

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

MIDDLESEX COUNTY

2015 SITTING

NO. 2014-P-1804

SJC-11957

COMMONWEALTH OF MASSACHUSETTS,

APPELLEE,

v.

DAISY OBI,

APPELLANT.

ON APPEAL FROM JUDGMENTS OF THE SOMERVILLE DISTRICT
COURT

BRIEF AND SUPPLEMENTAL RECORD APPENDIX
FOR THE COMMONWEALTH

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Commonwealth of Massachusetts

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1. Did the trial judge correctly exercise his discretion when he disallowed the defendant's peremptory challenge to a prospective juror who displayed a traditional Muslim style headscarf, similar to that worn by the victim, a known Muslim, where the defendant offered no legitimate non-religion-based explanation for the challenge?
2. Did the trial judge correctly exercise his discretion in denying the defendant's belated motion for recusal, where the judge found no bias and reported no memory of the substance of prior proceedings, and where all references to prior matters were raised at trial or were reflected in the defendant's board of probation report?
3. Were the sentence and probation conditions reasonable, where the trial judge imposed a sentence less than the statutorily allowed period

of incarceration and where the probation conditions -- that the defendant follow criminal and civil laws, including discrimination laws, attend a course on Islam, and provide a disclosure to her prospective tenants regarding her conviction - were reasonably related to rehabilitation of the defendant and protection of the public?

STATEMENT OF THE CASE

On August 28, 2012, a complaint (No. 1210CR2072) issued from the Somerville District Court charging that on August 28, 2012, the defendant, Daisy Obi, violated an abuse prevention order obtained by the victim, Ms. Gihan Suliman, in violation of G.L. c. 209A, § 7, and that she assaulted and battered the same victim, in violation of G.L. c. 265, § 13A (a). (R.A. 2, 7.) The defendant was arraigned on the same date and pleaded not guilty to both charges. (R.A. 2-6.)¹

On August 21, 2013, the defendant was placed on pretrial probation on docket 1210CR2072.² (R.A. 4.)

On November 5, 2013, the matter was advanced by

1 References to the defendant's record appendix are referenced as (R.A. ____), the Commonwealth's supplemental record appendix as (S.R.A. __), and the defendant's brief as (D.Br. ____). References to the transcripts are listed for the trial transcript as (Tr. I:__.), the transcript of the sentencing hearing as (Tr. II:__.), and the transcript of the post-sentencing motions as (Tr. III:__.).

2 Dockets 1210CR2267, 1210CR2269, 1210CR2272 each charging independent violations of a harassment prevention order protecting Gihan Suliman were dismissed on the same date.

probation, and on November 15, 2013, the case was restored to the trial list. (R.A. 3.) Following an additional pretrial conference and compliance and election hearing, the matter was scheduled for trial. In total, prior to the date of trial, the defendant appeared five times, before various judges, in this case. (R.A. 2.) One hearing, a non-evidentiary pretrial conference on April 5, 2013, was before Justice Paul M. Yee, Jr., who later presided at trial. (R.A. 2.)

The defendant was also sued by the victim in a small claims matter alleging failure to return of a security deposit (No. 1210SC1316). (R.A. 11-12, S.R.A. 1-6, Tr. I:67.) A trial was held before First Assistant Clerk-Magistrate William Farrell, and on February 27, 2013, he found in favor of the plaintiff, awarding the deposit, treble damages and attorney fees. (R.A. 11-12, S.R.A. 4.) Following the defendant's appeal, a trial was held before Justice Yee, and on April 8, 2013, he also found in favor of the plaintiff, awarding the deposit, treble damages and attorney fees. (R.A. 11-12, S.R.A. 4.)

On April 23, 2014, the scheduled trial date, the Commonwealth filed a notice of nolle prosequi on count

1 (which charged violation of a restraining order) following denial of a motion to amend the complaint. (Tr. I:10.) On the same date, the remaining count of assault and battery was tried by a jury before Justice Paul M. Yee. (R.A. 4; Tr. I:3.) Following conviction of assault and battery, Justice Yee ordered an evaluation in aid of sentencing pursuant to G.L. c. 123, § 15B. (Tr. I:144.) After reviewing that report, Justice Yee sentenced the defendant to two years in the house of correction, with six months to serve and the balance suspended for two years. (R.A. 5; Tr. II:9-11.)

As conditions of probation, Justice Yee ordered that the defendant "obey all federal and state laws, including all harassment prevention orders, all discrimination laws. You cannot discriminate. And all landlord/tenant laws." (Tr. II:9.) Additionally, the defendant was ordered to "enroll and attend an introductory course on Islam" and provide written disclosure to tenants that she had been convicted of assaulting a tenant and has had several harassment prevention orders issued against her. (Tr. II:10.) Justice Yee noted that three harassment prevention orders were issued against her, from distinct

individuals, all residing at 63 Pinckney Street. (Tr. II:8-9.) During sentencing, Justice Yee noted he was "really struck by the victim's testimony" about the anti-Muslim statements made by the defendant and that the defendant's violent conduct revealed deep disrespect for the victim; he further noted that he had considered the defendant's age when fashioning a sentence to reflect the four aims of sentencing. (Tr.II:6-8).

After sentencing, on June 3, 2014, the defendant filed a motion to be resentenced by a different judge, claiming for the first time that Justice Yee was biased because he had presided over other harassment prevention orders against the defendant. (R.A. 5, 13-16.) After a hearing on June 10, 2014, Justice Yee denied the motion. (R.A. 6; Tr. III:16-17.)

On June 3, 2014, the defendant filed a notice of appeal. (R.A. 1, 5.) The case entered on the docket of the Appeals Court on November 20, 2014.

