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SJC-13249

COMMONWEALTH vs. RALPH R., a juvenile.¹

Suffolk. September 7, 2022. - November 10, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,
& Georges, JJ.

Jury and Jurors. Constitutional Law, Jury. Practice, Criminal,
Jury and jurors, Conduct of juror, Deliberation of jury.

Complaint received and sworn to in the Suffolk County
Division of the Juvenile Court Department on June 2, 2014.

Indictments found and returned in the Suffolk County
Division of the Juvenile Court Department on September 4, 2014.

The cases were tried before Joseph F. Johnston, J.

After review by the Appeals Court, the Supreme Judicial
Court granted leave to obtain further appellate review.

Lisa M. Lana, Committee for Public Counsel Services, for
the juvenile.

Monica J. DeLateur, Assistant District Attorney, for the
Commonwealth.

Chauncey B. Wood & Sara E. Silva, for Massachusetts
Association of Criminal Defense Lawyers & others, amici curiae,
submitted a brief.

¹ A pseudonym.

LOWY, J. The Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights guarantee a criminal defendant the right to a trial by a fair and impartial jury. The juvenile asserts that this right was twice undermined at his trial: first, when the judge failed to respond adequately to two jurors sleeping; and second, when the judge failed to conduct a preliminary inquiry into a preverdict report by the jury foreperson that "discriminating comments" were made during jury deliberations. We conclude that the judge did not abuse his discretion in addressing the sleeping juror issues. On the other hand, we conclude that, in light of the judge's statement that he did not know what the foreperson meant by her report, it was an abuse of the judge's discretion not to conduct a preliminary inquiry to determine whether the foreperson's statement amounted to a credible report of racial, ethnic, or other improper bias in the deliberation room. Because we cannot be certain that such bias did not materially influence the verdicts, the juvenile's conviction as a youthful offender and his adjudications of delinquency must be vacated and set aside.²

² We acknowledge the amicus brief submitted by the Massachusetts Association of Criminal Defense Lawyers, Citizens for Juvenile Justice, New England Innocence Project, and Fred T. Korematsu Center for Law and Equality.

1. Background. The juvenile was charged by delinquency complaint with several firearm-related offenses, and subsequently he was indicted as a youthful offender for two of those offenses.³ At the juvenile's trial, a number of jury issues arose, three of which are relevant to this appeal.

First, during the Commonwealth's direct examination of its first witness, the judge called the prosecutor, defense counsel, and juror no. 8 to sidebar because he had observed that juror sleeping. At sidebar, the judge asked the juror whether she was sleeping, and if she had missed the entirety of the witness's testimony. The juror confirmed that she had fallen asleep, stating that she had "asthma and bronchitis." She stated that her "eyes just went," but she denied sleeping through all of the witness's testimony. The judge emphasized the importance of the juror's attention to the evidence, and ultimately allowed her to return to her seat on the jury. The judge informed the parties

³ The delinquency complaint charged the juvenile with carrying a firearm without a license, carrying a loaded firearm without a license, possession of a large capacity feeding device, possession of ammunition without a firearm identification card, and receiving stolen property. The juvenile was indicted as a youthful offender on charges of unlawful possession of a firearm and unlawful possession of a large capacity feeding device. Those charges, as well as the charge of receiving stolen property, were dismissed from the delinquency complaint prior to trial, at the Commonwealth's request.

that it would "be a live, fluid issue" that he would continue to monitor.

That afternoon, after the jury had retired for the day, the judge informed counsel that he was satisfied with juror no. 8's attentiveness. The judge inquired whether either attorney wished to be heard on the issue. The prosecutor stated that he had not "noticed anything of note since the initial sidebar," and defense counsel agreed, commenting: "She was awake the rest of the time." The judge then clarified for the record that juror no. 8 was "right in [his] line of sight" and was sleeping for "really a fleeting . . . moment." The judge further stated that he had "been watching [juror no. 8] very closely throughout just to be sure," as well as another juror who had earlier claimed she was not feeling well, and discerned no additional problems. He continued: "If counsel has anything different than that, please let me know, otherwise, we'll just continue as we are with our [fourteen] jurors." Neither voiced any concerns about juror no. 8 or any other juror.

