SJC-10590

COMMONWEALTH vs. ROBERT O. JACOBS.

Plymouth. April 9, 2021. - October 19, 2021.

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

Homicide. Firearms. Constitutional Law, Assistance of counsel. Evidence, Alibi, Expert opinion. Witness, Expert. Jury and Jurors. Practice, Criminal, Assistance of counsel, Jury and jurors, Conduct of juror, Capital case.

Indictments found and returned in the Superior Court Department on March 17, 2006.

The cases were tried before Barbara A. Dortch-Okara, J., and a motion for a new trial, filed on June 21, 2016, was heard by Robert C. Cosgrove, J.

Janet Hetherwick Pumphrey for the defendant.
Carolyn A. Burbine, Assistant District Attorney, for the Commonwealth.

GEORGES, J. In February of 2006, fifteen year old Jerard Rogers was shot to death after a party in Brockton. The defendant, then eighteen year old Robert O. Jacobs, was indicted on charges of murder in the first degree and unlawful possession

of a firearm in connection with the victim's death. At trial in September of 2008, the Commonwealth proceeded on theories of deliberate premeditation and extreme atrocity or cruelty. The defendant was convicted by a Superior Court jury of both charges and based on both theories of murder. After the defendant's motion to reduce the verdict of murder in the first degree was denied, he entered his appeal in this court. His motion for a stay of appeal was allowed so that he could pursue a motion for a new trial in the Superior Court. In this subsequent motion, the defendant argued that trial counsel provided ineffective assistance because counsel did not call three alibi witnesses and did not introduce testimony by a crime scene reconstruction expert. A Superior Court judge, who was not the trial judge, conducted an evidentiary hearing and denied the motion.

We consolidated the defendant's appeal from the denial of his motion for a new trial with his direct appeal, in which he argues that a new trial is required because the trial judge should have declared a mistrial due to juror misconduct. We discern no error in the trial judge's decision to deny the motion for a mistrial, nor any reason to grant relief under G. L. c. 278, § 33E. Accordingly, we affirm the defendant's convictions and the order denying his motion for a new trial.

Background. We summarize the evidence in the light most favorable to the Commonwealth, reserving certain details for

later discussion. See Commonwealth v. Chalue, 486 Mass. 847, 849 (2021).

On the evening of February 18, 2006, the defendant and the victim attended a party hosted by a high school classmate of the victim. The defendant was driven to the party by his close friend, Reaksmy Ke. Ke's sister, Soryear Ke, and Soryear's coworker, Carmen Velazquez, who was the victim's girlfriend, were passengers in the vehicle.[1] During the drive, Velazquez saw the defendant pull "a little silver gun" from his waistband and play with it for a few seconds. The victim arrived at the party separately, later that evening.

A degree of animosity had existed between the victim and the defendant prior to the party. The origin of the dispute appeared to be an incident in which the defendant had spat on the victim from an upper floor of a District Court court house, leading to a brief verbal altercation. The animosity continued during the party. At one point, the defendant and a friend of the victim engaged in a confrontation in which the defendant warned, "You and your friends are going to get it after the party, get away from me," while lifting his shirt to display a firearm. The party ended around midnight, and the remaining partygoers congregated in front of the house, where a fight

[1] Because Reaksmy Ke and Soryear Ke share a surname, we refer to each by their first names.

ensued.[2] Gunshots rang out, either immediately before the fight ended or shortly thereafter, and the partygoers fled in multiple directions. Three of the partygoers -- Shaquan Berry, Aaron Tobey, and Brian Jean-Pierre -- testified to having seen the defendant wearing a "gray hoodie" and shooting into the air during the first round of shots.[3] Tobey also testified that the defendant was standing "in the middle of" a nearby hill at that point.

In the aftermath of the gunshots, Velazquez encountered the victim and Soryear together at the top of the hill. Soryear spoke with them briefly before she began walking toward the bottom of the hill, leaving Velazquez and the victim together behind her. At that point, another round of gunshots was fired, four of which struck the victim. The victim knocked Velazquez to the ground before ultimately succumbing to his injuries at the scene. Five shell casings were found near the scene, with another two located together about one hundred yards away from

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[2] All of the witnesses who testified to having observed the fight said that neither the victim nor the defendant was involved.

