

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

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NOTICE OF DECISION

File Copy

Case Name: **State v. FOAD AFSHAR**
Case Number: **217-2015-CR-00588**

Enclosed please find a copy of the court's order of March 28, 2017 relative to:

Court Order - Motin for New Trial - GRANTED

March 28, 2017

Tracy A. Uhrin
Clerk of Court

(486)

C: Joseph A. Cherniske, ESQ; NH Department of Corrections; Theodore M. Lothstein, ESQ; New Hampshire State Prison

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

State of New Hampshire

v.

Foad Afshar

Docket No. 217-2015-CR-588

ORDER

On June 17, 2016, Defendant was convicted of one count of Aggravated Felonious Sexual Assault, two counts of Unlawful Mental Health Practice, and one count of Simple Assault. On August 26, 2016, Defendant was sentenced to three to six years, stand committed, at the New Hampshire State Prison for the Aggravated Felonious Sexual Assault.

On January 3, 2017, Defendant filed a motion for a new trial, claiming that he was denied effective assistance of counsel and his right to a fair and impartial jury. On January 30, 2017, the State filed an Assented-to Motion to Bifurcate Issues, which was granted; therefore, this Order will address only the issue of juror misconduct.

The juror issue arose as a result of defendant's post-trial lawyer discovering that two jurors, Numbers 6 and 14, had not disclosed on their juror questionnaires or during jury selection that they had been child victims of sexual assault, which they shared with the other jurors during deliberations. Juror 14 was interviewed by a defense investigator, Rebecca Dixon, and later by a County Attorney investigator, Jennifer Adams, the latter being audio-recorded. The only correction at hearing as to Dixon's

interview was that Dixon reported that the juror had destroyed notes she kept during the trial, but the juror indicated the notes still existed. Neither party requested the notes be viewed or produced. The pleadings reflected one other change to the Dixon report, which is that the juror did not mention God putting her in the position to serve, because she is in fact an atheist, but she did feel she was well-suited to serve in the case because of her natural objectivity. Juror 6 refused an interview with the defense investigator, and then sought advice from the prosecutor as to whether he was required to speak with her. He declined the interview initially with Dixon, because she showed up at his home unannounced and at an inconvenient time. After speaking with the prosecutor, he refused her follow up request for an appointment. This decision to cooperate with the State, but not the defense, was consistent with his somewhat defensive posture when questioned about his possible bias towards victims.

A hearing was held on February 22, 2017, at which both jurors testified. The defense clarified in a letter, dated March 15, 2017, in lieu of filing a memorandum on an issue raised by the Court, that the defendant does not complain that the jury may have considered facts not in evidence, the sexual assaults, but contends only that the sharing of the assaults during deliberations provides further evidence that the two jurors should have and would have been excused had their experiences been disclosed to the Court. See Letter from T. Lothstein to the Superior Court Clerk, dated March 15, 2017. Therefore, this Court will limit its consideration to the issue raised.

Both jurors filled out juror questionnaires before selection. In response to the question, "Have you or has any member of your family been the victim of a crime?", both jurors indicated, "No." The Court began jury selection by reading the charges to

the panel, so the prospective jurors would be fully aware of the allegations. The Court reminded the jurors, who had participated in jury selection in weeks prior, that if a juror's name were selected and the juror answered "yes" to any of the questions read to the jury pool, s/he should approach the bench to discuss the answer. The Court informed the jurors that the microphones would be turned off so the pool could not hear the discussions at the bench, and, if there was a sensitive subject matter that a juror did not wish to discuss in the presence of the lawyers and defendant, a request to speak privately with the judge would be accommodated. The jurors were also advised that counsel conducted *voir dire* would occur after an appropriate number of jurors were qualified to sit, and the jurors would be expected to answer questions posed by the lawyers in open court.

The following question was asked to the entire pool, and then clarified:

Have you or a close member of your family or a close friend ever been a victim of a crime?

And when I ask that question, I don't mean whether somebody has been prosecuted or identified or charged, I just mean have you ever been victimized.

Neither Juror 6 nor Juror 14 approached the bench when his or her name was called. Both specifically answered that they had no "yes" answers to any of the questions when individually asked by the Court, and both said they could be fair and impartial.