STATEMENT OF THE FACTS

The Commonwealth's Case

On April 1 2012, the victim, Gihan Suliman, moved into 42 Pinckney St, apartment three, located in a multifamily building in Somerville that was owned by

the defendant, Daisy Obi. (Tr. I: 42-43.) A lease was executed for a rental period to run April 1, 2012, to August 31, 2012. (Tr. I: 43.) Suliman, who was working as a lab supervisor at a hospital and finishing her thesis at Harvard University, lived in the apartment with her five children and her husband, who travelled regularly. (Tr. I:42-43.) For a period of two weeks, when the victim and her husband attended a wedding, the victim's two cousins stayed in the apartment to mind the children. (Tr. I:48-50.) The defendant lived on the second floor of the same building. (Tr. I:44.) The first evening of her tenancy, Suliman discovered there was no heat, and she reported to the defendant that this was a problem, especially since she had a four month old infant. (Tr. I:43,45.) For at least two weeks, there was no hot water, requiring Suliman to boil water for bathing. (Tr. I:47-48.)

Between April and August 2012, problems continued, both with the apartment and with the defendant. (Tr. I:47-55.) On multiple occasions the electricity in the victim's apartment, and only that apartment, failed without explanation. (Tr. I:52.) In July when this occurred, Suliman discovered that the electricity

worked in the building and asked the defendant to check the fuse in the basement, since the defendant was the only person with access to the padlocked basement where the fuse box was located. (Tr. I:53.) The defendant did nothing and left the building. (Tr. I:53.) On August 14, the electricity failed again in Suliman's apartment only. (Tr. I:54.) Receiving no response from the defendant, Suliman contacted police, who enlisted firefighters to cut the padlock and restore power after entering the basement. (Tr. I:52-55.)

The defendant also confronted Suliman and her small children about their Muslim faith. (Tr. I:49-51.) On an evening in May, at approximately 9:00, the defendant stood on the stairs outside of Suliman's apartment, screaming about "how Muslims are, they should be burned in hell, and how [the] prophet should be burned in hell." (Tr. I:49.) Suliman was concerned that her children would be frightened. (Tr. I:50.) In June, 2012, while Suliman was taking her baby out of the car, preparing to go into her apartment, the defendant screamed at her other children waiting on the steps, yelling that "they're wicked kids, they're evil . . . because they are Muslims, they are, they will be delivered in hell" and falsely accused the children of

causing filth. (Tr. I:51.) Suliman reported the matter to the police, partly to calm the children and help them feel safe. (Tr. 1:51.69.)

On the morning of August 28, 2012, construction workers were preparing to work on the street, and they rang door bells in the area to request that cars on the street be moved. (Tr. I:57.) After Suliman moved her car, she climbed the stairs from the first floor to the second floor, when she was confronted by the defendant at the top of the stairs outside the Defendant's second floor apartment. (Tr. I:57.) The defendant yelled at Suliman for ringing the bell, and Suliman explained about the construction work on the street and attempted to avoid further interaction. (Tr. I:57.) In response, the Defendant shouted at Suliman to "get out of my house!" then pushed her as she was at the top of the stairs. (Tr. I:57.)

Suliman fell backward, down the approximately fifteen to twenty stairs toward the first floor. (Tr. I:58.) As she fell, she struck her face on the banister, causing a bleeding and swollen lip, which was documented by photographs. (Tr. I:58-59.) Ultimately, she fell all the way to the bottom of the stairs, striking other parts of her body tearing a ligament in

her shoulder. (Tr. I:58.) During the descent, Suliman's keys flew from her hands. (Tr. I:58.) She was unable to find the keys until police arrived. (Tr. I:58.) As she fell, Suliman thought of her children who were alone in the apartment upstairs. (Tr. I:58.) The defendant returned to her apartment. (Tr. I:59.) Suliman called the police and locked herself in her apartment until they arrived. (Tr. I:59.)

When Officer Diogo DeOliveira responded shortly thereafter, he observed injuries to Suliman's face, saw that she was upset and crying, and watched her grabbing at her back. (Tr. I:71-72.) Her five children were also upset and crying. (Tr. I:72-74.) After speaking to the defendant in her apartment, DeOliveira placed her under arrest. (Tr. I:73-74.)

The Defendant's Case

The defendant cross-examined the victim about her multiple complaints to the police about the defendant and argued she was a "litigious woman trying to make a buck." (Tr. I:66, 111.) The defendant testified, claiming that the victim moved twelve people into the apartment in violation of the lease and that the complaints to police were retaliatory. (Tr. I:82-83). She testified that the victim moved out two months

before the incident, and that she never saw or heard the victim on August 28th. (Tr. I:85.)

Jury Selection

During jury selection, after questions had been posed to the venire, individual jurors questioned, and challenges for cause made, the defense attorney sought to exercise a peremptory challenge on juror number two. (Tr. I:19-21.) The Commonwealth noted that juror two, like the victim, was wearing a traditional Muslim headscarf, and challenged the peremptory based on religion. (Tr. I:21-22.) The Court agreed there was a basis for further inquiry. (Tr. I:22.)

THE COURT: I don't know the exact name (indiscernible) head covering for a woman...of Muslim faiths, and the alleged victim is of the Muslim faith. So if you are basing your challenge (indiscernible) because of her religion (indiscernible).

MR. RUBENSTEIN: Absolutely not, your Honor. I just don't...

THE COURT: Can you tell me what (indiscernible) basing your challenge.

MR. RUBENSTEIN: She does not strike me as a juror that would be sympathetic to my client. I don't...

THE COURT: She's a woman, just like your client. I don't see anything that's in the questionnaire that she would be (indiscernible) defendant.

MR. RUBENSTEIN: Well, I don't have any particular reason, just a gut feeling that she wouldn't be sympathetic to my client, and I'm exercising my peremptory based on that, your Honor, nothing to do with her religion, race, creed, or national origin.

THE COURT: I don't find that's a sufficient answer to allow a (indiscernible) challenge. And I do find that, as I stated before, it's not a permissible ground to base a challenge on (indiscernible) religion (indiscernible). So I'm going to disallow it.

MR. RUBENSTEIN: Judge, respectfully, I can exercise a preemptory (sic) challenge for pretty much any reason, and I have not, I am not exercising it based on her religion. I don't believe that -

THE COURT: You have not been able to verbalize that reason (indiscernible).

