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SETTING ASIDE A GUILTY VERDICT IS NEITHER EASY NOR IMPOSSIBLE

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INTRODUCTION:

Judges like setting aside jury verdicts of guilty almost as little as they enjoy being reversed on appeal because either outcome means that the case must be tried all over again. Such a result is equally unappealing to prosecutors who know that their case will likely not get any better and the defense will surely be better prepared next time since all the People's cards have already been laid on the table.

For the defendant, on the other hand, a vacated verdict means that he/she gets to live (hopefully, at liberty) another day and either roll the dice with a different jury or, perhaps, have counsel negotiate a better plea offer the second time around.

GHISLAINE MAXWELL GUILTY VERDICT CAST INTO DOUBT BY JUROR REVELATIONS OF SEXUAL ABUSE:

On December 29th, 2021, after a near month-long trial, British socialite and former business partner/girlfriend of convicted pedophile, Jeffrey Epstein, was found guilty by a federal jury in Manhattan (SDNY) of five out of six counts of sex trafficking and conspiracy for her role in recruiting and grooming underage girls to have sexual encounters with Epstein from 1994 to 2004. (Epstein, who was convicted in Florida of similar state charges several years earlier, was found dead in his Manhattan jail cell in August 2019 after being arrested on the federal charges).

Days later, on January 3rd, 2022, federal prosecutors informed the trial judge and Maxwell's defense team that they had learned that two of the jurors had spoken to the media (Reuters, The Independent, The Daily Mirror), revealing that they were victims of child abuse and shared this information with their fellow jurors during deliberations. (See 1/6/2 article by Shanya Jacobs: "Juror Revelations May Jeopardize Ghislaine Maxwell Convictions, Experts Say," washingtonpost.com).

The court has given the defense until January 19th to make a motion to set aside the verdict and the People have until February 4th to respond.

Reportedly, although prospective jurors in this high-profile case filled out a thirty-page, fifty-question questionnaire under penalty of perjury, neither one recalled whether, and if so, how they answered the question asking if they or anyone close to them had ever been the victim of sexual abuse, harassment, or assault.

One of the two, a 35-year-old male, executive assistant in the finance industry, told the press that he "breezed through" the questionnaire and was not specifically asked in court about sexual abuse (suggesting that he did not so indicate on the questionnaire which likely would have invited further questioning by the court and counsel). He said he was only questioned by counsel about his social media habits.

This juror also stated that he had shared information with fellow jurors about his experiences as a sex abuse victim after some of the others questioned certain inconsistencies in the testimony of the four victims. He said he did so (e.g., recounting how he could remember certain details such as the color of the walls and the carpet but not others), apparently to explain how victims' memories may be affected by abuse which does not necessarily mean that they're lying. Also, when other jurors expressed concern about victims waiting several years to report the abuse, this juror pointed out that he didn't report his abuse until he was in high school which set the others silent.

The other juror reportedly told the New York Times that her disclosure of her experience as a child sex abuse victim helped "shape" the jury deliberations. (See 1/7/22 article, "No Guarantee of New Maxwell Trial After Jurors' Revelations, Experts Say," by Luc Cohen and Karen Freifeld at reuters.com).

DEFENSE EXPERT ON FALSE MEMORY:

These belated revelations may be significant in terms of the sustainability of the verdict insofar as the gist of the defense was that the victims' memories were distorted by the passage of time and exposure to "post-event suggestion" in the media and elsewhere. (See 12/26/21 article: "Ghislaine Maxwell False Memory Expert Testifies for the Defense," www.bbc.com).

Toward that end, the defense called an expert witness, Elizabeth Loftus, a psychologist/professor at the University of California at Irvine to testify that peoples' memories of traumatic events are reconstructed rather than retrieved and as such, can be distorted or falsely embellished by self-serving details that fill in the blanks. She also noted that memories can be expressed in vivid detail with apparent self-confidence even though they may be false.

The Maxwell defense team may argue that the two jurors prejudiced the defendant's right to a fair trial by an impartial jury based only on the evidence presented by injecting their own personal experiences and engendering sympathy for the victims on whose behalf they acted as advocates if not unsworn (and un-cross examined) "experts" on the psychology of sex abuse victim memory and behavior.

