

Presently before the Court is the motion filed by the Defendant, James E. Cooke, seeking a new trial pursuant to Superior Court Criminal Rule 33 upon responses to *voir dire* posed individually to the array of prospective jurors. That which follows is the Court's resolution of the issues so presented.

**STATEMENT OF FACTS AND
NATURE OF THE PROCEEDINGS**

December 18, 2011 Incident

On December 18, 2011, Luz Rodriguez, who would ultimately become Juror Number 3 in the underlying action, witnessed what was purported to be a violent encounter at her residence.¹ Involved were her husband, Jose Acevedo and Valerie Cotto, the juror's twenty year-old daughter and Mr. Acevedo's stepdaughter. It is

¹ The summary of what allegedly took place on this date and during the subsequent chain of events as well as the reason therefor is based on the un rebutted testimony of Ms. Rodriguez on April 27, 2012, pleadings and other portions of the record in this case. References to the transcription of Ms. Rodriguez's testimony shall hereinafter be designated as "Hrg. Tr. at ___." Ms. Rodriguez will hereinafter be referred to as "Juror No. 3", reflecting the fact that she was the third juror selected and assigned that seat in the jury box.

alleged that on that date a verbal exchange involving name-calling began between Mr. Acevedo and Ms. Cotto.² Juror No. 3 left the room with Ms. Cotto's children after she witnessed Ms. Cotto grab a knife and threaten Mr. Acevedo with it.

The argument continued when Ms. Cotto hit Mr. Acevedo in the head twice with a frying pan. Mr. Acevedo responded by grabbing and choking her. It was at this point Juror No. 3 returned to the room in response to Mr. Acevedo's call to her. After observing what was taking place, Juror No. 3 asked Mr. Acevedo to let go of Ms. Cotto, which he did.³

Once Mr. Acevedo released her, Ms. Cotto called police and reported that Mr. Acevedo had tried to kill her. Juror No. 3 testified that while Ms. Cotto was on the phone speaking with the police, Mr. Acevedo informed her that after Juror No. 3 left the kitchen, he turned

² According to Juror No. 3, Ms. Cotto became incensed in response to comments made by Mr. Acevedo. She is alleged by Juror No. 3 to have entered the kitchen where he was located and became disrespectful as well as very aggressive towards Mr. Acevedo, calling him names and throwing things at him. Hrg. Tr. at 4.

³ *Id.* at 5-6.

away from Ms. Cotto who then hit him in the manner described above.⁴

Shortly thereafter, the police arrived at the family's residence and arrested Mr. Acevedo. Mr. Acevedo spent the night in prison but was released the following day, on December 19, after bail was posted by Juror No. 3.⁵ Ms. Cotto moved out of the family's residence later in the evening on the day of the incident.⁶

Mr. Acevedo was initially charged with strangulation, menacing and three counts of endangering the welfare of a child in the Court of Common Pleas. Because the case involved allegations of domestic violence, it was assigned for prosecution to the Family Division of the Department of Justice.⁷ On December 27, 2011, Mr. Acevedo

⁴ *Id.* According to Juror No. 3, Mr. Acevedo told her that Ms. Cotto was about to hit him a third time and that he believed the only way to prevent that was to grab her by the neck.

⁵ *Id.* at 6.

⁶ *Id.* at 8.

⁷ It appears that the Family Division is separate and apart from the unit charged with prosecuting felony trials in Superior Court to which prosecutors in this case are assigned. It also appears that the caseloads are separately maintained and prosecuted.

waived his preliminary hearing in the Court of Common Pleas and the matter was transferred to the Superior Court. There is no indication that Juror No. 3 knew about this event.

Family Court Proceedings

On February 16, 2012, an information was filed in Family Court charging Mr. Acevedo with two misdemeanors, i.e., offensive touching and menacing. The Superior Court charges against Mr. Acevedo were dismissed by the State on March 20, 2012. On March 23, 2012, the Family Court mailed a notice to Mr. Acevedo informing him that he was to be arraigned on April 11, 2012.

The Family Court set a trial date of May 7, 2012 at Mr. Acevedo's arraignment. On April 16, 2012, the Family Court mailed a written notice of the trial date to all participants and/or witnesses in the matter, including Juror No. 3. Juror No. 3 received that notice on April 25, 2012.