[3] Shaquan Berry, Aaron Tobey, and Brian Jean-Pierre identified the defendant as the person who fired the first round of shots, and their out-of-court identifications were introduced substantively. Given Tobey's inability or unwillingness to testify about his prior identification of the defendant, Tobey's identification testimony before the grand jury was introduced substantively, over objection.

the victim, in a parking area. Soryear told police that, during the second round of shots and as she turned and began walking down the hill, she saw the defendant standing on the hill, shooting the victim from "within five or six feet" away.[4] Soryear said that the defendant's sweatshirt hood was "off," such that she had a "full view" of his face. She later identified the defendant as the shooter in a photographic array.

Discussion. On appeal, the defendant principally focuses on the asserted errors by the motion judge in the denial of the motion for a new trial; we address those arguments first and then turn to the defendant's claim of juror misconduct that he asserted in his direct appeal.

1. Motion for a new trial. a. Standard of review. "'[A] motion for a new trial is addressed to the sound discretion of the trial judge,' who may grant a new trial 'if it appears that justice may not have been done'" (citations omitted).

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[4] Before the grand jury, Soryear identified the defendant as having shot the victim. At trial, however, she denied having seen the shooter or having identified the defendant as such. Soryear's prior identification was admitted substantively through the testimony of one of the police officers who interviewed her following the shooting. See Mass. G. Evid. § 801(d)(1)(C) (2021) (declarant's prior statement not hearsay if "[t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . identifies a person as someone the declarant perceived earlier"). See also Commonwealth v. Cong Duc Le, 444 Mass. 431, 439-440 (2005) (permitting substantive use of pretrial identification evidence where witness denies having made identification).

Commonwealth v. Kolenovic, 471 Mass. 664, 672 (2015), S.C., 478 Mass. 189 (2017). We review a decision on a motion for a new trial for an abuse of discretion, meaning we consider whether the motion judge's decision resulted from "a clear error of judgment in weighing the factors relevant to the decision such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). Where a judge conducts an evidentiary hearing, we "accept the [judge's] findings where they are supported by substantial evidence in the record." Commonwealth v. Velez, 487 Mass. 533, 540 (2021). "When, as here, the motion judge did not preside at trial, we defer to that judge's assessment of the credibility of witnesses at the hearing on the new trial motion, but we regard ourselves in as good a position as the motion judge to assess the trial record." Commonwealth v. Perkins, 450 Mass. 834, 845 (2008), quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986).

The defendant maintains that his trial counsel was constitutionally ineffective in several respects, which we discuss infra. In reviewing a claim of ineffective assistance of counsel in a case of murder in the first degree, we apply the substantial likelihood of a miscarriage of justice standard, Velez, 487 Mass. at 539, and "consider whether there was an error in the course of the trial (by defense counsel, the

prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion," Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014). Where the asserted error is based on a tactical or strategic decision by trial counsel, we consider whether counsel's decision was manifestly unreasonable when made.[5] Velez, supra at 540. See Commonwealth v. White, 409 Mass. 266, 272 (1991) ("In cases where tactical or strategic decisions of the defendant's counsel are at issue, we conduct our review with some deference to avoid characterizing as unreasonable a defense that was merely unsuccessful").

The manifestly unreasonable test is made up of two considerations. Velez, 487 Mass. at 540. First, "we evaluate the [strategic or tactical] decision at the time it was made, and make every effort . . . to eliminate the distorting effects of hindsight." Id., quoting Commonwealth v. Holland, 476 Mass. 801, 812 (2017). Second, substantively, "[o]nly strategy and tactics which lawyers of ordinary training and skill in criminal law would not consider competent" are manifestly unreasonable. Velez, supra, quoting Holland, supra.

[5] Such deference is required "because, ultimately, counsel alone has the benefit of the full factual picture that dictates the choice of those matters to be revealed to the fact finder and those that are better left unexposed to court room scrutiny." Kolenovic, 471 Mass. at 673.

b. Failure to call witnesses. The defendant argues that his trial counsel was constitutionally ineffective for failing to call putative alibi witnesses Reaksmy, Vanessa Franklin, and Christina Jacobs,[6] who would have testified that they were with the defendant (either at the time of the gunshots or immediately thereafter) and had not seen him shoot a gun or with a gun in his possession. The defendant also argues that counsel provided ineffective assistance by failing to call a crime scene reconstruction expert to opine that, given the eyewitness testimony and the physical evidence, the shooting took place in an area where no witness testified to having seen the defendant.

i. Alibi witnesses. Reaksmy, Franklin, and Christina testified at the hearing on the motion for a new trial. Reaksmy said that when the first round of shots was fired, the defendant was standing next to him and was not holding anything in his hand. Reaksmy also said that, during that first round of shots, he saw flashes of light approximately fifteen to twenty feet away from where he was standing. He and the defendant then ran toward the street, but he did not see the specific direction in which the defendant went. Reaksmy was not with the defendant when the second round of shots was fired.