MR RUBENSTEIN: I don't need a reason.

THE COURT: You do need a reason.

MR RUBENSTEIN: A preemptory challenge can be exercised for any reason whatsoever, Judge.

THE COURT. (indiscernible).

MR RUBENSTEIN: ...It's got nothing to do with her religion. I just think she'll be overly sympathetic to the alleged victim, and -

THE COURT: Because of her religion.

MR RUBENSTEIN: No.

THE COURT: (Indiscernible) the only difference between (indiscernible) jurors.

MR RUBENSTEIN: It's -

THE COURT: So I'm not going to allow it.

(Tr. I:21-24.) The challenge was disallowed and juror two seated over the defendant's objection. (Tr. I:24.) Prior to deliberations, juror number one, seat one, was randomly selected as the alternate. (Tr. I:127-128.) The court designated juror number two as foreperson,

following the court's practice of designating the juror closest to the judge. (Tr. I:127-128, Tr. III:15-16.) The defense attorney implicitly acknowledged this practice, and the judge noted that selecting someone else would be singling out that juror for her religion. (Tr. III:16.)

ARGUMENT

I. THE TRIAL JUDGE CORRECTLY EXERCISED HIS DISCRETION IN DISALLOWING THE DEFENDANT'S PEREMPTORY CHALLENGE OF A WOMAN WEARING A TRADITIONAL MUSLIM HEADSCARF, SIMILAR TO THAT WORN BY THE VICTIM, A KNOWN MUSLIM, WHERE THE DEFENDANT OFFERED NO LEGITIMATE NON-RELIGION-BASED EXPLANATION FOR THE CHALLENGE.

The judge properly disallowed the defendant's peremptory challenge, which was clearly based on her religion, and did not abuse his discretion in concluding that the challenge was improper. There is no Massachusetts or Federal constitutional right to peremptory challenges. Commonwealth v. Wood, 389 Mass. 552, 559 (1983). See Swain v. Alabama, 380 U.S. 202, 219 (1965). "What is guaranteed by both the Sixth Amendment to the United States Constitution and Art. 12 of the Declaration of Rights of the Massachusetts Constitution is the right to be tried by an impartial jury." Wood, 389 Mass. at 559, citing Frazier v. United States, 335 U.S. 497, 505 (1948). Peremptory

challenges are based in the common law, statutes, or rules of court. Id.

"The right to use peremptory challenges . . . is not absolute." Commonwealth v. Prunty, 462 Mass. 295, 305 (2012). The exclusion of prospective jurors solely on the basis of bias presumed to derive from an individual's membership of a particular sex, race, color, creed or national origin is "prohibited by both art. 12 [of the Declaration of Rights] . . . and the equal protection clause." Commonwealth v. Issa, 466 Mass. 1, 8 (2013); Commonwealth v. Soares, 377 Mass. 461, 488-489 (1979). This prohibition applies equally to defendants and the Commonwealth. Issa, 466 Mass. at 7-8 (Commonwealth challenged juror); Prunty, 462 Mass. at 304-305 (defendant challenged juror). See also Commonwealth v. Santos, 402 Mass. 775, 788 (1988) (Commonwealth equally entitled to representative jury, unimpaired by improper peremptory challenges); Commonwealth v. Fruchtman, 418 Mass. 8, 17 (1994) (ensuring nondiscrimination to benefit both sides and protect right to serve on jury without fear of exclusion due to discrimination). Otherwise, allowing "discrimination in jury selection would undermine public confidence in the fairness of the criminal

justice system." Prunty, 462 Mass. at 305-306. It is also the obligation of the trial judge to require lawyers to refrain from religious prejudice in court proceedings. S.J.C. Rule 3:09, Canon 3(B)(6).

Though peremptory challenges are presumed to be properly made, this presumption is rebutted when there is a prima facie showing of either a pattern or a challenge of a single prospective juror within a protected class or where "there is a likelihood that a juror is being excluded from the jury solely on the basis of a group membership." Prunty, 462 Mass. at 306; Commonwealth v. Burnett, 418 Mass. 769, 770 (1994); Commonwealth v. Maldonado, 439 Mass. 460, 463 (2003) (ultimate issue not whether there is a pattern of exclusion but whether challenge impermissibly based on protected group membership). The judge may consider the circumstances, including whether the challenged person is the only member of his or her protected class in the entire venire." Issa, 466 Mass at 9; see also Commonwealth v. Fryar, 414 Mass. 732, 738 (1993) ("pattern" of one is sufficient).

In this case, the Commonwealth appropriately raised a concern that the defendant was attempting to

strike the sole Muslim juror³ on the panel due to her religion. See Prunty, 462 Mass. At 305-308. As in Prunty, where the defendant attempted to strike the sole black juror from the case where the victim was black and race was a known issue in the case, the defendant here attempted to exclude the sole Muslim juror where the victim was also Muslim, and the defendant's anti-Muslim statements were expected to be raised at trial. Id. (Tr. I:21-24.) Though the judge did not specifically use the words "prima facie" when concluding there was a basis for bias, that finding is implicit where he described on the record the circumstances for his further inquiry: that the juror wore a "head covering for a woman . . . of Muslim faiths, and the alleged victim is of the Muslim faith." (Tr. I:22.) See Commonwealth v. Carleton, 418 Mass. 773, 774 (1994) (implicit finding of improper exclusion based on national origin where judge then asked basis

³ As defense counsel pointed out, the juror had apparently not indicated a religious affiliation on her questionnaire; however, the judge noted that the juror's head covering was not just a scarf but a covering worn in a way that indicated she was a Muslim. (Tr. I:22.) Cf. Commonwealth v. Carleton, 36 Mass. App. Ct. 137, 140-142, S.C., 418 Mass. 774 (1994) (prima facie showing of exclusion based on religion or ethnicity where prosecutor challenged venirepersons with Irish-sounding surnames). Defense counsel did not contest that assessment.

for challenge). The defendant's belated attempt to describe the juror's distinctive and religiously significant head covering as a fashion accessory (D.Br. 16-17) is simply not credible and is in contrast to what was obvious to those in the court room (including defense counsel, who did not seriously dispute that the juror's head covering indicated she was a Muslim).