On May 7, 2012, Mr. Acevedo pled guilty to offensive touching and the State entered a *nolle prosequi* on the

menacing charge. Juror No. 3 attended the proceeding with Ms. Cotto. There is no evidence that Juror No. 3 mentioned her service as a juror in the *Cooke* case to any member of the staff of the Family Division of the Department of Justice or to the staff of the Family Court assigned to the prosecution of the charges against Mr. Acevedo at any time during that or related events.⁸

Voir Dire

Jury selection in the instant case commenced on February 20, 2012. At this point, the Defendant was proceeding *pro se*, having been granted permission to do so on November 30, 2011.⁹ During jury selection, the Court asked ten preliminary questions to the jury array together. Individual *voir dire* then began. Each juror, having been first sworn, was individually asked the

⁸ *Id.* at 14-15.

⁹ Messrs. Figliola and Veith were removed at the Defendant's request but were directed to assist the Defendant as standby counsel. The Defendant continued *pro se* until permission to do so was revoked because of his contumacious behavior on March 9, 2012, after the jury was selected and trial had commenced. Standby counsel then resumed active control and direction of the presentation of the defense.

following questions:

14. Have you, a relative or close friend ever been a victim of or a witness to a violent crime? If yes,
 - (a) Where, when and what type of crime?
 - (b) Were you interviewed by any member of law enforcement?
 - (c) Did the case go to court?
 - (d) What was the result?
 - (e) Were you satisfied with the result that was achieved?

15. Have you, a relative or close friend ever been charged with or convicted of a criminal offense. . . ?

16. Are you, a close friend or relative presently under investigation or prosecution by any law enforcement agency for any criminal offense?

Juror No. 3 was individually questioned on February 21, 2012 and did not refer to the December 18 incident in response to the aforementioned questions. She did, however, disclose that two of her nephews were murdered in Philadelphia, Pennsylvania approximately 10 years earlier in answering Question No. 14. The juror also acknowledged that she had some hesitation about the death penalty. Neither party challenged her for cause or used

a peremptory challenge to strike her and she was seated as a juror. The selection of twelve jurors and six alternates was completed on March 1, 2012.

**Juror No. 3's Disclosure
and Hearing in Response**

Testimony in the guilt/innocence phase of the trial began on March 7, 2012. On April 13, 2012, the jury returned verdicts of guilty against the Defendant on two counts of Murder First Degree, Rape First Degree, Burglary First Degree, two counts of Burglary Second Degree, Arson First Degree, Reckless Endangering First Degree, Robbery Second Degree and Theft. As a result of the convictions, a penalty hearing was convened and began on April 18, 2012.

On April 26, 2012, during the course of that hearing, Juror No. 3 informed the Court that she had received notice to appear as a witness in the Family Court proceeding against Mr. Acevedo the day before. This Court held a hearing in response on April 27, 2012. The purpose of the hearing was to inquire into whether the

December 18 incident involving Mr. Acevedo and Ms. Cotto had impaired, or would impair during the remainder of the proceedings, Juror No. 3's ability to serve as an impartial juror in the *Cooke* trial. Juror No. 3 again swore under oath to tell the truth.

The Court's initial inquiries pertained to Question 14 and why Juror No. 3 failed to disclose the December 18 incident in response to that question. Juror No. 3 testified that "she wasn't thinking" about the situation with her daughter because in her view all that happened on the night in question was that her husband tried to defend himself from an assault by her daughter.¹⁰ More specifically, Juror No. 3 testified that "the way she saw it, [Mr. Acevedo] was just trying to stop her from hitting him with a frying pan" and that she "never felt that [Mr. Acevedo] tried to kill her."¹¹

¹⁰ *Id.* at 15, 16.

¹¹ *Id.* at 16. The following exchange took place during the hearing:

The Court: When your husband told you that your daughter hit him a couple of times with the frying pan.

Juror No. 3: Yes.

The Court's next set of questions pertained to Juror No. 3's response to Question 15. Juror No. 3 testified that her reasoning for not disclosing the December 18 incident when asked this question was two-fold. First, she testified that she did not mention the December 18 incident because she believed that the charges against Mr. Acevedo had been withdrawn by Ms. Cotto at some point in January before jury selection began.¹² Second, she

The Court: Did you believe that to be a violent crime or a violent offense or violent act?

Juror No. 3: No. I mean, it's violence, but I wasn't thinking about that incident when I answered that question. I mean, there was a fight between my husband and my daughter, yes that was violence.

The Court: But you thought it was all done with?

Juror No. 3: Yes. It was a family thing, something bad that happened one day. . . .