The second issue arose the following morning and concerned a different juror. Before the jury were brought into the court room, the judge met with counsel to discuss unrelated issues concerning two other jurors.⁴ During this discussion, defense

⁴ The first issue concerned an altercation wherein one juror, a breastfeeding mother, was provided accommodations to

counsel remarked, "If we had those two jurors excused, then we have two other jurors sitting there intermittently falling asleep because the gentleman with the white hair at times he'll just be asleep; yesterday, he was snoring. I -- it -- it's going to be tricky excusing jurors." This was the first mention of anyone other than juror no. 8 sleeping. In that moment, the prosecutor interjected that he had not observed the "gentleman with the white hair having issues." The "gentleman with the white hair" presumably was juror no. 3.⁵ The judge and defense counsel then had the following exchange:

The judge: "Well, I'll say this, I've -- I was eyeballing [the] juror in seat 8 the whole -- one eye did not leave her. . . . And after we had our discussion at sidebar if that continued. Then, at one point, I noticed the gentleman, whether it's three or four I'm not sure, and this is the point when the first witness you had -- you put up the video -- you had put up the video, and I looked down and his eyes were closed and his head was down, and I actually made sort of an announcement to the jury, 'Can everyone see the video?' something like that, and [thirteen] of the [fourteen] nodded or said 'yes.' He didn't. And then within seconds of that, though, he was then looking at the screen. So, in my mind, was this someone that was just kind of putting their head down and

use a breast pump in a private locked court room during the lunch break, and another juror became aggressive and hostile that she could not use the court room to eat her lunch, upsetting other jurors. The second issue involved a juror who ultimately was excused for religious reasons.

⁵ Although the transcript does not make entirely clear which juror was "the gentleman with the white hair," for the purpose of the appeal, the parties assume it was juror no. 3 because the judge referred to the gentleman as either juror no. 3 or juror no. 4, and juror no. 4 was a woman.

kind of concentrating and then looking up? So that's what I observed. Now, if you think that's worth inquiry?"

Defense counsel: "Yeah, [(indiscernible)] but I think that happened twice and, I mean, I --"⁶

The judge: "I didn't see the other. I didn't see the other one. Just as an offer of proof, what did you see?"

Defense counsel: "Same thing that you just described. I -
-"

The judge: "No, but you said, you heard -- you said it's -
-"

Defense counsel: "I don't remember exactly but I do remember you were trying to wake him up by -- I -- because I assume that's what you were trying to do."

The judge: "That obvious, huh?"

Thereafter, the judge instructed the court officer to alert him if she noticed any jurors sleeping, and the discussion reverted to unrelated matters. The trial proceeded with no further discussion of sleeping jurors.

The third juror issue occurred during deliberations, which began on a Thursday afternoon. On Friday morning, the jury sent the judge a note that they "ha[d] not reached a unanimous decision." As the judge instructed the jury to continue deliberating, the jury foreperson raised her hand to speak to

⁶ Many portions of sidebar discussions at trial are deemed "indiscernible" in the transcript due to low audio. The defendant bears the burden to reconstruct the record of indiscernible portions of the trial if they are relevant to his claims on appeal. See Commonwealth v. Sargent, 449 Mass. 576, 582 n.10 (2007).

the judge. At sidebar, with counsel present, the foreperson told the judge she had "concerns" that any decision would be "based on individual[s] who are using personal issues, personal matters into this case -- dominating the conversations and just not trying to put -- look at the case with an open mind"; she expressed doubt that the jury were going to reach a unanimous decision. The judge instructed the foreperson to continue deliberating, and he noted privately to counsel that a Tuey-Rodriguez⁷ instruction might be warranted. Shortly thereafter, the judge called the jury back into the court room to adjourn for the day, with instructions to return on Monday. The foreperson again requested to speak with the judge.

Prior to speaking to the foreperson, the judge consulted with counsel, noting that he wanted to avoid discussing deliberations, but he recalled that the foreperson may have had a work conflict preventing her from serving after Monday. At sidebar, the judge prefaced his conversation with the foreperson: "[I]f you have a question that's personal to you regarding any situation that you might have relative to family or otherwise, I will -- I'll address that with you right now.

⁷ See Commonwealth v. Rodriguez, 364 Mass. 87, 101-102 (1973) (Appendix A); Commonwealth v. Tuey, 8 Cush. 1, 2-3 (1851).

What I don't want to do is address anything relative to any deliberations." In response, the foreperson stated,

"It just -- my work obligation and I -- I can't be on this jury, on this case. There is a lot of discriminating comments among us. . . . A lot of discriminating comments among the group and they won't -- they not gonna reach a decision [(indiscernible)], doesn't matter. It's not a time problem."

