No. 174

The People &c.,
Respondent,
v.
Calvin L. Harris,
Appellant.

William T. Easton, for appellant.
Gerald A. Keene, for respondent.

PIGOTT, J.:

Michele Harris, mother of four young children and defendant's estranged wife, was last seen on the evening of September 11, 2001. At approximately 7:00 a.m. the following day, the Harris family babysitter, Barbara Thayer, discovered Michele's unoccupied minivan at the bottom of the quarter-mile

driveway of the Harris residence, which is situated on a 200-acre estate in a remote area of Tioga County. Although the Harrises were in the process of divorcing, they continued living in the same residence, albeit sleeping in separate rooms.

After driving Ms. Thayer to the end of the driveway to retrieve Michele's vehicle, defendant, the owner of several car dealerships, left for work. When a friend of Michele's called the Harris household and was told by Ms. Thayer that Michele had not returned home the night before, the friend called Michele's divorce attorney who, in turn, contacted state police. Later that morning, police questioned defendant at his dealership concerning Michele's disappearance. Defendant accompanied police to his home and consented to a search of his residence and Michele's minivan, eventually leaving the officers at the residence and returning to work. Later that day, defendant gave police written consent to search his residence and vehicles.

On September 14, 2001, evidence technicians discovered blood on the tiled floor of a kitchen alcove, on door moldings and surfaces leading to the garage and on the wall of the garage leading into the house. At that point, police obtained a search warrant and, upon returning the following day, discovered blood on the garage floor as well.[1]

The weekend following Michele's disappearance,

[1] Months later, police also examined a kitchen throw rug and discovered what appeared to be blood stains.

defendant and his children visited defendant's brother in Cooperstown. During dinner, defendant's sisters-in-law Francine and Mary Jo Harris confronted defendant about statements he had allegedly made to Michele. According to Francine and Mary Jo, Michele told them in March 2001 that defendant threatened her by stating that he would not need a gun to kill her, that police would never find her body and that he would never be arrested.[2] The police investigation, spanning several years, produced neither a body nor a weapon.

I.

In 2005, defendant was indicted on one count of murder in the second degree. A jury convicted him of that offense in the spring of 2007. The day after the verdict, a local farmhand came forward with information that he had seen Michele and a man in his mid-20s at the end of the Harris driveway at approximately 5:30 a.m. on September 12, 2001. Armed with this new information, defense counsel moved, pursuant to CPL 330.30, to set aside the verdict. The trial court granted the motion, and its order was affirmed on appeal (55 AD3d 958 [3d Dept 2008]).

[2] At the second trial, defendant denied making these statements. Francine and Mary Jo, however, testified that defendant initially denied making the statements, but then said that he may have said something like that but that did not mean that he was going to kill Michele.

II.

Given the high-profile nature of the case, there was significant media coverage in local newspapers and on television, including two national broadcasts, covering Michele's disappearance and defendant's first trial. Defense counsel made two change of venue motions prior to the retrial, citing "prejudicial publicity." Each motion was denied, as was a third motion made by defense counsel during jury selection.

After a lengthy retrial that included extensive blood spatter and DNA evidence and testimony concerning threatening statements defendant purportedly made to Michele, a jury once again convicted defendant of murder in the second degree. The Appellate Division, in a 3-1 decision, affirmed the judgment, holding, among other things, that the verdict was supported by legally sufficient evidence, that the trial court properly denied a for-cause challenge of a prospective juror made by defendant, and that the trial court properly allowed in evidence Michele's hearsay statements to Francine and Mary Jo for the limited purpose of allowing the jury to evaluate defendant's reaction to those accusations (88 AD3d 83 [3d Dept 2011]). The dissenting Justice, in addition to arguing that the verdict was not supported by legally sufficient evidence, asserted that the trial court committed reversible error in denying defendant's for-cause challenge of the prospective juror and in giving an inadequate limiting instruction concerning Michele's hearsay statements to

Francine and Mary Jo. A Justice of the Appellate Division granted defendant leave to appeal. We now reverse the order of the Appellate Division and remit for a new trial.

III.

The Appellate Division properly held that the guilty verdict was supported by legally sufficient evidence. However, a critical error occurred during voir dire when Supreme Court failed to elicit from a prospective juror an unequivocal assurance of her ability to be impartial after she apprised defense counsel that she had a preexisting opinion as to defendant's guilt or innocence.

At voir dire, the prospective juror acknowledged that she had followed the case in the media and that she had "an opinion slightly more in one direction than the other" concerning defendant's guilt or innocence. When asked by defense counsel if her opinion would impact her ability to judge the case based solely on the evidence presented at trial, the prospective juror responded, "[H]ow I feel, opinion-wise, won't be all of what I consider if I'm on the jury," but admitted that it would be "[a] slight part" of what she would consider (emphasis supplied).