Id. at 32.

¹² *Id.* at 31. The following exchange took place between the Court and Juror No. 3:

The Court: Well, some time in January she told you the charges had been dropped.

Juror No. 3: Exactly. And the same day that I spoke to you after I was selected as a juror, it's like same day I call her again and say: 'Are you sure you dropped the charges?' She

testified that she believed Ms. Cotto filed a "false claim" against Mr. Acevedo.¹³

Juror No. 3 testified that she did not learn that the charges remained open until April 11, 2012, the date of the Family Court arraignment.¹⁴ This provoked the Court to ask her a series of questions regarding her knowledge of the matter on that date. The following exchange took place between the Court and Juror No. 3 on that subject:

The Court: Now, on the day you were sequestered, which would have been the 11th, I think, did your husband say: 'Oh I've got a hearing or something?'

Juror No. 3: Yes.

The Court: Did you know anything about the hearing before the date you came up here with your bags?

Juror No. 3: No.

said: '*Yes Mommy. You have nothing to worry about.*' (emphasis added).

¹³ *Id.* at 31. Juror No. 3 testified:

[/t]o me, that was a false claim that she filed against my husband, and because supposedly [she withdrew] the charges, I thought the answer to your question was no. . . .

Id.

¹⁴ *Id.* at 12.

The Court: That's when he said something else is up or what did he tell you?

Juror No. 3: I have a hearing. It's on this such day. I said: 'Well, I [sic] going to be there anyway. I can go with you to the third floor because he doesn't speak much English.' I talk to the lady. Went to the third floor. She explained to him because you waived your right for the hearing, you don't have to be here today. You just need to come back on the date of the trial.

The Court: Now, at that point when he said he had a hearing did you say about what?

Juror No. 3: No, I read the letter so I knew it had to do with my daughter's case.

The Court: Okay. So that was the first time you knew it hadn't been dropped?

Juror No. 3: Exactly. . . .¹⁵

It is Juror No. 3's testimony that following this interaction with the Family Court, she called Ms. Cotto to ask her why the arraignment was scheduled if the charges had been withdrawn.¹⁶ Her testimony regarding that conversation is as follows:

¹⁵ *Id.* at 12-13.

¹⁶ *Id.* at 13.

Juror No. 3: Then I call her again and said: 'We got this letter again. What's going on?' And then she said: 'Well, when I spoke to them, told them I didn't want to press charges against him, they told me they were going to put his file aside and later on they were going to turn over the case to Family Court.'¹⁷

Next, the Court asked Juror No. 3 to explain her answer to Question 16. Juror No. 3 testified that she did not disclose the December 18 incident in response to this question because she believed that the charges had been dropped and that no further investigation or prosecution was pending on the matter.¹⁸ In addition, she testified that it did not become clear to her that she would be involved in ongoing proceedings, as posed by the question, until she received the notice to appear on April 25, 2012.¹⁹

The Court then asked Juror No. 3 whether the December 18 incident had affected, or would affect, her ability

¹⁷ *Id.*

¹⁸ *Id.* at 21, 32.

¹⁹ *Id.* at 12. Juror No. 3 testified that she had no contact with the police, prosecution or court officials pertaining to the December 18 incident after the preliminary hearing on December 27, until the arraignment on April 11. *Id.*

to deliberate or otherwise make decisions as a juror. She responded that it did not impair her ability to be fair and impartial towards both sides.²⁰ The specifics of that exchange are as follows:

The Court: When you voted, because it was a unanimous decision for a conviction in this case, was it based on anything other than the evidence presented?

Juror No. 3: No.

The Court: Let me ask it a different way. I want to make sure I'm really clear. Your daughter, when you walked back in or ran back in, was on the floor and your husband had her by the neck. This case it is alleged involves some strangulation. Did the fact that your daughter claimed to have been strangled or your husband had grabbed her by the throat, did that in any way affect your view of the evidence in this case?

Juror No. 3: No, because he wasn't trying to strangle her. He was just trying to stop her. If he wanted to strangle her, why did he call me to the kitchen?

The Court: Was there anything about that incident with your daughter that even made it difficult for you in any way to participate as a juror in this case?

²⁰ *Id.* at 20.