At this point, the judge interrupted the foreperson's explanation and asked about her work commitments. The foreperson reiterated:

"I cannot afford to go on this jury for more than it should right now. One, for my personal, I can't be here next week and, two, from what I am hearing from this group, we're not gonna reach a decision on Monday. There has to be some shoveling on this group. We not gonna reach a decision on Monday."

The judge conferred with counsel, and all agreed that the foreperson should be instructed to return on Monday.

In their discussion, defense counsel remarked that the foreperson's concerns "sound[ed] like a combination of things." The judge agreed, and the prosecutor noted, "[I]t makes a difference if it's one person because there is case law on removing a disruptive juror, and if she says there's discriminating statements being thrown out, but I don't know what she means." The judge responded, "I have no idea." After the foreperson left for the day, the judge stated to counsel, "She struck me as being not sincere with the concern that she expressed." Neither disagreed or objected.

On Monday, the jury resumed deliberations. Two hours into deliberations, the jury sent a note to the judge that they were deadlocked. The prosecutor requested that the judge inquire which jurors the foreperson was speaking about the previous Friday, seemingly referencing the foreperson's report of "discriminating comments," and requested that he ask those jurors "if they [were] able to deliberate based on the facts and circumstances of this case." The judge declined to do so, but he agreed to provide a Tuey-Rodriguez instruction. After the instruction was given, the jury resumed deliberations.

Just a few hours later, the jury submitted another note asking whether they were required to be unanimous on all of the charges. While the judge was conferring with counsel about how to respond, the jury notified the court officer that they had reached unanimous verdicts, but that one juror still wanted the question answered. Before taking the verdicts, the judge instructed the jury that they were required to address the four charges separately, and that they could reach a unanimous decision as to one or more of the charges but not reach a unanimous decision as to the others. The jury then briefly resumed deliberations before returning with unanimous verdicts of guilty on all charges.⁸

⁸ At the close of the Commonwealth's evidence, the judge had dismissed the youthful offender component of the indictment

The juvenile appealed, and a divided panel of the Appeals Court concluded that the judge abused his discretion by failing to conduct a voir dire of juror no. 3 in response to defense counsel's report that the juror had been sleeping and further erred by failing to conduct an inquiry into the foreperson's report of "discriminating comments" being made during deliberations.⁹ See Commonwealth v. Ralph R., 100 Mass. App. Ct. 150, 151 (2021). The Appeals Court accordingly vacated the judgment and adjudications of delinquency, and set aside the verdicts. Id. at 165. We allowed the Commonwealth's application for further appellate review.¹⁰

2. Discussion. a. Sleeping jurors. To protect the juvenile's and the public's right to "decisions made by alert and attentive jurors, . . . [a] judicial observation that a juror is asleep, or a judge's receipt of reliable information to that effect, requires prompt judicial intervention."

Commonwealth v. McGhee, 470 Mass. 638, 643-644 (2015), quoting

charging the juvenile with possession of a large capacity feeding device. See Commonwealth v. Quincy Q., 434 Mass. 859, 866 n.8 (2001).

⁹ The Appeals Court also concluded that the judge conducted a proper inquiry of juror no. 8, and that the evidence at trial was sufficient to support the juvenile's conviction as a youthful offender and the adjudications of delinquency. See Commonwealth v. Ralph R., 100 Mass. App. Ct. 150, 151 (2021).

¹⁰ We denied the juvenile's application for further appellate review of the sufficiency of the evidence.

Commonwealth v. Beneche, 458 Mass. 61, 78 (2010). However, "not every complaint regarding juror attentiveness requires a voir dire." McGhee, supra at 644, quoting Beneche, supra. See Commonwealth v. Villalobos, 478 Mass. 1007, 1008 n.1 (2017). "[I]f a judge receives a complaint or other information suggesting that a juror was asleep or otherwise inattentive, the judge must first determine whether that information is 'reliable.'" Id. at 1007, quoting McGhee, supra.

In assessing the reliability of the information received, "the judge must consider the nature and source of the information presented, as well as any relevant facts that the judge has observed from the bench." McGhee, 470 Mass. at 644. "If the judge determines that the information is not reliable, no intervention is necessary." Villalobos, 478 Mass. at 1007. "If, however, the judge does find the information reliable, he or she 'must take further steps to determine the appropriate intervention.'" Id. at 1008, quoting McGhee, supra.