COURTS ARE GENERALLY RELUCTANT TO LOOK BEHIND THE JURY CURTAIN:

Traditionally, courts have been hesitant to scrutinize how a guilty verdict was reached to encourage freedom of deliberation, protect jurors from harassment and promote finality in the justice system. (See McDonald v Pless, 238 US 264 [1915]).

In federal court, where the Maxwell case is pending, FRE 606(b) is quite strict about the depths to which a jury verdict can be plumbed. The rule states that during inquiry into the VALIDITY OF A VERDICT:

1. A juror MAY NOT TESTIFY about ANY STATEMENT MADE or INCIDENT THAT OCURRED during the jury's deliberations; the EFFECT of ANYTHING on the juror's or another juror's VOTE; or any juror's MENTAL PROCESSES concerning the verdict. THE COURT MAY NOT RECEIVE A JUROR'S AFFIDAVIT OR EVIDENCE OF A JUROR'S STATEMENT ON THESE MATTERS.

As is evident, jury verdicts are not unlike sausages in that while the justice system will accept the final product, there is little appetite for examining the ingredients or exploring the inner machinations of how it was made.

EXCEPTIONS:

2. A juror may, however, testify about whether:
   a. EXTRANEOUS PREJUDICIAL INFORMATION was improperly brought to the jury's attention.
   b. An OUTSIDE INFLUENCE was improperly brought to bear on any juror, or
   c. A mistake was made in the entering of the verdict on the verdict form.

So, while the mental processes and emotional reactions of jurors during deliberations are generally off limits from disclosure, when there is reason to believe that prejudicial information that was not part of the evidence introduced at trial or outside influences (e.g., threats or bribe offers or exposure to inflammatory media coverage) were brought to bear on the deliberations, then further inquiry may be warranted.

In Pena-Rodriguez v Colorado, 137 S Ct 855 (2017), two jurors informed defense counsel after the defendant was convicted of misdemeanor sex abuse and harassment that one of the jurors had stated during deliberations that he thought the defendant, who was Mexican, was guilty because Mexicans "do what they want," and the alibi witness was not credible because he was an "illegal."

Relying on Colorado's version of FRE 606(b), the trial court ruled that it would not consider juror affidavits describing racially prejudiced remarks by a fellow juror. The Colorado Court of Appeals affirmed as did its Supreme Court which determined that the juror affidavits were inadmissible.

The U.S. Supreme Court reversed in a 5-3 decision written by Justice Anthony Kennedy who stated that where a juror makes a clear statement that he/she relied on RACIAL STEREOTYPES or animus to convict a defendant, the Sixth Amendment requires that the "no impeachment" (of a verdict) rule give way to permit the trial court to consider the evidence of the juror's statements and any resulting denial of the jury trial guarantee.

The majority explained that while not every off-hand racial comment should warrant bypassing the Rule 606(b), where there is evidence of overt racial animus that calls into question the jury's impartiality, inquiry should be allowed. The Court also noted that questioning in jury selection may not always ferret out those who harbor racial prejudice.

The dissenters (Justices Thomas and Alito) opined that common law tradition discourages jurors from being compelled to testify about their deliberations and it is for the legislative branch rather than the judicial branch to set aside the no-impeachment rule.

THE NEW YORK RULE: CPL 330.30 (2):

This statute states at any time AFTER rendition of a guilty verdict and BEFORE sentence, the court MAY, upon motion of the defendant, SET ASIDE or MODIFY the verdict or any part thereof upon the grounds that during the trial, there occurred, OUTSIDE THE COURT'S PRESENCE, IMPROPER CONDUCT BY A JUROR or by ANOTHER PERSON IN RELATION TO A JUROR which MAY HAVE AFFECTED A SUBSTANTIAL RIGHT OF THE DEFENDANT and which was NOT KNOWN TO THE DEFENDANT prior to the rendition of the verdict.

Juror misconduct can embrace a wide variety of extrajudicial activities including unauthorized visits to a crime scene (People v Crimmins, 26 NY 2d 319 [1970], conducting experiments/tests/re-enactments (People v Legister, 75 NY2d 832 [1990], People v. Stanley, 87 NY2d 1000 [1996]), and injecting personal opinions that go beyond average, every day, life experience (People v Maragh, 94 NY2d 569 [2000]).

