]e acknowledge that, had the juror rejoined the deliberations, the end result well

view of all the circumstances," vacatur of the convictions is required. Commonwealth v. Haywood, 377 Mass. 755, 770 (1979).

3. Motion to suppress statements. The defendant argues that the motion judge erred in denying his motion to suppress statements because the Commonwealth failed to demonstrate that the defendant voluntarily waived his Miranda rights and voluntarily made a statement. During the interview, the defendant admitted to planning to steal the drugs with Tate. He also admitted to shooting Fiume. We conclude that the motion judge did not err in denying the defendant's motion to suppress, and the admission of those statements at trial was not error.

a. Standard of review. "In reviewing the denial of a motion to suppress, we defer to the motion judge as to the weight and credibility of the evidence. We accept the motion judge's findings of fact unless they are clearly erroneous and assess the correctness of the judge's legal conclusions de

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might have been mistrial." While it is possible that the jury may have been at an impasse, the trial judge also may have concluded that the defendant would be prejudiced by forcing the juror to continue deliberations. "[T]he law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." Commonwealth v. Cassidy, 410 Mass. 174, 177 (1991), quoting United States v. Perez, 22 U.S. 579, 580 (1824). Here, a mistrial may have been the proper course, where the juror refused to deliberate anew and the judge's colloquy did not confirm that the juror's reasons for his refusal were entirely personal to him.

novo." Commonwealth v. Weidman, 485 Mass. 679, 683 (2020), quoting Commonwealth v. Bell, 473 Mass. 131, 138 (2015), cert. denied, 136 S. Ct. 2467 (2016). "To the extent that the motion judge's findings are based entirely on documentary evidence, including video recordings, that are equally available to a reviewing court, no deference is owed because the reviewing court is 'in the same position as the [motion] judge.'" Weidman, supra, quoting Commonwealth v. Novo, 442 Mass. 262, 266 (2004).

b. Voluntariness of waiver. "Although the voluntariness of a Miranda waiver and the voluntariness of a particular statement made during custodial interrogation 'are separate and distinct issues,' the 'test' for both is 'essentially the same.'" Commonwealth v. Newson, 471 Mass. 222, 229 (2015), quoting Commonwealth v. Edwards, 420 Mass. 666, 670 (1995). "A waiver of Miranda rights is valid only if made 'voluntarily, knowingly and intelligently.'" Weidman, 485 Mass. at 688, quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966). "A voluntary statement is one that is 'the product of a "rational intellect" and a "free will," and not induced by physical or psychological coercion.'" Commonwealth v. Monroe, 472 Mass. 461, 468 (2015), quoting Commonwealth v. Tremblay, 460 Mass. 199, 207 (2011). "The initial burden is on the defendant to produce evidence tending to show that his statement was

involuntary; if he satisfies this burden, the Commonwealth is required to prove beyond a reasonable doubt that the statement was voluntarily made." Commonwealth v. Montoya, 464 Mass. 566, 577 (2013). See Edwards, supra at 669-670 (applying same standard to voluntariness of Miranda waiver).

We review the totality of the circumstances, considering factors such as "promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of Miranda warnings." Commonwealth v. Mandile, 397 Mass. 410, 413 (1986). See Commonwealth v. Martinez, 458 Mass. 684, 692 (2011) (court considers totality of circumstances when determining voluntariness).

i. Diminished mental capacity. The defendant argues that his diminished mental capacity also was a factor to which the motion judge should have given special attention. We give "special attention to whether a person of low intelligence waived Miranda rights and voluntarily and knowingly made a statement to the police" (citation omitted). Commonwealth v. Beland, 436 Mass. 273, 281 (2002). "People with low intelligence can, however, waive their rights." Id., citing

Commonwealth v. Jackson, 432 Mass. 82, 86 (2000). Here, the defendant was advised of his Miranda rights at the time he was arrested, after he was booked at the Logan Airport State police barracks, after he was booked at the Stoneham police department, before he was interviewed, after the police began recording the interview, and once during the interview. The defendant submitted school records showing that he had a language-based learning disability. Although the defendant dropped out of school after the eleventh grade, he did so not because of academic failure, but rather for family reasons. When the defendant was advised of his rights during the interview, he appeared to have no difficulty comprehending and responded appropriately. Throughout the interview he appeared calm, cooperative, and responsive.