The appropriate intervention typically involves "conduct[ing] a voir dire of the potentially inattentive juror, in an attempt to investigate whether that juror 'remains capable of fulfilling his or her obligation to render a verdict based on all of the evidence.'" Villalobos, 478 Mass. at 1008, quoting McGhee, 470 Mass. at 644. However, "[j]udges have substantial discretion in this area," McGhee, supra, and they may readily

exercise that discretion to determine "the remedy best suited to address the situation,"¹¹ Commonwealth v. The Ngoc Tran, 471 Mass. 179, 191 (2015). "The burden is on the defendant to show that the judge's response to information about a sleeping juror was 'arbitrary or unreasonable.'" Villalobos, supra, quoting McGhee, supra.

The juvenile argues that the judge failed to respond reasonably to information suggesting that juror no. 8 and juror no. 3 were sleeping at trial and that, as a result, a new trial is required. We conclude that the juvenile has not met his burden as to either juror.

i. Juror no. 8. Upon personally observing juror no. 8 sleeping, the judge promptly intervened and conducted a voir dire to determine whether that juror "had in fact fallen asleep and, if so, what portions of the evidence [she] might have missed." See Villalobos, 478 Mass. at 1008. The juror explained that, although she had fallen asleep, it had been brief, and she had not missed all of the witness's testimony. The judge -- who could see the juror from the bench -- found on the record that she had been asleep only for a "fleeting

¹¹ "The judge's decision can best be assessed if the judge makes a record of his or her findings, initially as to the reliability of the information presented, and subsequently . . . as to whether the juror in question was indeed asleep or inattentive" McGhee, 470 Mass. at 644.

moment." See Commonwealth v. Vaughn, 471 Mass. 398, 413 (2015) ("We defer to the findings of the trial judge on a claim alleging a sleeping juror"). Even so, the judge continued to "closely watch[] the juror, and monitor[] the situation." See Beneche, 458 Mass. at 79. The judge satisfied himself that juror no. 8 was attentive and alert for the remainder of the trial, and further consulted with counsel regarding their observations; both agreed that the issue was isolated and nonrecurring. There was no error or abuse of discretion. See Commonwealth v. Ray, 467 Mass. 115, 139 & n.18 (2014) (no abuse of discretion where, after voir dire, judge was satisfied that sleeping juror "could fairly participate in deliberations").

ii. Juror no. 3. The juvenile argues that the judge abused his discretion in failing to conduct a voir dire of juror no. 3 in response to his own observations of the juror, as well as defense counsel's report that that juror had been sleeping twice on the previous day.

The judge indicated that the previous day he initially had noticed juror no. 3's head down and eyes closed, but it was not obvious to him that the juror was sleeping. See Commonwealth v. Keaton, 36 Mass. App. Ct. 81, 87 (1994) ("Meditation may be mistaken for somnolence"). See, e.g., McGhee, 470 Mass. at 643 ("judge pointed out that '[s]ome people, when they concentrate, they close their eyes'"). To determine whether the juror was

paying attention or was asleep, the judge intervened by asking all of the jurors whether they could see the screen as the Commonwealth was showing a video exhibit. In the judge's own words, juror no. 3 was looking at the screen "within seconds" of the judge's statement.

"Although it is true that a judge must take action when confronted with evidence of a sleeping juror, the nature of that action is within the judge's discretion," Vaughn, 471 Mass. at 412, and need only be proportional to the information presented, see Commonwealth v. Alleyne, 474 Mass. 771, 778 (2016). As we have said, "further steps" must be taken to "determine the appropriate intervention," but not every instance of juror inattentiveness calls for a voir dire. See Villalobos, 478 Mass. at 1008 & n.1. Here, the judge did not abuse his discretion in determining that a voir dire of juror no. 3 was not warranted at that point. See Alleyne, supra ("Where a judge has only tentative information that a juror may be sleeping, it is sufficient to note the report and monitor the situation").