[6] Because the defendant and Christina Jacobs share a last name, we refer to the latter hereafter by her first name.

Franklin, the defendant's "god sister,"[7] testified that she also attended the house party that night and that she was standing next to the defendant when the first round of shots was fired. She and the defendant then left the area and began walking up the hill toward a convenience store on an adjacent street. While they were walking, Franklin heard a second round of shots. The defendant's sister, Christina, picked them up about "two minutes" after they reached the store. Similarly, Christina testified that during the early morning hours of February 19, 2006, she received a telephone call from Franklin, picked up Franklin and the defendant from the corner store, and drove them home.

All three alibi witnesses said that they had been asked by defense counsel to attend the defendant's trial and to sit outside the court room, which they did for the duration of the trial, on the assumption that they would be called to testify, although ultimately none of them was called. Rather, at trial, defense counsel said that he did not intend to call either Christina or Franklin "because after hearing everything [he had] heard here, [he did not] think that they would bring anything to the jury that would be helpful to anybody." Counsel expressed slight hesitancy but ultimately determined he would not call

[7] Franklin identified the defendant as her "god brother," explaining that Franklin's mother is the defendant's godparent.

Reaksmy because counsel did not "know what else he could bring to the table" and was "reluctant to expose [Reaksmy] to . . . vicious cross-examination."[8]

The decision "[w]hether to call a witness is a strategic decision." Commonwealth v. Morales, 453 Mass. 40, 45 (2009). Counsel is not ineffective for failing to call an alibi witness whose credibility is in question and who may harm the defense's case. See Commonwealth v. McMaster, 21 Mass. App. Ct. 722, 735-736 (1986). We have previously acknowledged that defense counsel's decision not to introduce cumulative testimony does not rise to the level of ineffective assistance of counsel. See Commonwealth v. Watt, 484 Mass. 742, 764 (2020), citing Commonwealth v. Vaughn, 471 Mass. 398, 414 (2015).

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[8] Trial counsel explained his hesitations to the trial judge in calling Reaksmy as a witness: "I have discussed this matter with the defendant, and in view of the testimony of other witnesses to the effect that Mr. Ke was observed, along with others, including the defendant, near his car at the time of the first shots. I don't know what else [Reaksmy] could bring to the table. He was going to be called because he would testify that he was with the defendant at the time the first shots were fired, and that the defendant did not fire those shots." Trial counsel explained: "I wouldn't hesitate, except there's always a down side to that, . . . you know, and I don't know what that down side is." After discussing the issue with the defendant, counsel informed the judge that Reaksmy would not be called, as "the defendant has agreed that I should make the call, and I'm making the call. I will not call the witness [Reaksmy] to testify." The trial judge then conducted a colloquy with the defendant to ensure that the defendant had spoken with counsel and understood the risks of choosing not to call a witness in his defense, and the defendant asserted that he did not wish to call Reaksmy.

"The burden to prove ineffective assistance remains on the defendant even if memories have faded and rendered his task more difficult," Commonwealth v. Hudson, 446 Mass. 709, 715 (2006), which was certainly the case here. Although defense counsel offered some contemporaneous explanation during the trial for his decision not to call the alibi witnesses, intervening adverse health issues precluded him from fully testifying to his specific decision-making process at the evidentiary hearing a decade after the trial.[9] Nevertheless, given the available information regarding counsel's motives for declining to call these potential alibi witnesses -- such as defense counsel's testimony at the evidentiary hearing and his submitted affidavits -- we conclude that the decision was not manifestly unreasonable. Counsel reasonably could have concluded that calling these witnesses, about whose other testimony counsel was uncertain, had the potential to harm the defendant's case more than doing so would have helped it.[10] See Commonwealth v.