Juror No. 3: No.²¹

The Court found Juror No. 3's answers to the relevant *voir dire* questions to be "inaccurate . . . but an honest statement or belief made in good faith."²² They were not, the Court found, deliberately inaccurate or meant to deceive.²³ The Court determined that there was no cause to remove Juror No. 3 or to otherwise challenge her participation, past or continued, in the case.²⁴

The Defendant moved for a mistrial claiming that had Juror No. 3 accurately answered the relevant *voir dire* questions, he would have challenged her for cause.²⁵ The Court denied the motion on the grounds that the statements set forth by Juror No. 3 were neither deliberate nor were they of such a dimension that it would result in fundamental injustice to the Defendant.²⁶

²¹ *Id.* at 20-21.

²² *Id.* at 58.

²³ *Id.* at 79.

²⁴ *Id.*

²⁵ *Id.* at 39.

²⁶ *Id.* at 71.

The State moved to strike Juror No. 3 given her potential to be biased against it. In support of its motion, the State argued that since the State, albeit through counsel not connected to the *Cooke* case, was prosecuting Mr. Acevedo on the charges then pending in Family Court, Juror No. 3's relationship with Mr. Acevedo would tend to create bias against the State.²⁷ The Defense opposed the State's motion.²⁸

The Court questioned Juror No. 3 on this issue. The exchange went as follows:

The Court: At present there is a prosecution by your daughter or on behalf of your daughter against your husband by the State.

Juror No. 3: Yes.

The Court: If that prosecution continues, will you be able to be fair and impartial towards both the Defense and the State in this case?

Juror No. 3: Of course. I don't see a connection between one case and the other.²⁹

²⁷ *Id.* at 80, 81.

²⁸ *Id.* at 87.

²⁹ *Id.* at 90-91.

The Court was satisfied with Juror No. 3's response and determined, based upon her testimony, that she could remain fair and impartial to both parties despite the fact that the Family Court proceedings were still pending.³⁰ The Court denied the State's motion and allowed Juror No. 3 to remain a part of the panel.³¹

Remainder Of The Trial Proceedings

On May 3, 2012, the jury found that the existence of the requisite statutory aggravating factor had been established. It went on to recommend that the Defendant receive the death penalty as to Murder First Degree (Count I) and Murder First Degree (Count II) by 11 to 1 and 10 to 2 votes respectively. The Defendant filed the instant motion on May 22, 2012 seeking a new trial based upon Juror No. 3's initial responses to *voir dire* Question Nos. 14 thru 16.

³⁰ *Id.* at 91.

³¹ *Id.*

Contentions of the Parties

The Defendant contends that Juror No. 3's failure to truthfully answer the relevant *voir dire* questions interfered with his ability to properly evaluate her as a prospective juror. He argues that if Juror No. 3 had answered the relevant *voir dire* questions honestly, it would have provided the defense with a valid basis to challenge the juror for cause. Alternatively, he would have been able to exercise a peremptory challenge. Either way, the Defendant contends that he was deprived of a fair and impartial trial, and is entitled to a new trial as a result. He principally relies upon two arguments in support of his motion.

First, the Defendant contends that Juror No. 3 should have been removed because of her involvement in the resolution of the charges arising out of the confrontation between Mr. Acevedo and Ms. Cotto. He posits that because the Acevedo/Cotto case involved a strangulation as did the homicide in the instant case, that fact would taint Juror No. 3's ability to be fair and impartial beyond constitutionally acceptable limits.

He also alleges that Juror No. 3 had *ex parte* communications with representatives of the Department of Justice and was to be a witness on behalf of the State at the Acevedo/Cotto trial. The Defendant contends that such conduct also impermissibly interferes with Juror No. 3's ability to be fair and impartial.

Second, the Defendant argues that Juror No. 3's explanation for her inaccurate answers during *voir dire* was "disingenuous" and support the conclusion that she was not fair and impartial due to her interest in the outcome. He alleges that even if Juror No. 3 honestly believed that the charges against Mr. Acevedo had been withdrawn, she knew on April 11, 2012, the date of Mr. Acevedo's arraignment in Family Court, that the charges were still pending. Accordingly, the Defendant argues that it can be inferred that Juror No. 3, by failing to notify the Court of her involvement in the Acevedo/Cotto matter until April 26, 2012, was attempting to secure a favorable resolution of the charges against Mr. Acevedo

by continuing to participate as a juror in this case.³²

In response, the State claims that although Juror No. 3's answers to the relevant *voir dire* questions were inaccurate, she believed them to be true when made. The State goes on to contend that she did not have any reason to believe otherwise until April 11. Nor was Juror No. 3 able to confirm that the charges against Mr. Acevedo remained viable until receiving a subpoena on April 25, 2012. This sequence, the State contends, supports the conclusion reached by the Court when the controversy first surfaced, i.e., that there was no basis to disqualify Juror No. 3 whose responses to the *voir dire* were understandable given what she knew and when she acquired that knowledge.