We also conclude that the juvenile has failed to establish that the judge abused his discretion by not conducting a voir of juror no. 3 in response to defense counsel's belated report that he "think[s] that happened twice." Defense counsel did not provide any specific information regarding the alleged second instance of that juror sleeping. See Beneche, 458 Mass. at 78-

79 (uncertainty of report bearing on reliability). The report about the juror came the day after defense counsel purportedly had made the observation, without any explanation for the delay, and despite counsel's opportunity to raise any juror concerns at a bench conference held the previous day. Because of the several juror issues, including juror no. 8 sleeping, the judge had been watching the jury "closely" the day before and did not observe juror no. 3's attention wane a second time. See Vaughn, 471 Mass. at 412 (report not "reliable enough to warrant further action, particularly where counsel said that the juror slept during the judge's instructions to the jury and the judge would necessarily have been looking at the jury"); Commonwealth v. Morales, 453 Mass. 40, 47 (2009) (judge is entitled to rely on personal observations of jury regarding question of juror attentiveness).

The judge apparently was dubious of defense counsel's report, which is evidenced by his request for an offer of proof. Cf. Villalobos, 478 Mass. at 1008 (judge "did not give any indication that he doubted the reliability of the prosecutor's reports," and thus should have conducted voir dire of jurors). The offer of proof did nothing to bolster the report's credibility. Defense counsel described the second instance only as the "same thing" as the first, in that the judge tried to awaken the juror, but counsel could not "remember exactly" what

had occurred. Given the report's lack of specificity, its timing, and the absence of corroboration, it was reasonable for the judge to conclude that the report lacked sufficient reliability to require a voir dire of juror no. 3. See id. at 1007. Contrast Commonwealth v. Dyous, 79 Mass. App. Ct. 508, 513 (2011) (because report provided "ample basis for believing that one of the jurors was asleep during the trial," and subsequent colloquy with counsel "raise[d] a real doubt whether the juror was attentive" for short trial, judge should have conducted voir dire). We disagree with the juvenile that the judge necessarily found the report reliable because he instructed the court officer to bring any sleeping jurors to his attention. Considering the myriad juror issues at this trial, doing so was a reasonable, cautious, and proactive response. See Beneche, 458 Mass. at 79.

b. Report of "discriminating comments." The juvenile argues that, on receipt of the foreperson's report of "discriminating comments" being made during jury deliberations, the judge was required to conduct a preliminary inquiry to determine what the foreperson meant by her statement and that the failure to do so constituted nonwaivable structural error.¹² We agree that, where the judge indicated that he did not know

¹² The juvenile is Hispanic.

what the foreperson meant by her comment, it was error for the judge not to investigate the meaning of her statement. We disagree that the error is nonwaivable; however, in this case, we cannot say that the judge's failure to inquire did not create a substantial risk of a miscarriage of justice.

"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. McCalop, 485 Mass. 790, 798 (2020), quoting Commonwealth v. Heywood, 484 Mass. 43, 44 (2020). See Peña-Rodriguez v. Colorado, 580 U.S. 206, 223 (2017). "The presence of even one juror who is not impartial violates a defendant's right to trial by an impartial jury." Commonwealth v. McCowen, 458 Mass. 461, 494 (2010), quoting Commonwealth v. Long, 419 Mass. 798, 802 (1995). Consequently, the possibility that racial or ethnic bias has infected jury deliberations "cannot be ignored." McCalop, supra at 790, 798-799, quoting Commonwealth v. Laguer, 410 Mass. 89, 97 (1991). "[T]o ignore concerns about the influence of racial bias in the jury room 'might well offend fundamental fairness.'" McCalop, supra at 799, quoting Commonwealth v. Tavares, 385 Mass. 140, 155 n.25, cert. denied, 457 U.S. 1137 (1982).

At the same time, "inquiry into jury deliberations is prohibited." Commonwealth v. Moore, 474 Mass. 541, 545 (2016),

S.C., 489 Mass. 735 (2022). We have stressed that, when speaking to a deliberating juror, a judge must take extreme caution to avoid delving into deliberations. See, e.g., Commonwealth v. Chalue, 486 Mass. 847, 886 (2021) (Appendix); Commonwealth v. Williams, 486 Mass. 646, 656 (2021); Moore, supra at 545-548. Recognizing that this is "no easy task," we have guided judges to instruct deliberating jurors that they may not tell the judge about deliberations and that, if they do, the judge will have to interrupt them. See Williams, supra. Indeed, we have "emphasize[d] 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." Id. This is because "[t]he secrecy of jury deliberations has served as a bedrock of our judicial system, and inquiry into the 'jury's deliberative processes . . . would intrude improperly into the jury's function.'" Moore, supra at 548, quoting Commonwealth v. Solis, 407 Mass. 398, 403 (1990).