Defense counsel challenged the prospective juror for cause on the ground that she could not say that her preexisting opinion would have no effect on her ability to sit as a fair juror. The trial court denied the challenge and defendant

utilized a peremptory challenge on the prospective juror. Defendant exhausted his peremptory challenges, and, therefore, preserved this issue for review (see CPL 270.20 [2]).

CPL 270.20(1)(b) provides that a party may challenge a potential juror for cause if the juror "has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial." We have consistently held that "a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that he or she can be fair and impartial" (People v Chambers, 97 NY2d 417, 419 [2002]; see People v Arnold, 96 NY2d 358, 363 [2001]; People v Johnson, 94 NY2d 600, 614 [2000]). "When potential jurors themselves say they question or doubt they can be fair in the case, trial judges should either elicit some unequivocal assurance of their ability to be impartial when that is appropriate, or excuse the juror when that is appropriate," since, in most cases, "[t]he worst the court will have done . . . is to have replaced one impartial juror with another impartial juror" (People v Johnson, 17 NY3d 752, 753 [2011] citing People v Johnson, 94 NY2d 600, 616 [2000]).

The prospective juror had a preexisting opinion concerning defendant's guilt or innocence that cast serious doubt on her ability to render an impartial verdict. At that point, it was incumbent upon the trial court to conduct its own follow-up

inquiry of the prospective juror once she stated that her preexisting opinion would play only "[a] slight part" in her consideration of the evidence. Given the absence of that inquiring, the trial court committed reversible error in denying defendant's for-cause challenge (see Johnson, 17 NY3d at 753).

Finally, while the trial court properly allowed in evidence Michele's hearsay statements to Francine and Mary Jo for the limited purpose of providing context as to defendant's reaction upon being confronted with them, it erred in failing to grant defendant's request for a limiting instruction to the jury not to consider the statements for their truth. The trial court acknowledged that Michele's statements constituted hearsay, but denied defendant's request for a limiting instruction because it did not "want to unnecessarily confuse the jury." It opted instead to charge the jury that the statements constituted hearsay which would not normally be allowed in evidence because its truthfulness could not be tested under oath, and then stated:

> "You, the jury, may consider that testimony regarding this episode and determine what evidentiary value, if any, you choose to assign to the exchange that occurred between Mary Jo and Francine and Mr. Harris."

The trial court's failure to issue the appropriate limiting instruction was not harmless. In a case where there was no body or weapon, and the evidence against defendant was purely circumstantial, the danger that the jury accepted Michele's

statements for truth was real. Although the court's instruction explained why the statements were admitted in evidence, it failed to apprise the jury that the statements were not to be considered for their truth. This error was compounded when the prosecutor in his summation relied on those statements as direct evidence that defendant had, in fact, murdered Michele and successfully hid her body, as he purportedly threatened Michele that he would do.

We are not unsympathetic to defendant's claim that prejudicial and inflammatory pretrial publicity saturated the community from which the jury was drawn and effectively deprived defendant of a fair trial by an impartial jury. A significantly high percentage of prospective jurors admitted to having heard about the case and nearly half had formed a preexisting opinion as to defendant's guilt or innocence. Notably, "as with so many other cases, the problem encountered with jury selection is inextricably linked to the problem of venue," and although media saturation by its very nature is prejudicial, "it is unrealistic to expect and require jurors to be totally ignorant prior to trial of the facts and issues in certain cases" (People v Culhane, 33 NY2d 90, 110 [1973] [citations omitted]).

Although our decision to reverse the conviction and order a new trial is premised upon the trial court's denial of the for-cause challenge and failure to issue the appropriate

limiting instruction, we are cognizant that publicity attending a third trial may render voir dire significantly burdensome. In such a case, to counter the potential "temptation to relax the rules and accept a doubtful juror so that the case may proceed to trial," we expect the trial court to exercise "special vigilance to insure that the adverse publicity does not infect the adjudicating process" and, in such exercise, strongly consider changing venue if for-cause disqualifications "become legion," rendering voir dire "hopelessly burdensome" (Culhane, 33 NY2d at 110 n 4).

We have considered defendant's remaining contentions and conclude that they are without merit.

Accordingly, the order of the Appellate Division should be reversed and a new trial ordered.

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Order reversed and a new trial ordered. Opinion by Judge Pigott. Chief Judge Lippman and Judges Ciparick, Graffeo, Smith and Jones concur. Judge Read dissents and votes to reverse and dismiss the indictment for the reasons stated in so much of the dissenting opinion of Justice Bernard J. Malone at the Appellate Division as addressed sufficiency of the evidence (88 AD3d 83, at 98-120).

Decided October 18, 2012