[9] Four or five years before the evidentiary hearing, defense counsel suffered a stroke that significantly diminished his memory. Defense counsel recalled representing the defendant, but could not identify him on sight at the evidentiary hearing.

[10] The defendant argues that trial counsel's ineffectiveness is further evidenced by his interviews with the alibi witnesses before trial, in which he informed at least two of them of the importance of their testimony. This argument is unavailing. After considering the case put forth by the Commonwealth, counsel reasonably might have changed his mind about the value

Little, 376 Mass. 233, 242 (1978) ("Counsel could sensibly conclude that putting [all available alibi witnesses] on the stand would do more harm than good").

At trial, counsel made clear that, in light of the testimony put forth by the Commonwealth, he did not believe that either Franklin or Christina would provide any new, credible, and material information to the jury. He also explained that, although Reaksmy might have been able to testify that he had been standing next to the defendant when the first round of shots were fired, the jury already had heard evidence to that effect, and thus he was reluctant to expose Reaksmy to potentially vigorous cross-examination merely to introduce cumulative evidence.

Moreover, trial counsel made these strategic decisions after the close of the Commonwealth's case, which was replete

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of the alibi testimony. It is the choice of the defendant, and, indeed, the responsibility of defense counsel, to modify or even abandon an initial defense plan and to adapt to create a more effective strategy for the defense. See Ouber v. Guarino, 293 F.3d 19, 28 (1st Cir. 2002) ("[O]n the eve of trial, a thoughtful lawyer may remain unsure as to whether to call the defendant as a witness. If such uncertainty exists, however, it is an abecedarian principle that the lawyer must exercise some degree of circumspection"). See, e.g., Felts v. State, 354 S.W.3d 266, 284-285 (Tenn. 2011), and cases cited ("[D]evelopments in the course of a trial will often prompt, indeed necessitate, legitimate changes in strategy"). We decline to hold that defense counsel's decision to change strategies after hearing the Commonwealth's case-in-chief necessarily demonstrates or, by itself, is evidence of counsel's ineffectiveness.

with conflicting testimony. Although there were some points of general agreement among the Commonwealth's witnesses with respect to the shooting itself, such as their description of the shooter's clothing and hair, the number of shots fired, and the time of the shooting, the testimony regarding the location and the identity of the shooter differed.[11] In such circumstances, it was not manifestly unreasonable for trial counsel to conclude that the risk of putting the alibi witnesses on the stand, and subjecting them to cross-examination, potentially could cause more harm than good to the defense's case. See Commonwealth v. Fuller, 394 Mass. 251, 261 (1985), S.C., 419 Mass. 1002 (1994) (failure to call witness not manifestly unreasonable where counsel interviewed potential defense witness but good cause existed to be wary and counsel reasonably could have concluded that calling witness would do more harm than good). Here, trial counsel reasonably could have concluded that the better course of action was to emphasize the conflicting testimony among the Commonwealth's key witnesses and to argue the presence of reasonable doubt as a result.

[11] For example, Soryear testified that the shooter was standing toward the top of the hill, but later contradicted herself. Tobey testified that he viewed the shooter, whom he identified as the defendant, running away from the scene, but later stated that he was unable to identify the shooter.

This is true especially considering the defendant's relationships with Reaksmy, Franklin, and Christina: Reaksmy, the defendant's very close friend; Franklin, his close "god sister" for most of his life; and Christina, the defendant's biological sister. Counsel could have concluded that the jury would view these relationships as supplying strong motivations for the witnesses to fabricate an alibi for the defendant and that, if so, the testimony would in fact increase the jury's focus on the strengths of the Commonwealth's case. See Hudson, 446 Mass. at 725-726 (inherent weakness of alibi testimony of family member exacerbated by witness's failure to disclose immediately defendant's alibi); Commonwealth v. Thomas, 429 Mass. 146, 153 (1999) ("Common sense and the case law dictate that the testimony of a blood relative of the defendant is inherently less credible than the testimony of other witnesses").