(Tr. I:22.)

When the judge finds a prima facie showing of bias, the burden shifts to the challenging party, who 'must provide, if possible, a neutral explanation establishing that the challenge is unrelated to the prospective juror's group affiliation.'" Burnett, 418 Mass. at 771. If the challenging party offers such reasons, the judge should specifically determine whether they were "bona fide or a mere sham." Id. The explanation "must be both adequate (i.e., clear and reasonably specific, personal to the juror and not based on the juror's group affiliation) and genuine (i.e., in fact the reason for the exercise of the challenge)". Prunty, 462 Mass. at 309 (internal quotation marks omitted).

Here, "the judge properly requested an explanation for the defendant's peremptory challenge of the only"

juror on the venire who appeared to be Muslim. Id. at 307. In response, defense counsel stated he didn't "have any particular reason, just a gut feeling" that the juror "wouldn't be sympathetic to [his] client." (Tr. I:22.) He claimed he did not need a reason, then denied that the challenge was based on race, creed or national origin. The judge stated that the defense did need a reason and failed to provide one, remarking "you have not been able to verbalize that reason," since the only difference between the challenged juror and others were that she appeared to be Muslim. (Tr.I:24.)

In Prunty, the Supreme Judicial Court noted that "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal because the party's intent largely will turn on evaluation of credibility." Prunty, 462 Mass. at 313 (internal quotations omitted). Although defense counsel stated that his peremptory challenge was motivated by nonreligious considerations, the judge was entitled to disbelieve him. See id. at 309; Commonwealth v. Curtiss, 424 Mass. 78, 82 (1997). This Court should "rely on the good judgment of the trial court", Soares, 377 Mass. at 491, and defer to the judge's ruling on

whether the permissible ground for the peremptory challenge has been shown. Prunty, 462 Mass. at 304. Accordingly, the claim that the seating of the juror was improper should be denied, and the trial judge's finding that the challenge was impermissibly based on religion should be affirmed.

II. THE TRIAL JUDGE CORRECTLY EXERCISED HIS DISCRETION IN DENYING THE DEFENDANT'S BELATED MOTION FOR RECUSAL, WHERE THE JUDGE FOUND NO BIAS AND REPORTED NO MEMORY OF THE SUBSTANCE OF PRIOR PROCEEDINGS INVOLVING THE DEFENDANT, AND WHERE ALL REFERENCES TO SUCH PRIOR MATTERS WERE RAISED AT TRIAL OR REFLECTED IN THE DEFENDANT'S BOARD OF PROBATION RECORD.

The defendant next argues that the trial judge should have recused himself because he was supposedly biased against the defendant. (D.Br. 20-25.) However, the defendant raised the issue of the judge's supposed partiality only after she had been convicted and sentenced, and that claim was focused not on the trial but on sentencing. (R.A. 5, 13-16.) The timing of the defendant's motion suggests that it was motivated by adverse sentence and the refusal of the trial judge to permit religious discrimination in jury empanelment.

A motion for recusal filed weeks after the conclusion of a trial is presumptively untimely absent a showing of good cause for its tardiness. Demoulas v.

Demoulas, 428 Mass. 543, 547 (1998). "The law is well settled that the one seeking disqualification of the judge must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." Id. at 548-549, quoting United States v. Kelly, 519 F.Supp 1029, 1050 (D.Mass. 1981). The purpose of this rule is to prevent a litigant from being able to "pull[] the recusal motion off the shelf" in a "last-minute attempt to nullify an adverse judgment." Id. at 549-550. That the trial judge had handled one of the five hearings on the victim's harassment prevention order against the defendant, and that he had presided over the civil complaint against her, was fully known to the defendant a full year prior to trial. (R.A. 9-12, S.R.A. 1-6.) In fact, the defendant referred to the small claims matter in his cross-examination of the victim, confirming that counsel knew of the proceeding; inferably, he knew or could easily have found out which judge had heard the case. (Tr. I:67.) The defendant failed to show good cause for the delay, and her motion was correctly denied.

Considered on its merits, the motion was also correctly denied. The trial judge did not abuse his

discretion when he declined to recuse himself sua sponte, either before trial or post sentencing, from handling this case. Given the untimeliness of the defendant's motion, the defendant's claim that "the judge did not search his conscience prior to hearing the trial" (D.Br. 22) -- a claim unsupported by any evidence -- rings hollow, since he was not asked to do so until after the trial. See id.

The matter of recusal is generally left to the discretion of the trial judge. Commonwealth v. Coyne, 372 Mass 599, 602 (1977). "To show that a judge abused his discretion by failing to recuse himself, a defendant ordinarily must show that the judge demonstrated a bias or prejudice arising from an extrajudicial source, and not from something learned from participation in the case." Commonwealth v. Adkinson, 442 Mass. 410, 415 (2004). See also Liteky v. United States, 510 U.S. 540, 551 (1994) ("not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant").

A judge is not required to recuse himself from hearing a case, even where the judge is the fact finder, merely because he has previously handled matters involving the same defendant or the same facts. Adkinson, 442 Mass. at 415 (trial judge handled codefendant's motion to suppress); see also Coyne, 372 Mass. at 601-603 (appellate judge handled earlier rape case). A judge must "consult first his own conscience" to determine whether he has the capacity to rule fairly at trial, then determine whether, from an objective standpoint, his impartiality might reasonably be questioned. Lena v. Commonwealth, 369 Mass 571, 575-579 (1976). For disqualification to be required, there must be evidence that a judge has considered extrajudicial sources of information. Fogarty v. Commonwealth, 406 Mass. 103, 111 (1989).