These "two lines of precedent" -- although often difficult to reconcile and implement -- "need not conflict." Peña-Rodriguez, 580 U.S. at 223. If handled delicately, a judge may investigate the potential of racial or ethnic bias in the jury room without invading the jury's deliberative process. See Commonwealth v. Quiles, 488 Mass. 298, 316 (2021), cert. denied,

142 S. Ct. 1237 (2022). For example, in Tavares, 385 Mass. at 153-156, the judge employed a procedure whereby, upon receipt of preverdict allegations that one juror made a racist comment about the defendant and another juror used a racist term to describe a witness, the judge conducted an inquiry of each deliberating juror to determine whether the remarks were in fact made and, if so, whether the jurors could nevertheless fairly and impartially render a verdict. We concluded that the judge did not err in doing so, reasoning that, in such circumstances, a judge has "broad discretion to make 'such order as he [or she] deems appropriate for the administration of justice.'" Id. at 155, quoting Commonwealth v. Fidler, 377 Mass. 192, 203 (1979). Following the inquiry in Tavares, the judge found that at least one of the reported racial remarks had been made, but the judge determined that the jury's ability to render an impartial verdict had not been affected. Tavares, supra at 154, 156. We concluded that the judge was in the "best position" to make such a finding and determined there was no error. Id. at 156, quoting New England Canteen Serv., Inc. v. Ashley, 372 Mass. 671, 675 (1977).

More recently, in Quiles, we approved a judge's use of the procedure set forth in Tavares in response to a preverdict report of jury bias. See Quiles, 488 Mass. at 315-316. There, one juror reported that another juror had made "racist comments"

during deliberations. Id. at 314. After conducting an individual voir dire of the deliberating jurors, the judge found that the juror had indeed made the racist comments; the judge dismissed that juror, but otherwise found the remaining jurors indifferent. Id. We concluded that the judge appropriately "investigat[ed] the comments without prying into the jury's deliberations," and did not err in allowing the remaining jurors to deliberate. Id. at 316. Notably, we declined to extend the more rigorous test for postverdict allegations of juror misconduct set forth in McCowen, 458 Mass. at 496-497,¹³ to preverdict allegations, stating that "[t]he preverdict procedure in Tavares affords a trial judge necessary flexibility in determining what steps need to be taken to ensure the defendant is tried by an impartial jury." Quiles, supra.

We do not suggest that an individual inquiry of each deliberating juror is required in every instance where there is a preverdict allegation of jury bias. Judges are afforded broad discretion in addressing issues concerning juror impartiality

¹³ The case of McCowen, 458 Mass. at 496-497, set forth a two-part test for postverdict allegations of juror bias: first, 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"; and second, "[i]f 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."

that arise during trial. See Commonwealth v. Alicea, 464 Mass. 837, 848-849 (2013). Indeed, "[b]ecause the [judge's] 'determination of a juror's impartiality is essentially one of credibility, and therefore largely one of demeanor, [a reviewing] court give[s] a trial judge's determination of impartiality great deference.'" Commonwealth v. Colon, 482 Mass. 162, 168 (2019), quoting Commonwealth v. Philbrook, 475 Mass. 20, 30 (2016). However, to do so in instances where the jury's impartiality has been called into question sufficiently during trial, there must be a finding of impartiality supported by facts in the record. Cf. Commonwealth v. Jacobs, 488 Mass. 597, 608 (2021) ("When a trial judge learns that the jury were exposed to an extraneous influence, the judge is required to determine whether the jurors are able to remain impartial"); Philbrook, supra at 31 ("we give deference to the judge's conclusion, arrived at following extensive individual voir dire, that the remaining jurors had not been influenced by the comments [by three jurors suggesting premature deliberations] and continued to be impartial").

We recognize that, in this trial riddled with juror issues, the judge was careful and patient in dealing with these challenges. The judge once more was placed in a difficult position when the foreperson approached him during deliberations. Despite the judge's prefatory instruction

against divulging information about deliberations, the foreperson disclosed issues personal to her, matters concerning deliberations, and a report of "discriminating comments" in the jury room. Although the judge, in keeping with his careful approach to the many juror issues, followed our guidance in Williams, 486 Mass. at 656, and interrupted the foreperson when she began to discuss deliberations, the issue of potential discrimination in the jury room had already been revealed. Confronted with this information, the judge needed to take steps to understand what the foreperson meant in order to determine whether further inquiry was required to assess whether the jury's impartiality had been affected.