The defense claims that the undersigned judge excused every juror that identified himself or herself as a victim of sexual assault, which is not correct. In fact, the second juror called indicated among other things that she had been a victim of child molestation. The undersigned judge posed a follow up question as

as to whether the experience would interfere with her ability to be fair, and the juror was excused when she answered affirmatively. What the record does not reflect is the demeanor of the jurors when they approached the bench. Most times it is obvious that a juror is not capable of serving just by their affect, and there is no need to retraumatize a victim by follow-up questions. The fitness of the jurors was decided on a case-by-case basis. Nonetheless, this Court's experience of almost ten years on the trial bench and many more as a litigator is that people who have suffered sexual assault victimization are generally greatly impacted by the trauma, such that the subject matter alone is obviously anxiety producing. Absent an objection, to be cautious for the defense and State, and to be sensitive to jurors, it is true the Court errs on the side of excusing jurors.

At hearing, Juror 6, the elected foreperson of the jury, noted that he had become friendly with several members of the jury over the course of the almost three-week trial and jury deliberation. He confirmed he had been sexually assaulted by a babysitter when he was approximately five or six years old. The incident stopped only because the babysitter's mother returned home while it was in process. After, the juror did not immediately complain of the assault, but later told his mother that he did not want to go back to that babysitter and she acceded to his request, so the abuse ended. He never explained to his mother or anyone else why he would not go back, and, therefore, no follow up occurred.

Juror 6 explained that he had not remembered the sexual assault until he was fifty-five years old when the perpetrator came into his service station one morning to book an appointment. He is now 64 years old, so it has been almost ten years since he

recovered his “buried” memory. After encountering the perpetrator, he was disabled to the point of not being able to breathe or function for several days. He claimed that his distress was the result of being upset that he had buried the memory, not because of the assault itself, which the Court did not find convincing.

During deliberations, one young male juror was expressing his concern about being able to make the decision whether or not the defendant was capable of committing the charged offense. Juror 14 expressed her view that there was no profile of an offender, and shared that she herself was a victim of sexual assault. Juror 6 then in support revealed that he too had been the victim of a sexual assault.

To justify why he did not come forward and report the assault, Juror 6 explained that he did not see himself as a victim when the questions were asked. He seemed to have difficulty with the term even applying to him, as though it would be some kind of unacceptable vulnerability. He described himself “an advocate for people.” As an example, he noted that he had read a book about a female sexual assault survivor before the Defendant’s trial, reached out to the author, and started communicating with her through email and directly. After trial, he involved himself in discussions related to pending sexual assault legislation that would have required corroboration of an alleged victim’s testimony for conviction and changed the use of the term “victim” in court to “alleged victim” or “complainant.” He contacted the sponsor of the proposed legislation to express his strong disagreement with the legislative changes. He also indicated that he would not be able to sit on a sexual assault trial if the alleged victim had been a girl, because of how he feels about his daughter, a circumstance he had to contemplate during a jury selection involving an alleged aggravated felonious sexual assault of a girl.

Juror 6, however, has a son as well, who is three years older than his daughter, so it is not clear why this would not likewise effect his ability to be neutral.

During the hearing, it came to light that Juror 6 had been the victim of numerous other crimes while he owned and operated service stations, which he also did not disclose. In fact, one employee stole a company vehicle, burned a hole in a safe, escaped, and then ultimately was convicted and sentenced to a year in jail. He reported that he was not a victim of that crime either, because it was “the cost of doing business,” despite the fact that the perpetrator has been convicted of the crime and jailed. When addressing the reason he did not report his sexual assault, however, he told Investigator Adams that he did not disclose his victimization in part because no one was convicted or found guilty beyond a reasonable doubt. When pressed about not disclosing the thefts, he then suggested that it was not he who was the victim, but rather the victim was the company of which he was the owner and president. He indicated that if the judge had asked whether he had been a victim of sexual assault, he would have revealed the childhood incident. He also failed to disclose that he had many friends in law enforcement.