Here, nothing supports the defendant's claim that the judge was biased or that he considered extrajudicial information; accordingly, the defendant's claims of error were properly denied. The defendant claims that by handling a small claims matter in which he ruled against her, and by presiding over other matters including harassment prevention order proceedings involving the defendant and a non-

evidentiary pretrial matter for this case, the judge was impermissibly biased. (D.Br.23.) Contrary to the defendant's assertions, however, Justice Yee was not required to recuse himself simply because he had previously presided over matters involving the defendant. Commonwealth v. Foster, 77 Mass. App. Ct. 444, 448-449 (2010) (knowledge gained from independent court proceedings not extrajudicial source).

The defendant relies heavily on the judge's statement that the defendant was the "landlord from hell" because of "all the harassment protection orders that came not just from this victim but from other tenants past and present." (Tr. III:12.) This statement was in direct response to the defendant's argument in closing that the victim was "the tenant from hell" (Tr. I:110), and amounted to an adoption of the Commonwealth's argument, as supported by the jury, that "it wasn't the tenant from hell, but the landlord from hell." (Tr.I:115.) At the sentencing hearing, the defendant blamed problems upon an absent property manager and minimized the seriousness of her physical attack on the victim. (Tr. I:4.)

Furthermore, it was entirely permissible for the judge to consider the defendant's board of probation

record, which revealed multiple harassment prevention orders from several individuals who were tenants of the defendant. See Commonwealth v. Goodwin, 414 Mass. 88, 92 (1993) (prior misconduct may be considered by judge fashioning appropriate sentence). He further noted that his familiarity with the defendant was based merely on seeing her in multiple sessions of the Somerville District Court, a fact not unusual. See Foster, 77 Mass. App. Ct. at 448 (in busy district courts, individuals frequently appear before same judge). Notably, the defendant is unable to point to specific examples during trial demonstrating either that the judge acted with bias, Adkinson, 442 Mass. at 415, or considered any information from extrajudicial sources, which deprived her of a fair trial. See Commonwealth v. Gogan, 389 Mass. 255, 258-260 (1983) (record reveals no evidence judge ruled partially). Since she was afforded her right to a fair trial, the defendant's appeal should be denied.

III. THE SENTENCE AND PROBATION CONDITIONS WERE REASONABLE, WHERE THE TRIAL JUDGE IMPOSED A SENTENCE LESS THAN THE STATUTORILY ALLOWED PERIOD OF INCARCERATION AND WHERE THE PROBATION CONDITIONS -- THAT THE DEFENDANT FOLLOW CRIMINAL AND CIVIL LAWS, ATTEND A COURSE ON ISLAM AND PROVIDE A DISCLOSURE TO PROSPECTIVE TENANTS REGARDING HER MISCONDUCT -- WERE REASONABLY RELATED TO REHABILITATION AND PROTECTION OF THE PUBLIC.

The sentence imposed was fully within the statutorily permitted range of discretion, and the conditions of probation were reasonably related both to the defendant's crime and to the purposes of probation. "A judge has considerable latitude within the framework of the applicable statute to determine the appropriate individualized sentence." Commonwealth v. Goodwin, 414 Mass. 88, 92 (1993). See Commonwealth v. Celeste, 358 Mass. 307, 309-310 (1970). Justice Yee sentenced the defendant to two years in the house of correction, with the requirement that she serve six months, with the balance suspended if the defendant satisfied certain conditions. (Tr. III:9.) This sentence was, on its face, within the maximum permitted by statute, here two and one half years in the house of correction. G.L. c.265, § 13A; Goodwin, 414 Mass. at 92. Accordingly, the committed portion of the sentence must be upheld.

The defendant did not argue at the time of sentencing that the conditions of probation impermissibly infringed on her constitutional rights; therefore, this Court reviews those conditions to determine whether any error gave rise to a substantial risk of a miscarriage of justice. Commonwealth v. Gomes, 73 Mass. App. Ct. 857, 858 (2009). There was no error; the conditions of probation should be affirmed, as they are reasonably related to legitimate probationary goals.

The primary goals of probation are rehabilitation and protection of the public. Commonwealth v. LaFrance, 402 Mass. 789, 795 (1988); Gomes, 73 Mass. App. Ct. at 858. "Other recognized goals include punishment, deterrence and retribution." Commonwealth v. Power, 420 Mass. 410, 415 (1995), cert. denied, 516 U.S. 1042 (1996). Probation should be tailored to address the "particular characteristics of the defendant and the crime." Gomes, 73 Mass. App. Ct. at 859. In this case, Justice Yee clearly linked the probationary goals to the standard and two special conditions to the facts he heard at trial. (Tr. II:8.) The conditions should not be disturbed absent clear error.

The defendant's claim that the first announced condition is unconstitutionally vague is disingenuous.

The requirement that the defendant "as a condition of the suspension . . . obey all federal and state laws, including all harassment and [sic] prevention orders, all discrimination laws . . . cannot discriminate . . . [a]nd [must obey] all landlord/tenant laws" (Tr. II:9, S.R.A. 7), is merely a demand that she follow the law. The requirement to follow all local, state and federal laws is a standard condition of probation found in most probation contracts. See, e.g., Commonwealth v. Durling, 407 Mass. 108, 109 (1990); Commonwealth v. Maggio, 414 Mass. 193, 194 (1993); Commonwealth v. Delisle, 440 Mass. 137 n.7 (2003). The requirement that the defendant respect other people's rights was simply an elaboration on that requirement.

The first special condition, requiring the defendant to attend a class to learn about Islam, is also reasonably related to the probationary goals. The purpose of requiring the defendant to enroll in a course to understand Islam has a legitimate purpose of deterring future violence against those practicing Islam and encourages her to better understand others, so that she may conform her conduct to anti-discrimination laws. See Power, 420 Mass. at 413-418 (conditions affirmed even though First Amendment rights are implicated);

Commonwealth v. Ericson, 85 Mass. App. Ct. 326, 338, review denied, 469 Mass. 1103 (2014).