We disagree with the Commonwealth that the foreperson's use of the term "discriminating," as opposed to "discriminatory," was insufficient to signify potential discrimination of some nature during deliberations. It is a reasonable inference from the context in which the statement was made that the foreperson likely meant "discriminatory."^{14,15} Importantly, the judge

¹⁴ The term "discriminating" is first defined in Webster's Dictionary as "making a distinction" or "distinguishing." See Webster's Ninth New Collegiate Dictionary 362 (1985). While not inconceivable, it is improbable that the foreperson was complaining that the jury were making comments of a judicious or discerning nature. Notably, included as part of the second definition for "discriminating" is "discriminatory." See id.

¹⁵ The Commonwealth also asserts that there is nothing to suggest that the foreperson's report referred specifically to

himself stated that he did not know what the foreperson meant by the report. Without further inquiry, the judge deemed the report insincere. Although judges are entitled to make credibility determinations regarding juror inquiry, and we will defer to those determinations absent clear error, see Commonwealth v. Kincaid, 444 Mass. 381, 388 (2005), a judge must do so fully equipped with the information necessary to make such a determination, see, e.g., Commonwealth v. Cassino, 474 Mass. 85, 97-98 (2016) (no abuse of discretion where, after voir dire of two jurors reported to be biased, judge concluded report lacked credibility and found two jurors impartial).

racial discrimination, or even discrimination based on some other improper characteristic. But that is precisely the problem with the judge's failure to inquire. The term "discriminatory" without the use of a qualifier often refers to discrimination on the basis of a person's membership in a protected group. See, e.g., Commonwealth v. Grier, 490 Mass. 455, 458 (2022) (discussing framework for determining whether peremptory strike was made for "discriminatory purpose" where such challenges are prohibited only when made on basis of membership in "discrete" group under art. 12); Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016) (referring to employee's burden to show that adverse employment action was made with "discriminatory animus," where discrimination is prohibited only when made on basis of classes protected by G. L. c. 151B). See also Webster's Third New International Dictionary 648 (2002) (providing illustration of use of word "discriminatory" as "attitudes toward minority groups"). While it is possible that the foreperson was not referring to statements reflecting discrimination on this basis, without further inquiry, that could not be determined by the judge and cannot now be determined on appeal.

It is true that the foreperson approached the judge twice during deliberations, and the judge was certainly reasonably suspicious that her motive in doing so was to be relieved from jury service. Clearly, "[a] trial judge is in a better position than an appellate court to ascertain a potential juror's credibility and demeanor, and to determine whether the juror . . . is merely trying to convince the judge to excuse him or her from serving." Long, 419 Mass. at 804 n.7. Here, however, the judge's statement that the foreperson "struck [him] as being not sincere" cannot be reconciled with his statement minutes earlier that he had "no idea" what the foreperson meant by her report, particularly where the judge took no intermediate steps to investigate the statement.¹⁶

In order to safeguard a defendant's right to an impartial jury, when a judge receives preverdict information that reasonably suggests that a statement reflecting racial, ethnic, or other improper bias was made during jury deliberations, the information "cannot be ignored." Laguer, 410 Mass. at 97. See also Peña-Rodriguez, 580 U.S. at 225 ("A constitutional rule that racial bias in the justice system must be addressed . . .

¹⁶ We note that theoretically it is possible for a judge not to credit a comment that the judge does not understand considering the context and, perhaps, previous interaction with that juror. The judge made no such credibility determination here.

is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right").

Given the seriousness in which we treat inquiry of deliberating jurors, the judge must first determine whether the report is credible such that further inquiry is required. Where there is any question concerning the credibility of the report, the judge must conduct a preliminary inquiry "to determine the truth or falsity of the . . . allegations." McCowen, 458 Mass. at 494. The possibility presented by such a report that the jury may not be impartial, which is a fundamental right, must also be treated seriously, see id., and thus this threshold credibility determination should not be a difficult one to satisfy. Any uncertainty by the judge about the credibility of the reported information or its content should be resolved in favor of conducting a preliminary inquiry of the juror who made the allegations.