It can also involve the failure to disclose a statutorily proscribed relationship with the defendant, victim, the prosecutor, defense counsel (CPL 270.20 [1][c]), or failure to follow the judge's instructions, for example, by engaging in premature deliberations or reading and discussing media accounts of the trial (People v Romano, 8 AD3d 503 [2d Dept. 2004]).

SOME CASES:

In People v Romano, *supra*, the Second Department held that the trial court properly concluded that the cumulative effect of juror misconduct, including discussions with alternates about the testimony and witness credibility during the trial, jurors reading and discussing newspaper accounts and improper communication with alternates after deliberations commenced created a SUBSTANTIAL RISK of PREJUDICE to the defendant's right to a fair trial, thereby justifying an order setting aside the verdict and granting a new trial.

People v Testa, 61 NY2d 1008 (1984): Here, the Court of Appeals held that while there was an insufficient basis to overturn the AD's affirmance of the trial court's denial of the defendant's motion to set aside the guilty verdict (based on conflicting testimony about jurors' exposure to and discussion of news reports of the co-defendant's guilty plea) as a matter of law, the case should be remitted to the AD for a factual review of the trial court's determination.

The Court noted that there is NO CONCRETE TEST for assessing claims of improper jury influence, observing that "because jury misconduct can take many forms, no ironclad rule of decision is possible. In each case, the facts must be examined to determine the nature of the material placed before the jury and the likelihood that prejudice would be engendered." (Citing People v Brown 48 NY2d at 388 [1979]).

The Court cautioned that such an examination must be performed with caution because inquiry into the deliberation process for the purpose of impeaching a verdict should only be undertaken in EXTRAORDINARY CIRCUMSTANCES. (*Id* at 393).

In Testa, the Court could not conclude that the trial court abused its discretion as a matter of law, but the AD should take another look at the case to determine the facts and exercise its discretion. (Citing People v Creech, 60 NY2d 895 [1983]).

CONTENTIOUS DELIBERATIONS ALONE DO NOT AMOUNT TO JUROR MISCONDUCT:

In People v Torres, 2020 NY Slip Op 07231 (2d Dept. 12/2/20), the Second Department upheld the trial court's denial of the defendant's (convicted of Sex Abuse 1st degree) motion to set aside the verdict noting that generally, a jury verdict may NOT be impeached based upon the TENOR of the deliberations, but it may be impeached by proof of IMPROPER INFLUENCE. (Citing People v Brown *supra*).

Improper influence, in the court's view, involves conduct which tends to put the jury in possession of evidence not introduced at the trial, and the court must carefully examine such evidence/information and determine whether it created a substantial likelihood of prejudice. (Citing People v Maragh, s*upra*.)

The court determined that the defendant's claims went more toward the tenor of the deliberations, and while two jurors made off-hand references to their own life experiences in discussing the evidence, they did not hold themselves out as experts on such matters. Accordingly, since the defendant failed to demonstrate a likelihood of prejudice to a substantial right, there was no basis to set aside the verdict. (Citing People v Marsden, 130 AD3d 945 [2d Dept. 2015]).

See also, People v Brown, 307 AD2d 645 (3d Dept. 2003): A claim by one juror that several jurors bullied the others into a compromise verdict was not enough to impeach the verdict where such information, in the court's estimation, reflected only upon the tenor of the deliberations.

NOT EVERY JUROR FAUX PAS WARRANTS A NEW TRIAL:

In People v Rodriguez, 100 NY2d 30 (2003), the Court held that a juror's FAILURE TO DISCLOSE certain information, in this case, that the juror was acquainted with a prosecutor, was NOT ENOUGH to establish prejudice warranting a new trial. As note in People v Clark, 81 NY2d 913 (1993), not every misstep by a juror rises to the INHERENTLY PREJUDICIAL LEVEL at which automatic reversal is required.

And in People v Coles, 27 AD3d 830 (3d Dept. 2006), the Third Department held that a juror's failure to disclose that she worked as a night custodian in the courthouse (where she would occasionally see prosecutors but did not know them or any of the judges), did not suggest any relationship that predisposed her toward the People.