Nor does the condition amount to undue coercion in violation of the Establishment Clause. In order to survive an Establishment Clause challenge based on coercion, there are generally three questions: "first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?" Kerr v. Farrey, 95 F.3d 472, 479 (7th Cir. 1996). Here, it is clear that there is state action, as the condition is a court-ordered probation requirement, and the defendant would suffer consequences if she failed to complete the requirement. However, the object of the condition is not that she adopt or be discouraged from any religious practice -- or even that she attend a Muslim religious service, contrast id. at 479-480 (prison may not require attendance at Narcotics Anonymous meetings) -- but merely that she educate herself; therefore the condition neither advances nor inhibits religion. Contrast Inouye v. Kemna, 504 F.3d 705 (9th Cir. 2007) (drug treatment program required reverence and belief in higher power for successful completion).

Even if this Court were to conclude that attending a course on Islam does amount to impermissible religious coercion, the remainder of the sentence should be upheld. Commonwealth v. Pike, 428 Mass. 393, 405 (1998). In both Pike and LaFrance, where special conditions of probation were found to be invalid, the Supreme Judicial Court remanded the cases to the trial court for revision of the probation conditions while affirming the non-offending portions of the sentence. Accordingly, if the Court finds error in the special condition, the Court may remand the matter to the trial court for revision of the probation conditions.

Turning to the second special condition, the goals of public protection and deterrence of misconduct are satisfied by requiring a disclosure to tenants. Contrary to her assertion (D.Br. 34), the defendant is not precluded from earning an income or using her property. Even some financial loss, however, is not grounds to invalidate the condition. Power, 420 Mass. at 415-418. In Power, the defendant was prevented from profiting from her biography. Id. In affirming the condition, the Supreme Judicial Court held that "a special condition of probation is not subject to the same rigorous First Amendment scrutiny that is employed against a

statute of general applicability," and found the condition "reasonably related to a valid probation purpose. It serves . . . valuable punitive and deterrent purposes beyond those that would be served through the imposition of a prison sentence alone." Id. at 417. The condition here is similarly related, and should be affirmed.

Nor does the condition violate G.L. c. 6, § 172 ("CORI law") or the defendant's First Amendment rights. First, the defendant need not provide a full copy of her criminal record, only the required disclosure. Further, the information to be disclosed is of a sort that the general public would be entitled to "for up to a year following disposition, including periods of incarceration." G.L. c. 6, § 172 (4). "[M]any other conditions placing burdens on otherwise constitutionally protected First Amendment or other rights have been upheld when applied to probationers." Power, 420 Mass. at 417 n. 6. A probation condition may not only limit speech, but may also impose an affirmative speech obligation. See id., citing Goldschmitt v. State, 490 So.2d 123 (Fla. Dist. Ct. App. 1986).

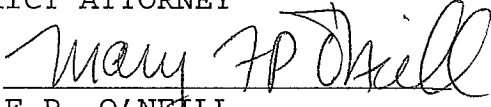
In Goldschmitt, a defendant who was convicted of drunk driving was required as a condition of probation

to post a bumper sticker when driving identifying himself as one convicted of a drunk driving offense. Id. at 125. Here, the defendant's obligation to notify tenants regarding her conviction is reasonably connected to the probationary goals of public protection and rehabilitation, as disclosing the information to tenants will provide them a means to adequately prepare in advance for the possibility of problems with the defendant, and will deter the defendant from misconduct against those who are made aware of recourse to the police and courts should such misconduct arise. There was no error. The conditions should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment and sentence should be affirmed.

Respectfully submitted,
For the Commonwealth
MARIAN T. RYAN
DISTRICT ATTORNEY

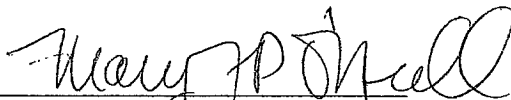
BY: 
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Dated: May 8, 2015

CERTIFICATE OF COMPLIANCE
Mass. R.A.P. 16 (k)

RE: Commonwealth v. Daisy Obi,
Appeals Court No. 14-P-326

I, Mary F.P. O'Neill, hereby certify that the brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

by: 
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Dated: May 8, 2015



MASSACHUSETTS
SOMERVILLE DC POSTING
Docket Report

EVENTS				
Date	Session	Event	Result	Resulting Judge
12/06/2012	Small Claims Magistrate Session	Magistrate Hearing	Event Continued	Farrell
12/06/2012	Small Claims Magistrate Session	Motion Hearing (CV)	Held	Farrell
02/07/2013	Small Claims Magistrate Session	Magistrate Hearing	Held	Farrell
03/14/2013	Small Claims Magistrate Session	Judge Hearing (CV)	Held	Yee
03/28/2013	Small Claims Magistrate Session	Payment Review	Not Held But Event Resolved	Tomasone
04/25/2013	Small Claims Magistrate Session	Motion Hearing (CV)	Not Held But Event Resolved	Tomasone
05/09/2013	Small Claims Magistrate Session	Motion Hearing (CV)	Not Held But Event Resolved	Farrell
05/16/2013	Small Claims Magistrate Session	Payment Review	Event Continued	Farrell
05/23/2013	Small Claims Magistrate Session	Payment Review	Held	Walker
08/29/2013	Small Claims Magistrate Session	Judge Hearing (CV)	Held	Yee

FINANCIAL DETAILS					
Date	Fees/Fines/Costs	Assessed	Paid	Dismissed	Balance
10/19/2012	Small Claims Filing Fee for claim Over \$500 but Under \$2,000 due Receipt: 13500 Date: 10/22/2012	40.00	40.00	0.00	0.00
10/19/2012	Small Claims Filing Fee Surcharge due. Receipt: 13500 Date: 10/22/2012	10.00	10.00	0.00	0.00
02/21/2013	Notice of Appeal-MGL 218 section 23, Small Claims appeal, \$25 fee Receipt: 16337 Date: 02/21/2013	25.00	25.00	0.00	0.00
Total		75.00	75.00	0.00	0.00
Date	Money on Deposit	Assessed	Paid	Dismissed	Balance
02/21/2013	Small Claims cash deposit in lieu of Appeal Bond due. Applies To: Obi, Daisy (Defendant) Receipt: 16337 Date: 02/21/2013	100.00	100.00	0.00	0.00
Total		175.00	175.00	0.00	0.00

MADE COPY
 4-6-13
Robert A. Tomasone
 Magistrate Somerville Dist. Ct.



