

News > Police-Fire (/News/Police-Fire/)

Judge rules tosses sex assault conviction, grants new trial for former Concord therapist Foad Afshar

By CAITLIN ANDREWS
Monitor staff

Tuesday, March 28, 2017

A former Concord psychologist will be released from prison now that a judge threw out the sexual assault conviction against him.

Foad Afshar was expected Tuesday night to be back in the area after Merrimack County Superior Court judge Diane Nicolosi granted him a new trial on charges he assaulted a 12-year-old patient during therapy.

Nicolosi ruled Tuesday that two jurors – including the jury foreman – who disclosed their status as sexual assault survivors during deliberations were biased and eliminated Afshar's right to a fair and impartial trial. The male foreman had a clear bias in favor of victims, while the other juror showed emotional difficulty with her own experience, Nicolosi wrote. In each circumstance, the jurors would have been excused from the jury pool, the judge said.

"In this case, bias went to the heart of the matter in dispute, the credibility of the complainant," Nicolosi wrote. "Such a bias necessarily produced the jurors' verdicts and deprived the defendant of an impartial jury. The court concludes that justice was not done."

Afshar, of Bow, was sentenced Aug. 26 to a three- to six-year prison sentence after a jury determined he touched a young patient's genitals during a session Jan. 6, 2015. He was found guilty on one felony count of aggravated sexual assault and an alternative misdemeanor count of simple assault, as well as two counts of unlawful mental health practice, both misdemeanors.

The judge's decision to grant a new trial means Afshar's conviction and sentence were thrown out and his original personal recognizance bail was reinstated, according to the ruling. ³⁸

Afshar filed a motion for a new trial in Superior Court in January, claiming ineffective counsel and that he had not received a fair trial because two jurors failed to disclose during jury selection they had been victims of sexual abuse.

Afshar's attorney Ted Lothstein argued that the two jurors in question brought up their personal experiences during a critical moment in deliberations when other jurors were questioning his guilt or innocence.

Assistant Merrimack County Attorney Kristin Vartanian argued that the jurors did not disclose their status earlier because they misunderstood the question posed about whether they or a family member had ever been a victim of a crime, because neither juror's experience involved the police, according to separate post-trial interviews the prosecution conducted. In addition, both jurors repeatedly confirmed they felt they could be "neutral and objective," according to court documents.

Nicolosi wrote in her decision that neither juror could be considered impartial, although for different reasons. The male juror was not credible in his view that he was impartial, "perhaps because he has not come to terms with his own experience," as a victim of a crime, according to court documents.

"He seemed to have difficulty with the term even applying to him, as though it would be some kind of unacceptable vulnerability," Nicolosi wrote.

Lothstein argued the jury foreman befriended other jurors and ultimately used his position to sway the Afshar jury toward conviction.

Before the trial, the foreman read a book about a female sexual assault survivor, contacted the author and corresponded with her directly. After the trial, the foreman contacted state Rep. Bill Marsh to say he had an "extreme difficult time" with a bill that would have required a higher burden of proof in sexual assault cases if the defendant had no prior convictions. The bill was later killed in a House committee.

Nicolosi wrote that "the juror's answers, his demeanor, and his actions and communications before, during and after trial ... shows his personal identification with persons who report being victims of sexual assault, which resulted in at the very least a subjective bias that could not be set aside."

Whether the second, female juror was impartial was a much harder call, Nicolosi wrote. While she believes the juror viewed herself as neutral, Nicolosi wrote that the juror's emotional reaction to the questioning at the post-trial hearing would have led to her being excused.

"The court does not hold any view that the two jurors were untruthful in a willful manner, nor does it express any opinion as to the correctness of the verdict," Nicolosi wrote. "The court believes both jurors intended to do their sworn duty. Sometimes, however, intention and capability are not joined." 38

Merrimack County Attorney Scott Murray said the prosecution will thoroughly review the ruling before deciding whether to appeal or go forward with a new trial, something he said would require the consultation of the victim. He said his office is concerned about the impact the ruling will have on future jurors, but did not want to comment further because of the ongoing case.

Amanda Grady Sexton, director of public policy for the New Hampshire Coalition Against Domestic and Sexual Violence, said the ruling deeply concerned her, especially the precedent it could set for jurors.

“Sexual assault survivors serve on juries every day,” she wrote in an email. “Even this court acknowledged that almost half of the jury had been impacted by sexual violence. Sexual assault survivors are not inherently biased. Considering that 1 in 4 women and 1 in 20 men in NH have been sexually assaulted, a jury of one’s peers will likely always include sexual assault survivors.”

Nicolosi acknowledged her ruling was not an easy one and that it will potentially require Afshar’s young client to testify again in excruciating detail.

“The integrity of our legal system, for a defendant, a victim and our community requires confidence in the verdict, delivered by fair and neutral people, who could objectively base a decision on the evidence, free of bias that cannot be set aside,” she wrote.

Lothstein said the court has ordered a status conference that must be held within the next 30 days to discuss when the new trial will occur. Afshar has also filed an appeal to the state Supreme Court asking for his conviction to be overturned, but that will now not be pursued given Nicolosi’s decision.

(Caitlin Andrews can be reached at 369-3309, candrews@cmonitor.com or on Twitter at @ActualCAndrews.)