People v Robinson, 1 AD3d 985 (4th Dept. 2003): In this case, the Fourth Department held that the trial court did not abuse its discretion in denying the defendant's 330.20 motion where it became known that one of the jurors had installed appliances at the apartment complex where the crime occurred and discussed the apartment layout with other jurors. The court concluded that although this juror believed that the diagram of the apartment used at trial was inaccurate, his knowledge was not shown to have affected the verdict. In fact, other jurors testified that they were not influenced by this juror.

PERSONAL EXPERIENCE OR JUROR EXPERTISE?

In People v Santi, 3 NY3d 234 (2004), the Court of Appeals cautioned that while jurors cannot engage in experimentation, conduct their own investigation, or rely on facts which are OUTSIDE THE RECORD and/or BEYOND THE UNDERSTANDING OF THE AVERAGE JUROR and not explained by an expert at trial (see NY Advisory Evidence Rule 7.01), they are not required to "check their life experience at the door."

In this case, the court held that the defendant was not unfairly prejudiced by a juror, a patient care associate at a hospital, who gave a lay opinion based on experience with respect to the introduction of an IV line.

But see People v Maragh *supra* where the Court of Appeals found that the jury's deliberations in this Manslaughter case were tainted by the injection of what amounted to the untested professional opinions of two nurses who, relying on their own training and experience (which was beyond the ken of average jurors), concluded that the victim's blood loss from blunt force trauma could cause ventricular fibrillation leading to death.

The defendant was charged with Manslaughter 1st and 2d degrees for allegedly beating his girlfriend to death. The People's expert determined that the cause of death was blunt force trauma to the victim's liver and spleen resulting in massive internal blood loss. The defendant was eventually convicted of Criminally Negligent Homicide.

The defense argued that the victim suffered a seizure and died from a venous air embolism. Their expert said that the autopsy findings were consistent with death from an embolism and another cardiac event. The victim's ventricular fibrillation and congested blood vessels were, in this expert's opinion, consistent with an air embolism but inconsistent with death due to loss of blood. The organ lacerations were attributed to the roughly two hours of vigorous resuscitation efforts.

One of the nurse-jurors first spoke with her counterpart and then told the other jurors that in her medical experience and estimation, the reported volume of blood loss could have caused ventricular fibrillation (VF) which could result in death. They also said that she had seen patients suffer VF resulting from blood loss.

The other nurse provided her own estimations of blood volume loss which she shared with the other jurors.

The trial court granted the defendant's motion to set aside the verdict, concluding that these two jurors, in effect, became UNSWORN WITNESSES for the prosecution and reached conclusions based on facts that went well beyond the evidence adduced at trial. The AD reversed (263 AD2d 493) but the Court of Appeals agreed with the trial court's determination that a new trial was warranted.

On appeal, the defendant argued that the use of juror PROFESSIONAL EXPERTISE to contradict the testimony of experts combined with the sharing of non-evidence-based conclusions with other jurors constituted cognizable misconduct. In essence, the two nurses became unsworn and unchallenged witnesses against the defendant.

The People contended that the defendant's argument was unpreserved because he had not requested a cautionary instruction from the trial court (for the jury to refrain from relying on any personal expertise or evidence outside the record).

The Court held that while jury verdicts should not be disturbed by inquiries into the deliberative process, a showing of IMPROPER INFLUENCE creates a NECESSARY AND NARROW EXCEPTION to the general rule. (Citing People v Brown *supra* at 393). The Court also noted that the trial court has discretion and post-verdict fact-finding powers (at a HEARING) to determine whether misconduct occurred sufficient to warrant setting aside a guilty verdict. (Citing People v Testa, *supra* at 1009).

As the Court explained, in cases such as this, the complained of conduct must be something more than the APPLICATION OF EVERYDAY EXPERIENCE which all jurors are expected to do when evaluating evidence. The potential for prejudice, however, arises when a juror who has professional expertise beyond that of the average juror shares his/her expertise to evaluate the evidence and draw his/her own expert conclusion on a material issue in the case that is in addition to and distinct from the medical evidence adduced at trial.