MASSACHUSETTS
SOMERVILLE DC POSTING
Docket Report

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
BOND SMALL CLAIM	100.00			100.00
Total	100.00			100.00

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 Cas *Robert A. [Signature]*
 Magistrate Somerville Dist. 100



MASSACHUSETTS
SOMERVILLE DC POSTING
Docket Report

INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
10/19/2012	1	Statement of Small Claim entered.	
10/19/2012		Event Scheduled Event: Magistrate Hearing Date: 12/06/2012 Time: 08:30 AM	
11/30/2012	2	Filed On this date Jeffrey M Feuer, Esq. added as Private Counsel for Plaintiff Gihan Suliman	
12/06/2012	3	Filed On this date Godson Achebe Anosike, Esq. added as Private Counsel for Defendant Daisy Obi	
12/06/2012		Plaintiff's motion to amend claim is allowed (AC-M Riley) (1st session from 9:00 to 9:30). Defendant's motions to dismiss and for summary judgment are denied (M.R.Civ.P.81). Defendant's motion to continue is allowed. Notice to the parties for Event: Magistrate Hearing Date: 02/07/2013 Time: 10:00 AM (3rd session from 9:30 to 10:30)	Tomasone
12/06/2012	4	Memorandum filed by Gihan Suliman.	
02/07/2013		Magistrate Trial held (3rd session from 12:15 to 1:40)	Farrell
02/07/2013		Taken under advisement.	Farrell
02/07/2013		Judgment Entered: Judgment for Plaintiff(s) , after trial by a magistrate Farrell, William G Judgment For: Suliman, Gihan Judgment Against: Obi, Daisy Terms of Judgment: Interest Begins: 10/19/2012 Jdgmnt Date: 02/07/2013 Interest Rate: .12 Daily Interest Rate: .000329 Damages: Damage Amt: 2000.00 Filing Fees: 50.00 Damages Multiplier: Treble Punitive Damages: 4000.00 Crt Ord Atty Fee: 2100.00 Judgment Total: 8,223.04 Payment Orders: Pay total judgment amount by 03/15/2013	
02/07/2013		Notice of judgment sent to parties.	
02/15/2013	5	Filed On this date Godson Achebe Anosike, Esq. dismissed/withdrawn as Private Counsel for Defendant Daisy Obi	

877-742-2014

2.06.13. Robert A. Tomasone
Magistrate Somerville Dist. Ct.



MASSACHUSETTS
SOMERVILLE DC POSTING
Docket Report

04/08/2013	<p>Judgment Entered: Judgment for Plaintiff(s) , after trial by a judge Yee, Hon. Paul M Judgment For: Suliman, Gihan Judgment Against: Obi, Daisy Terms of Judgment: Interest Begins: 10/19/2012 Jdgmnt Date: 04/08/2013 Interest Rate: .12 Daily Interest Rate: .000329 Damages: Damage Amt: 2000.00 Filing Fees: 50.00 Further Orders: CLERK'S FINDING IS ADJUDICATED//PAYMENT REVIEW SCHEDULED 5/16/13 @ 8:30 AM Judgment Total: 2,162.52 Payment Orders: Pay total judgment amount by 05/08/2013</p>
04/11/2013	6 Motion for reconsideration filed by Daisy Obi.
04/19/2013	7 Motion to amend judgment (Uniform Small Claims Rule 8) CORRECT filed by Gihan Suliman.
04/25/2013	<p>Judgment Entered: Judgment for Plaintiff(s) , after trial by a judge Yee, Hon. Paul M Judgment For: Suliman, Gihan Judgment Against: Obi, Daisy Terms of Judgment: Interest Begins: 10/19/2012 Jdgmnt Date: 04/25/2013 Interest Rate: .12 Daily Interest Rate: .000329 Damages: Damage Amt: 2000.00 Filing Fees: 50.00 Damages Multiplier: Treble Punitive Damages: 4000.00 Crt Ord Atty Fee: 3000.00 Further Orders: CORRECTED JUDGMENT//PAYMENT REVIEW SCHEDULED 5/16/13 @ 8:30 AM Judgment Total: 9,173.70 Execution entered on 09/16/2013</p>
09/16/2013	<p>Execution Issued: Execution on Money Judgment Judgment Debtor: Obi, Daisy Judgment Creditor: Suliman, Gihan Terms of Execution: EXON Issuance Date: 09/16/2013 Judgment Total: 9,173.70 Post Judgment Int. Rate: .12 Post Judgment Int. Total: 434.61 Execution Subtotal: 9,608.31 Execution Total: 9,608.31</p>

COPIES
1/2/13
Robert P. [Signature]
Magistrate Somerville Dist. Ct.



MASSACHUSETTS
SOMERVILLE DC POSTING
Docket Report

1210SC001316
Suliman, Gihan v. Obi, Daisy

CASE TYPE: Small Claims	FILE DATE: 10/19/2012
ACTION CODE: SC501	CASE STATUS: Disposed - Statistical Purposes
DESCRIPTION: Small Claim \$501-\$2000	STATUS DATE: 02/07/2013
CASE TRACK:	CASE JUDGE:
CASE SESSION: Small Claims Magistrate	

LINKED CASE

PARTIES

Plaintiff
Suliman, Gihan

Private Counsel 546368
 Jeffrey M. Feuer
 Goldstein and Feuer
 Goldstein and Feuer
 678 Massachusetts Ave.
 Suite 702
 Cambridge, MA 02139
 Work Phone (617) 492-8473
 Added Date: 11/30/2012

Defendant
Obi, Daisy
63 Pinckney St., #2
Somerville, MA 02145

PARTY CHARGES

#	Offense Date/ Charge	Code	Town	Disposition	Disposition Date
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5/03/13

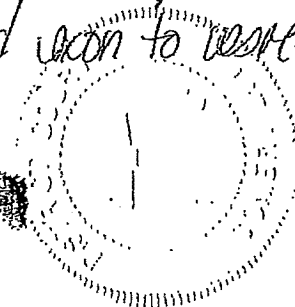
waiter
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*BP present
in full*

by

*Total balance judgement of \$7,113.70 to be paid
8/29/13 @ 9am. If total is not paid soon to resolve*

CLERK
 Robert P. Tommaso
 Magistrate Somerville Dist. Ct.