The State further contends that even if Juror No. 3 had accurately answered the relevant *voir dire* questions, it is not likely that she could have been challenged for cause. The State's argument is that any bias Juror No.

³² The Defendant contends that it can be inferred from the record that Juror No. 3 was attempting to secure a dismissal of the charges from the State. Such a position would be premised on the principal that "[y]ou owe me one, I just helped to convict a murderer and recommend death." Def.'s New Trial Motion at 8-9.

3 might have had because of the Family Court proceedings being prosecuted by the State against Mr. Acevedo would have been directed against the State. Given those circumstances, the Defendant would not have suffered any prejudice from the involvement of Juror No. 3 and is not entitled to a new trial.

DISCUSSION

Standard of Review

The Sixth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution guarantee a criminal defendant the right to have his case brought before an impartial jury.³³ This right requires that jury verdicts be based solely on the evidence presented at trial.³⁴ Moreover, a defendant can be denied his Sixth Amendment right to an impartial jury if only one juror is

³³ U.S. CONST. Amend. VI; Del. CONST. Art I, § 7; *Flonnery v. State*, 778 A.2d 1044, 1052 (Del. 2001).

³⁴ *Flonnery*, 778 A.2d at 1052.

improperly influenced.³⁵ Nevertheless, there is an equally well-established general common law prohibition against impeaching jury verdicts once the jury has been discharged.³⁶ The Delaware Supreme Court has stated that a "defendant is entitled to a new trial only if the error complained of resulted in actual prejudice or so infringed upon defendant's fundamental right to a fair trial as to raise a presumption of prejudice."³⁷

A motion for new trial is governed by Superior Court Criminal Rule 33 and provides that this Court may grant a defendant a new trial if "required in the interests of justice."³⁸ Generally, the defendant must prove he was "identifiabl[y] prejudice[d]" by the juror misconduct unless the defendant can establish the existence of "egregious circumstances" that, if true, would be deemed inherently prejudicial so as to raise a presumption of

³⁵ *Massey v. State*, 541 A.2d 1254, 1257 (Del. 1988) (citing *Styler v. State*, 417 A.2d 948, 951 (Del. 1980)).

³⁶ *Massey*, 541 A.2d at 1257 (citing *McDonald v. Pless*, 238 U.S. 264, 267 (1915); *Sheeran v. State*, 526 A.2d 886, 894 (Del. 1987)).

³⁷ *Hughes v. State*, 490 A.2d 1034, 1044 (Del. 1985).

³⁸ Super. Ct. Crim. R. 33.

prejudice in favor of the defendant.³⁹ Rule 33 requires a motion for new trial to be served no later than seven days after a verdict is announced, unless, within that time, the Court grants an extension.⁴⁰

Juror Impartiality And *Voir Dire*

The accused has a fundamental right to a fair trial and an impartial jury.⁴¹ The accused's right to be tried by a jury of his or her peers is fundamental to the criminal justice system in America.⁴² An essential

³⁹ *Massey*, 541 A.2d at 1257 (internal citations omitted). Conduct that has been deemed presumptively prejudicial includes:

(1) a bailiff's comment to jurors that relates to the content or procedure of the deliberations; (2) a bailiff's comments to the jurors that expresses his view of the evidence; and (3) when jurors are made aware of information, not introduced at trial, that relates to the facts of the case or the character of the defendant.

Redden v. State, No. 0701015161, 2010 WL 893685, at *1 (internal citations omitted).

⁴⁰ The Court granted an extension of time for filing the instant motion until May 21, 2012. Therefore, the Defendant's motion is timely filed.

⁴¹ *Flonnelly*, 778 A.2d at 1051-52.