The risk is that the other jurors will defer to the gratuitous injection of professional juror opinions that go beyond their own knowledge and everyday frames of reference. In this case, one of the other jurors testified that the nurses' opinions directly affected the deliberations and verdict.

In short, while jurors can and should draw upon their life experience in evaluating evidence, they cannot go beyond the evidence presented at trial and rely upon opinions based on the individualized, untested expertise of professionals who happen to be on the jury. Doing so not only prejudices the defendant's right to fair trial based on the evidence but impairs the integrity of the trial process altogether.

The Court also rejected the AD's view that the defendant could have addressed the problem in jury selection because what happens in *voir dire* is no guarantee against juror misconduct during deliberations at the conclusion of trial.

CHALLENGE FOR CAUSE:

CPL 270.20 (1)(b) states that a prospective juror may be challenged (and removed) for CAUSE if he/she has a STATE OF MIND likely to preclude him/her from rendering an IMPARTIAL VERDICT BASED ON THE EVIDENCE ADDUCED AT TRIAL.

Unlike post-verdict proceedings where counsel cannot explore jurors' mental processes in arriving at a verdict, the whole point of *VOIR DIRE* is to determine the prospective jurors' state of mind to ensure that they do not have any biases, prejudices, attitudes, or beliefs that might PREDISPOSE them to decide the case on some factor(s) or consideration(s) other than the evidence produced at trial.

If a prospective juror expresses certain beliefs that call his/her impartiality into serious question in a given case, the court and counsel are obliged to determine whether such beliefs might preclude him/her from deciding the case fairly (and only) upon the evidence presented during the trial. If the juror cannot give an UNEQUIVOCAL ASSURANCE of impartiality, he/she should be excused for CAUSE. (See People v Smith, 136 AD3d 532 [1st Dept. 2016]).

If for some reason, the court does not grant the challenge for cause, counsel is well advised in such situation to excuse the prospective juror on a PEREMPTORY BASIS. (CPL 270.25). It is also worth noting

that an erroneous denial of a cause challenge when counsel is out of peremptory challenges (before jury selection is concluded) constitutes REVERSIBLE ERROR. (See, People v Culhane, 33 NY2d 90 [1973]), People v Wright, 30 NY3d 933 [2017]: Where the trial court's failure to obtain assurances of impartiality from a prospective juror whose statements raised serious questions about the juror's ability to be unbiased, the denial of the defendant's cause challenge when the peremptory challenges were exhausted constituted reversible error).

JURORS WITH PRE-EXISTING BELIEFS ON A MATERIAL MATTER MUST GIVE UNEQUIVOCAL ASSURANCE OF IMPARTIALITY:

One of the primary purposes of *voir dire* is to ferret out jurors who harbor certain beliefs one way or another that might prevent them from deciding the issues in the case fairly and impartially on the evidence presented at the trial. As noted by the Court of Appeals in People v Arnold, 96 NY2d 358 (2001), while the courts expect jurors to rely on their common sense and life experience when evaluating evidence and witness credibility, it is imperative that those selected come into the process with an OPEN MIND, uncluttered by biases, prejudices or sympathies that interfere with their ability to follow the judge's instructions and decide the case on the evidence.

And, when a prospective juror expresses reservations or concerns about their impartiality in a particular case, absent a credible, unequivocal assurance that he/she can set those concerns aside and decide the case fairly, such juror should be EXCUSED FOR CAUSE. The Court, (citing, *inter alia*, People v Culhane, *supra* at 108), stated that when there is any doubt about a prospective juror's impartiality, the trial judged should ERR ON THE SIDE OF EXCUSING SUCH JUROR since the worst that can happen is the replacement one impartial juror with another.

In Arnold, a domestic violence assault case in which the defendant claimed self-defense, a prospective juror who had degrees in Sociology and Women's Studies, agreed in jury selection that this might not be the case for her, she might think of herself as an expert on the subject matter and that she would be more comfortable sitting in a different kind of case. She also indicated that she had a "problem" with domestic violence.