The reasonableness of defense counsel's strategic decision not to call these witnesses is further buttressed by the motion judge's finding that Reaksmy and Franklin contradicted each other regarding important details concerning the evening's events when testifying at the hearing on the motion for a new trial. Specifically, Reaksmy testified that he drove to the party with the defendant and that he did not recall Franklin's presence at the party. Reaksmy further testified that he was

with the defendant when the first round of shots was fired. Franklin testified, however, not only that she was at the party, but also that the defendant was standing "right next to" her during the first round of gunshots. During cross-examination, Franklin then contradicted herself and denied having been with the defendant when she heard the first round of gunshots. Given these key contradictions, trial counsel's misgivings about Franklin's and Reaksmy's capabilities as witnesses reasonably could have led him to conclude that their testimony could indicate to the jury that they either had difficulty remembering the details of the evening or were fabricating their testimony, and that it was better for the defendant's case not to call them as witnesses.

This is not a case where counsel failed to investigate, identify, or interview potentially key defense witnesses. Contrast Commonwealth v. Hampton, 88 Mass. App. Ct. 162, 166-167 (2015) (counsel ineffective for failure to investigate witness testimony). See generally Commonwealth v. Denis, 442 Mass. 617, 629-630 (2004). To the contrary, the record reflects that trial counsel was aware of these witnesses, had interviewed them (in some cases several times), knew the substance of what they had

to say,[12] and subsequently made a deliberate and strategic decision not to call them. These actions were not manifestly unreasonable.

ii. Expert witness. The defendant contends that trial counsel was ineffective because he did not retain an expert witness to testify regarding the likely location of the shooter. The absence of expert testimony constitutes ineffective assistance where such testimony could provide a substantial ground of defense or is necessary to rebut critical expert testimony relied upon by the Commonwealth. See Commonwealth v. Millien, 474 Mass. 417, 429-434 (2016).

At the hearing on his motion for a new trial, the defendant called Peter Massey, a crime scene reconstruction expert, to testify. Massey testified that, despite several of the Commonwealth's witnesses testifying to having seen the gunman standing at the approximate midpoint of the hill, if an individual were walking uphill while firing a gun at a fixed object, one would expect to "find a trail of [shell] casings at

[12] At the evidentiary hearing on the defendant's motion for a new trial, a number of trial counsel's documents were admitted by stipulation of the parties, including the "trial file" (consisting of copies of the indictments, reports, grand jury transcripts, and trial motions) and several memoranda to file. Following trial counsel's testimony at the hearing, "well over one hundred pages" of other electronically stored documents relating to the defendant's trial, such as portions of trial counsel's notes, were discovered and subsequently admitted as evidence by stipulation.

distances determined by the firing of the firearm," rather than the close grouping of shell casings that was found at the top of the hill. The location where the casings were recovered was significant to Massey because, in his opinion, the path of the bullets through the victim's body was inconsistent with the shooter having fired from partway up the hill. Massey explained that, based on the locations of the casings, the shooting had to have taken place "in very close proximity to where the victim's body was found," and that "the muzzle of the firearm . . . and the victim were all on the same plane." The defendant argues that, had Massey's testimony been presented to the jury, it would have influenced the jury toward acquittal, as it would have demonstrated that the defendant could not have been the shooter. We disagree.

The defendant's argument misconstrues Massey's testimony at the evidentiary hearing. Essentially, Massey opined that the victim, the shooter, and the muzzle of the gun all had been "on the same plane," and that the shooter was in very close proximity to the victim when he fired the fatal shots. We agree with the motion judge that Massey's testimony that the victim, the shooter, and the muzzle of the gun were all "on the same plane" and in very close proximity did "nothing to contradict" Soryear's testimony that she saw the defendant shoot the victim

from about five to six feet away.[13] Accordingly, we conclude that trial counsel's decision not to retain an expert on crime scene reconstruction was not manifestly unreasonable.

2. Claim of juror misconduct on direct appeal. The defendant also argues in his direct appeal that he is entitled to a new trial or a reduction of the verdict of murder due to juror misconduct.