⁴² *Banther v. State*, 823 A.2d 467, 481 (Del. 2003) (hereinafter *Banther II*).

ingredient to that right is that the jury consists of neutral and unbiased jurors.⁴³

Voir dire is the historic method used to identify bias in prospective jurors and serves a critical function in protecting a defendant's right to a fair trial by an impartial jury.⁴⁴ The purpose of *voir dire* examination is to provide the Court and the parties with "sufficient information to decide whether prospective jurors can render an impartial verdict based on the evidence developed at trial in accordance with the applicable law."⁴⁵ The right to challenge a jury during *voir dire*, either peremptorily or for cause, is a primary safeguard to the right to trial by an impartial jury.⁴⁶ That right is compromised when a juror fails to disclose material information during *voir dire*.⁴⁷

⁴³ *Hughes*, 490 A.2d at 1040.

⁴⁴ *Banther II*, 823 A.2d at 481-82 (citing *Diaz v. State*, 743 A.2d 1166, 1172 (Del. 1999)).

⁴⁵ *Hughes*, 490 A.2d at 1041 (citing *Parson v. State*, 275 A.2d 777, 780 (Del. 1971)).

⁴⁶ *Jackson*, 374 A.2d at 2 (Del. 1977).

⁴⁷ *Id.*

Delaware courts have adopted the test promulgated by the United States Supreme Court in *McDonough Power Equipment, Inc. v. Greenwood* (hereinafter "*Greenwood*")⁴⁸ for determining whether a new trial should be granted in the interests of justice based upon a juror's failure to disclose information during *voir dire*.⁴⁹

In *Greenwood*, it was discovered that a juror in a three week products liability trial had not answered a *voir dire* question correctly concerning prior injury to an immediate member of his family. The defendant prevailed and the plaintiff ultimately moved for a new trial. He argued that his right to exercise peremptory challenges had been denied when the juror failed to respond to *voir dire* which was designed to elicit the information not disclosed.⁵⁰ The opinion is silent as to why information was withheld. The United States District Court for the District of Kansas denied that motion but

⁴⁸ 464 U.S. 548 (plurality opinion).

⁴⁹ *Banther II*, 823 A.2d at 484 (citing *Greenwood*, 464 U.S. at 555-56).

⁵⁰ *Greenwood*, 464 U.S. at 550.

was reversed by the United States Court of Appeals for the Tenth Circuit.

The United States Supreme Court agreed with the District Court and reversed the decision by the Court of Appeals, holding that:

To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. . . . We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.⁵¹

The matter was then remanded back to the District Court for a hearing to determine whether a new trial was warranted.⁵²

The Supreme Court's holding in *Greenwood* mandated

⁵¹ *Id.* at 555-556.

⁵² *Id.* at 556.

that a complaining party establish the aforementioned three factors or the challenge fails. In terms of the first prong, the complaining party must show that a juror's response during *voir dire* was dishonest, meaning intentionally false. The second prong of the *Greenwood* test is that the dishonest answer must have pertained to a material *voir dire* question.⁵³ The third prong of the *Greenwood* test requires that the correct or truthful response must have provided a valid basis for a challenge for cause.⁵⁴

In assessing a juror's honesty during *voir dire*, the trial judge's determination is entitled to "special deference."⁵⁵ The rationale behind this position is that there is "no doubt that it is the judge who is best situated to determine competency to serve impartially."⁵⁶

⁵³ *Id.* To establish reversible error in cases involving inadvertent nondisclosure, a defendant must demonstrate that "a juror failed to answer honestly a material question on *voir dire*. . . ." See *Banther v. State*, 783 A.2d 1287, 1290 (Del. 2001) (hereinafter *Banther I*) (quoting *Greenwood*, 464 U.S. at 556).

⁵⁴ *Id.*

⁵⁵ *Patton v. Yount*, 467 U.S. 1025, 1038 (1984).

⁵⁶ *Hughes*, 490 A.2d at 1043.

The *Greenwood* Court also held that an honest yet mistaken answer to a *voir dire* question rarely amounts to a federal constitutional violation.⁵⁷ If the moving party can establish the existence of these three factors, the interests of justice mandate that a new trial should be granted.⁵⁸

***Greenwood* Factors**

Materiality of *Voir Dire* Responses

There is little doubt that Questions 14, 15 and 16 were material to jury selection and therefore critical for purposes of providing a fair trial for the Defendant. The questions focus on the prospective juror, a relative or close friend and sought to elicit responses pertaining to being the victim or a witness of a violent crime, being charged or convicted of a criminal offense or presently being under investigation or prosecution by law enforcement for a criminal offense. Clearly, in a

⁵⁷ *Smallwood v. State*, 812 A.2d 1141 (TABLE), No. 154, 2002 at *2 (Del.) (citing *Greenwood*, 446 U.S. at 555-56).