Thereafter, the record reflected (not entirely clearly) that all prospective jurors agreed to follow the law and not treat the case as a referendum on domestic violence. Defense counsel moved to excuse the juror for cause, expressing concern that she would act as an unsworn expert in the jury room and never gave an unequivocal assurance of impartiality. The prosecutor argued that despite her expression of discomfort, this juror never said she wouldn't follow the law or that she couldn't be fair.

The court overruled the cause challenge, whereupon the defense used its last remaining peremptory challenge to excuse the juror.

The AD reversed the conviction, concluding that once the juror expressed doubt about her ability to be impartial, and/or indicated that she might consider herself an unsworn expert in the jury room, it was incumbent on the court to ascertain that her prior state of mind would not influence her verdict. In the court's view, the subsequent collective promise to be fair and not view the case as a statement about

domestic violence did not resolve the matter as to this particular juror's impartiality. (The two dissenters saw no indication of any predisposition on the part of the juror who promised to follow the law and decide the case upon the evidence).

The Court of Appeals affirmed, noting that prospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who give less than unequivocal assurances of their impartiality MUST BE EXCUSED. (Citing People v Blyden, 55 NY2d 73 [1982]). As the Court viewed it, the trial court should not have seated this juror without obtaining an unequivocal promise that she could be fair.

Since the defense had to use its last remaining peremptory challenge to excuse this juror, thereby leaving them with no more peremptory strikes before the conclusion of *voir dire*, the erroneous decision to deny the challenge for cause constituted reversible error. (See People v Culhane, *supra*, citing, *inter alia*, People v Casey, 96 NY 115 [1884]).

FINAL THOUGHT:

In the Ghislaine Maxwell case, the attorneys never questioned the two jurors about their sex abuse history and whether such experiences would have affected their impartiality in a case where four young women, (the youngest being 14 years old) were reportedly lured by the defendant into the lair of the lascivious Jeffrey Epstein. Common sense would seem to beg the question, "how could they not?"

Even if these jurors had, if asked, provided assurances of impartiality notwithstanding their history as victims, the defendant's attorneys would likely have excused them if not for cause, then peremptorily. It's hard to know why either juror spoke to the media without considering that their revelations might jeopardize the verdict on the grounds of bias, the sharing of personal experiences, and explanations of behavioral dynamics that went beyond the ken of their fellow jurors.

In sex abuse trials, it is not uncommon for the prosecution to call an expert witness (e.g., a psychologist) to explain things like delayed reporting and Child Abuse Accommodation Syndrome. Instead, the jury arguably had the equivalent of unsworn, unchallenged information beyond the evidence that not only may have bolstered the victims' credibility but, as one of the jurors reportedly claimed, "shaped the deliberations."

If these two jurors lied on the questionnaire about their victim status for the purpose of helping ensure a conviction of an alleged child abuser, it is difficult to understand why they would have spoken to the media about their past, only to call the verdict into question. While they might not have considered the legal implications of their fifteen minutes (or more) in the spotlight, it is hard to fathom how they would have overlooked a question about prior sex abuse in a high-profile case on that very subject.

If nothing else, this case underscores the utmost importance of thorough preparation for jury selection and taking nothing for granted (including answers on lengthy questionnaires) when asking prospective jurors about their prior experiences and attitudes about key issues that will undoubtedly come up during the trial. If, for example, a juror said during questioning that he "breezed through" the questionnaire, that might tell the lawyer something about that juror's attention to detail even if he was not a sexual abuse victim.

It seems likely that the judge in the Maxwell trial will conduct some type of hearing or inquiry into the post-verdict revelations of the two jurors to determine whether the verdict was compromised, and the defendant was denied her Sixth Amendment right to a fair trial by an impartial jury based solely on the evidence presented. Although courts, as noted at the outset, are generally loathe to loosen the strings and look inside, in this situation, since the cat is already out of the bag, there may be no other choice than to take a hard look at what transpired during deliberations and how it may have affected the verdict.

At this point, Maxwell who reportedly is facing up to sixty years in prison, is undoubtedly clinging to the hope of a second chance to challenge the People's proof at a new trial. For prosecutors, and more importantly for the victims, the prospect of having to do it all over again is probably as unappealing as their time spent with Jeffrey Epstein.