ORDER OF PROBATION CONDITIONS UPON FINDING OF GUILTY OR SUFFICIENT FACTS	<input type="checkbox"/> RISK/NEED OR OUI SUPERVISION	DOCKET NO(s). IN WHICH PROBATION WAS ORDERED
	<input type="checkbox"/> ADMINISTRATIVE SUPERVISION	2072/12
PROBATIONER'S NAME & ADDRESS	DISPOSITION	Trial Court of Massachusetts District Court Department
DRESY DBT	C. Jgrs IK SUS 6 mos to serve BAU SUS 6-2-14	Somerville District Court 175 Fellsway Somerville, MA. 02145

TO THE ABOVE-NAMED PROBATIONER: You are hereby placed on probation by this Court. Unless you are excused by your probation officer, you must appear in court on the probation end date indicated, at which time a report on your probation progress will be made. If you fail to appear on that date or any other date required, a warrant may be issued for your arrest.

PROBATION START DATE: 6-2-14
PROBATION END DATE: 6-2-15

GENERAL CONDITIONS OF PROBATION (You must comply with items 1-6 unless struck out by judge)

- Obey all court orders and all local, state and federal laws, including any support order, as defined in G.L. c. 119A, § 1A.
- Report to your probation officer at such times and places as he or she requires, and make no false statements to your probation officer.
- Notify your probation officer within 48 hours if you change residence or employment.
- Pay any ordered Probation Supervision Fees monthly or, if permitted by the court, perform community service monthly.
- Submit a DNA sample to the State Police, if required to do so by law. Register with the Sex Offender Registry, if required to do so by law.
- Sign all releases necessary for supervision and verification of compliance.

(You must also comply with items 7-9 if RISK/NEED OR OUI SUPERVISION is checked above)

- Allow the probation officer to visit you in your home with or without notice.
- Report to your probation officer within 48 hours after you are released from any incarceration.
- Do not leave Massachusetts unless you get the express permission of your probation officer and sign a waiver of rendition.

SPECIAL CONDITIONS OF PROBATION (You must also comply with all items checked below and all payments ordered)

- EMPLOYMENT/SCHOOL: Remain employed or make reasonable efforts to obtain employment or attend school, and provide verification as required.
- WORK/SCHOOL VISITS: Allow the probation officer to visit your place of employment or school with or without notice.
- SUBSTANCE ABUSE EVALUATION/TREATMENT: As directed by the probation officer, and subject to review by a judge on request, submit to and successfully complete any substance abuse evaluation, treatment and aftercare at a non-residential program. and/or a residential program.
- DRUG/ALCOHOL TESTING: Remain drug free alcohol free. Submit to random testing as required.
- MENTAL HEALTH EVALUATION/TREATMENT: Submit to evaluation Complete treatment and take medications as prescribed
- SPECIFIC PROGRAMS: Complete the following program(s), including any aftercare: Driver Alcohol Education (G. L. c. 90, § 24D) 14-Day Residential Driver Alcohol Education Certified Batterer's Intervention Anger Management Treatment Other
- HAVE NO CONTACT WITH and STAY (distance) _____ AWAY FROM: (name[s]) BOY ALL R...
- COMMUNITY SERVICE: Perform _____ hours of community service as directed by probation.
- HOME CONFINEMENT: Submit to home confinement and electronic monitoring until _____ pursuant to the schedule approved by the Court.
- OTHER CONDITIONS: 1) WRITTEN DISCLOSURE TO ALL VENUES RE ISLAMIC RELIGION

3) Report upon Release 2) ENROLL & ATTEND A COURSE RE ISLAMIC RELIGION

20. Make all FINANCIAL PAYMENTS listed below, as directed by probation.		
TYPE	AMOUNT	DUE DATE AND/OR TERMS
Counsel Fee/Contribution	\$ 150	
Default Warrant Fee	\$	
Default Warrant Arrest Fee	\$	
Court Costs	\$	
Fine/Surfine/Civil Assessment	\$	
Restitution	\$	
Victim/Witness Assessment	\$ 50	
Probation Fee & Surcharge	\$ 65	
OUI § 24D State Fee	\$	
OUI Victims Assessment	\$	
Head Injury Assessment/Surfine	\$	
Drug Analysis Fee	\$	
Batterer's Program Assessment	\$	

JUDGE'S SIGNATURE
SIGNATURE OF JUDGE
DATE: 6/2/14

INTERPRETER'S SIGNATURE
SIGNATURE OF INTERPRETER: I have translated the terms of this Order and the acknowledgment set forth above to the probationer prior to his/her signature.

PROBATIONER'S ACKNOWLEDGMENT OF ORDER
SIGNATURE OF PROBATIONER: I have read and understand the above conditions of probation and I agree to observe them. I understand that if I violate any such condition it may result in my arrest, revocation of probation, the entry of a guilty finding (if not already entered), and the imposition or execution of sentence. I have received a copy of this Order.
DATE: 6/2/14

PROBATION OFFICER'S SIGNATURE
SIGNATURE OF PROBATION OFFICER
DATE: 6/2/14

Commonwealth of Massachusetts

v.

Daisy Obi

ON APPEAL FROM JUDGMENTS OF THE SOMERVILLE DISTRICT
COURT

BRIEF AND SUPPLEMENTAL RECORD APPENDIX
FOR THE COMMONWEALTH

Middlesex County
2015 Sitting