The details provided about the outcome of the theft conflicts his explanation of why he did not come forward to report his victimization as a child. When someone was arrested and convicted of theft, his measure of a crime, he still did not reveal the thefts. He reiterated that he did not consider himself to be a victim of a crime, that being a victim was “not [his] lifestyle.” When the Court confronted him with the clarification provided, that it did not matter whether the offending party had been prosecuted, charged or even identified, Juror 6 represented that either he did not hear

think it pertained to him. Despite all of these feelings and actions regarding victims of sexual assault, Juror 6 maintained that he believed he had been fair and impartial during Defendant's trial.

In short, the Court does not find Juror 6 to be credible about his ability to have been fair and impartial, perhaps because he has not come to terms with his own experience, an assault he repressed for some 50 years. The Court finds the juror's answers, his demeanor, and his actions and communications before, during and after trial, including seeing himself as an advocate for victims, show 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. This was demonstrated by his refusal to speak with the defense investigator, his aversion to accepting that he is a victim, and by his offense at the use of the term, "alleged," when referring to a complaining witness, which simply reflects the presumption of an accused's innocence unless and until a jury evaluates a witness' testimony and finds guilt. The automatic use of the term "victim" presumes that a person who reports s/he was sexually assaulted is credible. The juror's demeanor at times was defensive and his explanation for not reporting his connection with law enforcement and the criminal conduct he experienced were not internally consistent or completely logical.

The Court also notes that the assault Juror 6 describes is quite similar to that described by the youth in the case at bar. Although Juror 6 was much younger, the assault was by a caretaker in a position of authority; a teenager to a 5-6 year old is likely as powerful as an adult to a twelve-year old. Both children did not report

immediately, but refused to return to the situation. The fact that Juror 6's memory was so deeply repressed suggests that it was more traumatic than maybe he recognizes.

Juror 14 testified at the hearing about why she did not report her childhood assault. The decision on Juror 14's impartiality is a much closer call. When Juror 14 was in middle school, she was assaulted by another girl younger than she, whose teenage brother was watching and involved. When the jury questions were propounded, she also said she did not consider the incident to be a crime or herself to be a victim, because there was no court case and no lawyers were involved. She also told the investigator she did not disclose it because it was "private," and she never shared it with anyone. She did noted that her parents called the police regarding the incident, so a formal report was made. She also was interviewed, but she became aware of this only after asking her father. At the hearing, she agreed that she now believes the incident was legally a crime, but did not think of it that way when asked by the Court during selection and would not answer the question differently even in light of the investigation.

Juror 14 acknowledged that when she heard the charges involved in the trial, she thought immediately of her own experience. She knew that the charges were "a big deal" and "wanted to be a part of it." She was excited to be a juror and thought of herself as thinking in "gray areas," having strong morals, and being able to see problems "from a million angles." She was equally concerned with the arriving at the correct outcome for the youth, if he had been victimized, as the defendant, if he did not perpetrate the offense.

During jury deliberations, she offered that she had been a victim, as did Juror 6, without providing details. She could not recall the context of the discussion. She said "three or four" other people mentioned similar things had happened to them or relatives, including Juror 6, one juror whose niece had been molested, and one who changed her dentist, because she was uncomfortable with his practice of placing instruments on her chest. Juror 14 did not believe her disclosure impacted the discussions, and thought she was just adding to the conversation because she related, as others did, due to her life experience. However, the Court notes that according to Juror 6 it came up in response to another juror's doubt about the defendant's guilt, and whatever the belief, the information aligned the disclosing jurors with the youth in the Afshar case.¹

Juror 14 was extremely emotional during the questioning at the bench. She did not want to talk about the details of her assault, and shared very little. Because she needed time to compose herself, the Court took a fairly long break and chose to continue the discussion at the bench rather than have her sit in the witness box. She remained upset, but was able to answer questions. Although the Court absolutely believed Juror 14 was honest and perceives herself as neutral, the Court is concerned that the emotional response suggests otherwise. Had she been interviewed prior to