After the jury began deliberations, a court officer noticed one of the jurors copying something from his cell phone onto a piece of paper. When the officer confronted the juror, the juror revealed that he was writing down a definition of the term "reasonable doubt" that he had retrieved from a webpage, Legal.com. The juror said that he had mentioned to other members of the jury the day before that he wanted to search an external source for more information on the subject of reasonable doubt, but that he did not believe that any of the other jurors could see what he was writing, as he had been "in

[13] We emphasize that, although Soryear denied seeing the shooter or identifying the defendant as such when testifying at trial, the Commonwealth was permitted to introduce Soryear's earlier, positive identification of the defendant as the shooter through the testimony of Sergeant Scott Warmington of the State police as substantive evidence. See Cong Duc Le, 444 Mass. at 432 (allowing substantive use of pretrial identification evidence, even if witness testifies that he or she did not make such identification). Therefore, the jury could have found Soryear's prior testimony and identification of the witness persuasive and in line with Massey's conclusions, mitigating the usefulness of Massey's testimony.

the corner" of the room and was not reading aloud as he wrote. The judge conducted a separate voir dire of each juror asking whether the juror witnessed the interaction in the deliberation room that morning or had seen what the juror was writing. The judge sought to determine whether any other jurors had sought out extraneous information, had been exposed to extraneous information, or no longer were able to follow the judge's instructions.

During these interviews, the judge learned that, the previous evening, another juror had used the Internet to read about "reasonable doubt," but had not spoken to any other juror about the subject. After completing the interviews, the judge dismissed the two tainted jurors but denied the defendant's motion for a mistrial. The judge determined that dismissal of the two jurors was sufficient to protect the impartiality of the jury, given that the remaining jurors had not spoken with the two tainted jurors and either did not notice one of the juror's act of writing, only saw the writing upside down, or only saw the title of "reasonable doubt." Each of the remaining jurors expressed the belief that he or she could remain impartial, would continue to follow the judge's instructions, and would not seek out extraneous information. After replacing the two excused jurors with two alternate jurors, the judge instructed the jury to begin their deliberations anew.

"Article 12 of the Massachusetts Declaration of Rights and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to a trial before an impartial jury." Commonwealth v. Philbrook, 475 Mass. 20, 30 (2016). To safeguard this right, a trial judge is obliged to avoid extraneous influences on jurors. See Commonwealth v. Colon, 482 Mass. 162, 167 (2019). "An extraneous matter is one that involves information not part of the evidence at trial and raises a serious question of possible prejudice." Id., quoting Commonwealth v. Guisti, 434 Mass. 245, 251 (2001), S.C., 449 Mass. 1018 (2007). See, e.g., Commonwealth v. Fidler, 377 Mass. 192, 194 (1979) (during deliberations, juror stated information not presented at trial). "[N]ot all extraneous jury discussion[, however,] compromises a defendant's right to a fair trial, and the presence of an extraneous influence does not necessarily require a mistrial." Colon, supra at 168.

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. See Philbrook, 475 Mass. at 30-31. A trial judge has "discretion in addressing issues of extraneous information on jurors discovered during trial." Commonwealth v. Trapp, 423 Mass. 356, 362, cert. denied, 519 U.S. 1045 (1996). "A reviewing court 'will not disturb a judge's findings of impartiality,' or a judge's

finding that a juror is unbiased, 'absent a clear showing of an abuse of discretion or that the finding was clearly erroneous.'" Colon, 482 Mass. at 168, quoting Commonwealth v. McCowen, 458 Mass. 461, 493-494 (2010). "Where a judge conducts individual voir dire of each juror, excuses all influenced jurors, and determines that the remaining jurors are impartial, a defendant's right to an impartial jury has not been violated." Colon, supra.

Here, the trial judge was informed immediately by a court officer that the jury potentially had been exposed to an extraneous definition of "reasonable doubt." The judge conducted a comprehensive, individual voir dire of each juror to determine the information to which he or she had been exposed, and whether the juror was able to remain impartial and to decide the case based on the evidence presented at trial. During these colloquies, the judge found two jurors who explained that they had conducted external research about the meaning of "reasonable doubt," concluded that those jurors could not remain impartial, and dismissed them. The remaining jurors stated that they had not conducted any of their own research and had not seen the definition of reasonable doubt the juror had attempted to write on paper in the deliberation room. At most, the remaining jurors said that they had seen only the words "reasonable" or "reasonable doubt." Accordingly, we conclude that the trial

judge did not err in declining to declare a mistrial on the basis of this juror misconduct, and the defendant's right to an impartial jury was not violated.

3. Review under G. L. c. 278, § 33E. We have reviewed the entire record pursuant to our responsibilities under G. L. c. 278, § 33E, and discern no basis to reduce the conviction of murder in the first degree to a lesser degree of guilt or to order a new trial.

Judgments affirmed.

Order denying motion for a new trial affirmed.