

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-927

COMMONWEALTH

vs.

WILLIAM HOYT.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, William Hoyt, appeals from a judgment, after a Superior Court jury found him to be a sexually dangerous person pursuant to G. L. c. 123A, § 14 (d), and the subsequent order committing him to a treatment center. Concluding that the judge's dismissal of a prospective juror did not create a substantial risk of a miscarriage of justice, we affirm.

"We afford a trial judge a large degree of discretion in the jury selection process," Commonwealth v. Heywood, 484 Mass. 43, 45 (2020), quoting Commonwealth v. Long, 419 Mass. 798, 803 (1995), and review determinations regarding jury selection for an abuse of discretion. See Heywood, supra. Under G. L. c. 234A, § 3, persons with physical disabilities are presumed to be competent to serve as jurors, Heywood, supra at 47, and may not "be[] disqualified per se." Commonwealth v. Susi, 394 Mass.

784, 788-789 (1985). A judge may, however, dismiss a prospective juror based on a physical disability if the judge "finds such service is not feasible." Heywood, supra at 46-47, quoting G. L. c. 234A, § 3. Whether a potential juror is competent to serve should be determined "on a case-by-case basis." Heywood, supra at 47. Accord Susi, supra at 788.

Here, during voir dire, a juror reported having "a hearing problem." The judge observed that the juror was struggling to hear him despite being "really close [to the judge]," and told the juror, "it's going to be important . . . to hear everything that's said." The juror responded, "Yeah, well, I can't do that, because I'm [sic] wicked bad hearing." Based on his observations of the prospective juror, and the juror's explicit statement that he would not be able to hear everything said during the trial, the judge dismissed the juror without objection.

Where, as here, a juror indicates a physical disability, the judge should explore reasonable accommodations that would enable the juror to serve on the jury. If the judge concludes that reasonable accommodations are unavailable or impracticable under the circumstances, it would be preferable if the judge explained this on the record, regardless of whether a party has

objected.¹ See Heywood, 484 Mass. at 47, 48-49 (stating that "such case-by-case determinations may also be required by [the Americans with Disabilities Act (ADA)]" and that "the judge here clearly complied with the ADA" by "furnish[ing] . . . auxiliary services allowing [juror] to serve while another juror described the visual evidence"). Here, our record does not include an explicit reference to the judge's consideration of whether a hearing-assistive device or other accommodation was available and, if so, would have enabled the juror to serve.

Nonetheless, "[e]ven were we to find that the judge erred in . . . dismissing the juror[], the defendant is not entitled to the redress he seeks." Commonwealth v. Mora, 82 Mass. App. Ct. 575, 578 (2012). Pursuant to G. L. c. 234A, § 74, an "'irregularity or defect' in the empanelment process . . . does not warrant reversal unless a defendant objects to it 'as soon as possible after its discovery or after it should have been discovered and unless [he] has been specially injured or prejudiced thereby.'" Commonwealth v. Oppenheim, 86 Mass. App. Ct. 359, 372-373 (2014), quoting G. L. c. 234A, § 74. Accord

¹ Here, after dismissing the juror because of his hearing impairment, the judge stated, "Just to put on the record with that, there was no objection to excusing that juror but he was three feet away from me through a thin sheet of Plexiglas and he actually leaned around the Plexiglas to try . . . to hear me better, and I was -- I thought I was saying things pretty clearly and loudly. So he's excused."

Commonwealth v. Seng, 456 Mass. 490, 495 (2010). Because the defendant did not object to the dismissal of the juror, we review the judge's decision for a substantial risk of a miscarriage of justice.² See Heywood, 484 Mass. at 45, quoting Commonwealth v. McCoy, 456 Mass. 838, 842 (2010).

Here, there was no risk of a miscarriage of justice. Nothing in the record suggests that the dismissal of the prospective juror impaired the defendant's right to an impartial jury. See Mora, 82 Mass. App. Ct. at 578-579. See also Commonwealth v. Ngoc Tran, 471 Mass. 179, 189-190 (2015) (although it may have been "better practice" for judge to conduct hearing about sleeping juror, there was no substantial likelihood of miscarriage of justice where sleeping juror was designated as alternate and defendant did not object to juror being designated as alternate). As the defendant "has not shown

² The defendant claims that an improper dismissal of a prospective juror constitutes structural error, and thus no showing of prejudice is required. Structural error, however, can be waived by failure to object. See Heywood, 484 Mass. at 45, quoting Commonwealth v. McCoy, 456 Mass. 838, 842 (2010) ("Where a defendant has been denied an impartial jury, and the issue is properly preserved, the error is structural and requires reversal without a showing of actual prejudice. However, '[w]here a defendant fails to challenge a juror for cause, the questions of the impartiality of that juror and the adequacy of voir dire are waived'" [emphasis added]).

that he was prejudiced by the dismissal of the juror[]," he is not entitled to a new trial. Mora, supra at 579.

Judgment and order of
commitment affirmed.

By the Court (Ditkoff, Hand &
Brennan, JJ.³),



Clerk

Entered: August 15, 2022.

³ The panelists are listed in order of seniority.