¹ The Court has some concern as well that the disclosure may have prompted jurors to go along with the views of Jurors 6 and 14 subconsciously to support them. During the trial our country also suffered a tragedy at a Florida night club that raised an issue about possible prejudice about the ethnicity of the terrorist and defendant, which caused another lengthy delay. This trial was long, with lots of interruptions that left the jurors together. Jurors bond during emotionally difficult trials, which this one was. "Due process does not require a new trial every time a juror has been placed in a potentially compromising situation." State v. Rideout, 143 N.H. 363, 365–66 (1999) (citing Smith v. Phillips, 455 U.S. 209, 217 (1982)). "When a juror is exposed to extraneous information sufficiently related to the issues presented at trial, a presumption of prejudice is established, and the burden of proof shifts to the State to prove that the prejudice was harmless beyond a reasonable doubt." State v. Lamy, 158 N.H. 511, 522–23 (2009). However, the defense has chosen not to raise this issue. Therefore, it was not factually or legally explored, and the Court makes no ruling on it.

selection and presented as she did at the post-trial hearing, the Court would have excused her for cause.

Part I, Article 35 of the New Hampshire Constitution states, “It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.” The same impartiality is required of jurors. State v. Town, 163 N.H. 790, 793 (2012). “Generally, a juror is presumed to be impartial.” Id. at 794. “A juror is considered impartial if the juror can lay aside her impression or opinion and render a verdict based on the evidence presented in court.” Id. “When a juror’s impartiality is questioned, however, the trial court has a duty to determine whether the juror is indifferent.” Id. “If it appears that any juror is not indifferent, he shall be set aside on that trial.” RSA 500-A:12, II; Town, 163 N.H. at 794. “Indifference or impartiality is not a technical conception. It is a state of mind.” State v. Weir, 138 N.H. 671, 673 (1994). The New Hampshire Constitution “provides at least as much protection as the Federal Constitution on this issue” so the Court will only consider this issue under the New Hampshire Constitution, using federal cases only for guidance. State v. Tabaldi, 165 N.H. 306, 313 (2013) (citing Weir, 138 N.H. at 673).

For the reasons discussed above, the Court concludes that Jurors 6 and 14 were not “impartial as the lot of humanity will admit.” The Court recognizes that a person who has been offended in a similar way as a complainant can be fair and neutral, See Town, 163 N.H. at 794, but this is not the case with the jurors at issue, most particularly Juror 6. Had these conversations occurred before selection, the Court would have excused both jurors as being unsuitable to serve in the Afshar case, Juror 6 because of a clear

bias favoring a complainant and Juror 14 because of her emotionality and difficulty with her own victimization.

The Court wants to be clear that a post-trial decision such as this is not an easy one. The Court is cognizant that the trial was very difficult for the youth and his family. The complainant was aggressively cross-examined for days, and was forced to testify to his story many times in excruciating detail and in response to questions that were repetitive, sometimes confusing, and followed by constant often insulting commentary. 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. The Court believes both jurors intended to do their sworn duty. Sometimes, however, intention and capability are not joined, which the Court finds true in the case. 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.

The juror misconduct in this case is not similar to the misconduct addressed in State v. Gordon, 141 N.H. 703, 707 (1997), where a juror looked up the criminal statute at issue in a library, or State v. McLain, 2016 N.H. Lexis 47, where a juror failed to disclose a connection to law enforcement, but the law enforcement testimony was limited and on an undisputed issue. In both cases, the jurors were not recalled, because the trial judge concluded the misconduct could not have effected the verdict. Gordon, 141 N.H. at 506; McLain, 2016 N.H. Lexis 47 *2. In this case, the bias went to the heart of the matter in dispute, the credibility of the complainant. Such a bias necessarily produced the jurors' verdicts and deprived the defendant of an impartial jury

Court concludes that justice was not done, and the equities require a new trial. See RSA 526:1.

Defendant's Motion for a New Trial is GRANTED. All of Defendant's convictions resulting from the jury's verdicts are vacated. The post-trial bail order is vacated, and the pretrial bail order is reinstated. The audio-tape of the County Attorney investigator is sealed, as are the jury questionnaires, which are made part of the record. A status conference will be scheduled after thirty (30) days.

SO ORDERED.

Date: 3/28/2017



Diane M. Nicolosi
Presiding Justice