The defendant also suggests that he had diminished capacity because he was under the influence during the interview. The defendant stated that he had smoked marijuana about two and one-half hours before the interview, but the marijuana only affected him for fifteen minutes or less. He also said that he had sipped on two shots of brandy earlier that day, but the alcohol was not affecting him during the interview. The trooper who interviewed the defendant saw no indicia of intoxication, such as glassy or watery eyes, slurred speech, or any other physical mannerisms. Based on the evidence presented at the hearing on

the motion to suppress and our independent review of the recorded interview, the motion judge properly concluded, beyond a reasonable doubt, that the defendant made his statements voluntarily after a knowing and intelligent waiver of his Miranda rights.

ii. Promise of leniency. The defendant further argues that police interviewers made assurances to him that rendered his statements involuntary. We disagree. At no time during the interview did police improperly provide "an assurance, express or implied that [a confession would] aid the defense or result in a lesser sentence." Commonwealth v. Colon, 483 Mass. 378, 390 (2019), quoting Commonwealth v. Meehan, 377 Mass. 552, 564 (1979). "[A]n officer is not prohibited from 'suggest[ing] broadly that it would be "better" for a suspect to tell the truth, [and] may indicate that the person's cooperation would be brought to the attention of public officials or others involved, or may state in general terms that cooperation has been considered favorably by courts in the past.'" Commonwealth v. Santana, 477 Mass. 610, 619 (2017), quoting Tremblay, 460 Mass. at 209.

Here, police suggested that "there is a little bit more here and we don't know the whole story." They stated: "We'd like to help you and just wrap this up and get your side of it honestly." They also stated: "I think it would really help you

out." They encouraged the defendant to "help [himself] out" by telling the truth. Police did not, however, assure the defendant in any way that his confession would aid in his defense; in fact, they explicitly informed him that it would not. See Commonwealth v. Jordan, 439 Mass. 47, 53 (2003). They told him, "[W]e said that we're trying to have you tell us the truth because we want to know the truth. We're not here making you any promises or making you any or saying that if you help us or tell us anything, we can offer you anything because that is not the case." Statements encouraging the defendant to be truthful without a direct or implicit promise of leniency, such as the ones at issue here, are not improper.

c. Invocation of right to counsel. The defendant argues that he invoked his right to counsel during the interview and that questioning should have ceased. During custodial interrogation, "[i]f the accused indicates that he wishes to remain silent, 'the interrogation must cease.' If he requests counsel, 'the interrogation must cease until an attorney is present.'" Commonwealth v. Santos, 463 Mass. 273, 285 (2012), quoting Edwards v. Arizona, 451 U.S. 477, 482 (1981).

Here, the defendant's statement was not an unambiguous request for counsel. The defendant stated, "[T]his is where the lawyer thing come in." The trooper responded, "If you're saying the lawyer thing, does that mean you want to have a lawyer? Do

you want to stop?" To which the defendant responded, "No, I definitely, I'll definitely, like I'll talk."[5] "When a suspect's statement . . . simply reflects his musing about the possibility of stopping the questioning until he has spoken with an attorney, we have consistently found the statement to be too ambiguous to constitute an unequivocal invocation of the right to counsel." Commonwealth v. Melo, 472 Mass. 278, 295 (2015), quoting Commonwealth v. Morganti, 455 Mass. 388, 398 (2009), S.C., 467 Mass. 96, cert. denied, 574 U.S. 933 (2014). Even though the defendant responded in the negative, the trooper attempted to clarify further the defendant's ambiguous statement. See Commonwealth v. Clarke, 461 Mass. 336, 352 (2012) ("Although we do not today mandate it, such clarification, the intuitively sensible course, has the benefit of both ensuring protection of the right if invoked and of minimizing the chance of suppression of subsequent statements at trial if not" [quotation and citation omitted]). The trooper further stated, "[I]t's very important if you said something about an attorney, if you're saying you want a lawyer, I want to stop, but if you want to talk I'm glad to listen. Do you

[5] A transcript of the interview included in the record of this case differs slightly from what we hear in the recording and from what the motion judge quoted in her decision. The transcript version of the defendant's response is, "No, that's, like I'll talk." The difference does not affect our conclusion.

understand what I'm saying?" In response, the defendant stated, "Mm-hmm," and affirmatively nodded his head up and down. Both the testimony at the motion hearing and the recorded interview reflect the defendant's desire to go forward with questioning without an attorney.

4. Conclusion. The order denying the defendant's motion to suppress is affirmed. We vacate the judgments entered against the defendant and remand this matter to the Superior Court for a new trial.

So ordered.