The proper scope and form of the preliminary inquiry will remain within the judge's discretion, but may include, for example, simply asking the reporting juror for more information. See Tavares, 385 Mass. at 155. Following such an inquiry, once the judge better understands the nature and extent of the information reported, the judge has the discretion to determine whether further investigation is required, which may include an

individual voir dire of the deliberating jurors. See Quiles, 488 Mass. at 316.

Of course, each situation will be fact-specific, and a reviewing court will defer to a judge's credibility determinations regarding whether the reported statement was made and, if so, whether it affected the jury's impartiality. See Quiles, supra. If, however, the judge decides not to conduct any inquiry based on a determination that the initial report lacks credibility, as the Commonwealth contends was the case here, the judge should explain on the record the basis for that credibility determination. See Commonwealth v. Bresnahan, 462 Mass. 761, 772 n.13 (2012) ("if a judge does not find credible the allegations of extraneous influence, he or she may deny the defendant's motions for juror inquiry").

Because, here, the judge indicated that he did not know what the foreperson meant by her report of "discriminating comments" in the jury room, and did not ask, he did not have the necessary information to determine meaningfully whether the foreperson's statement amounted to a credible report of statements by deliberating jurors reflecting racial, ethnic, or other improper bias. It constituted an abuse of the judge's discretion to not conduct a preliminary inquiry to determine what the foreperson meant in order to assess whether the jury remained capable of impartially rendering a verdict.

Having concluded that there was error, we turn to the proper standard of review. "Because the right to be tried by an impartial jury is 'basic to a fair trial,' errors that undermine the right to an impartial jury are structural errors."

Commonwealth v. Grier, 490 Mass. 455, 464 (2022), quoting Commonwealth v. Williams, 481 Mass. 443, 455 (2019). Yet "even structural error is subject to the doctrine of waiver." Mains v. Commonwealth, 433 Mass. 30, 33 n.3 (2000). See Commonwealth v. Jackson, 471 Mass. 262, 268 (2015), cert. denied, 577 U.S. 1145 (2016) ("the right to a public trial, like any structural right, can be waived"). The juvenile argues that, because of the risk of indelible harm presented by the possibility that racial or ethnic bias influenced jury deliberations, the onus should be on the judge to ferret out such claims. The juvenile asserts, as a result, that a judge's failure to investigate preliminarily a claim that raises the possibility of racial or ethnic bias among the jury should be deemed structural error that is not waivable by the defendant's failure to object.

We do not agree. "[S]tructural errors can be procedurally waived just like any other constitutional error, and . . . 'the term "structural error" carries with it no talismanic significance as a doctrinal matter.'" Commonwealth v. Francis, 485 Mass. 86, 108 (2020), cert. denied, 141 S. Ct. 2762 (2021), quoting Weaver v. Massachusetts, 137 S. Ct. 1899, 1910 (2017).

Where a defendant objects to a judge's response to an allegation of juror bias, the judge has the opportunity to investigate the claim or explain his or her reasoning for deciding not to do so. See Weaver, supra at 1912. However, where a defendant fails to object, the judge "is deprived of the chance to cure the violation," id., and a reviewing court is left without a developed record to review the claim on appeal, see Commonwealth v. Robinson, 480 Mass. 146, 151 (2018). "To presume prejudice in this context would ignore the distinction, one long recognized by this court, between properly preserved and waived claims." See Commonwealth v. LaChance, 469 Mass. 854, 857 (2014), cert. denied, 577 U.S. 922 (2015) (violation of public trial right is structural error subject to waiver). Therefore, where the defendant failed to object at trial, we review for a substantial risk of a miscarriage of justice. See Francis, supra at 103.

"An 'error creates a substantial risk of a miscarriage of justice unless we are persuaded that it did not 'materially influence[]' the guilty verdict[s]." Commonwealth v. Horne, 476 Mass. 222, 228 (2017), quoting Commonwealth v. Alphas, 430 Mass. 8, 13 (1999). "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.'" McCalop, 485 Mass.

at 791, quoting Peña-Rodriguez, 580 U.S. at 224. Based on this record, we cannot be certain whether comments reflecting racial, ethnic, or other improper bias were made and, if they were, whether they created a substantial risk of a miscarriage of justice.

3. Conclusion. The juvenile's conviction as a youthful offender and his adjudications of delinquency are vacated and set aside. The case is remanded to the Juvenile Court for proceedings consistent with this opinion.

So ordered.