⁵⁸ *Id.*

capital murder case, any other conclusion is untenable. The materiality prong of *Greenwood* is therefore established.

Character of *Voir Dire* Responses

After presiding over the Defendant's trial and reviewing the record of those proceedings, two conclusions are readily apparent. The first is that Juror No. 3 answered Questions Nos. 14, 15 and 16 incorrectly. Hindsight reveals that she was related to an alleged victim of a violent crime, Ms. Cotto. It further reveals that she was related to someone who had been charged and was being prosecuted for a criminal offense, Mr. Acevedo. The second is her failure to correctly answer the *voir dire* questions in that regard was not intentional and/or otherwise committed with a mental state that would suggest any improper purpose or motive. The relevant facts in this regard are not in substantial dispute. There was a verbal exchange between Mr. Acevedo and Ms. Cotto which led to a physical confrontation between those two on December 18, 2011. It

was witnessed, at least in part, by Juror No. 3 and took place in the home then occupied by all three. According to Juror No. 3, Ms. Cotto first hit Mr. Acevedo who retaliated by grabbing and choking her. The incident ended at the direction of Juror No. 3.

Ms. Cotto called the police and filed charges against Mr. Acevedo. However, there was an apparent reconciliation between them and Ms. Cotto informed Juror No. 3 at some unknown point in January 2012 that she would not pursue the charges.⁵⁹ This exchange clearly took place prior to the start of the selection of the jury in this case on February 20 and the individual *voir dire* of Juror No. 3 on February 21.

Juror No. 3 had no involvement in the initiation or prosecution of the charges against Mr. Acevedo nor did she have any contact with anyone associated therewith until April 11. It was at that point that she was informed of and attended the arraignment of Mr. Acevedo on two misdemeanor charges (initially brought as felonies) because of his difficulties with the English

⁵⁹ Hrg. Tr. at 8-10.

language. After attending that proceeding, Juror No. 3 again asked Ms. Cotto about the continued viability of the charges arising out of the December 18 incident and was again informed that the charges would not be pursued and/or would be dropped.

Juror No. 3 had no contact or information to the contrary until April 25, 2012, when she received a subpoena to testify at Mr. Acevedo's trial in Family Court on May 7. She notified this Court and counsel of what had taken place the next day. No connection between Juror No. 3 and the Acevedo/Cotto matter had been otherwise brought to the attention of this Court by or from any other source.⁶⁰

There is no indication that Juror No. 3 was intentionally deceptive at any point in her responses to the *voir dire*, in bringing the matter to the attention of the Court or in testifying before Court about her involvement in the Acevedo/Cotto matter. The Court found

⁶⁰ The Court further notes that Juror No. 3, Ms. Cotto and Mr. Acevedo all used different surnames even though Juror No. 3 and Mr. Acevedo were married. That fact alone would have made it very difficult to establish any link between the Acevedo/Cotto charges and this case unless Juror No. 3 came forward.

her to be candid and credible in her responses to the questions posed in those regards. While she might have been mistaken relative to the existence and/or status of the charges against Mr. Acevedo, her beliefs were reasonable given what she had been told. She also had no access to any information which would have told her that her view of the situation was mistaken.

The Court's view of Juror No. 3's candor and credibility applies as well to her testimony that she had been and could continue to be fair and impartial as a juror in addressing the charges against the instant Defendant. Nor has the Defendant pointed to any evidence or made any argument that would negate the Court's view of the continued viability of Juror No. 3's involvement herein. The Defendant's contention that Juror No. 3 was disingenuous in her answers to *voir dire* questions at issue is simply unsupported by the record or any other source of information concerning the case.

There is nothing to indicate that Juror No. 3 had any contact with anyone regarding the charges against Mr. Acevedo or sought to obtain a favorable resolution of

them. Moreover, the Defendant's argument ignores Juror No. 3's post April 11 contact with Ms. Cotto and the information conveyed by the latter concerning the charges against Mr. Acevedo. It also ignores the fact that Juror No. 3 promptly came forward as soon as she received formal notice (on April 25) that the charges against Mr. Acevedo were going forward on May 7.

**Responses To Voir Dire
As A Challenge For Cause**

The Defendant has argued that had Juror No. 3 answered the questions accurately, there would have been a valid basis to challenge her for cause. The final prong of the *Greenwood* test, he argues, has therefore been established. He is mistaken for several reasons.

First, in response to Question 14, which inquired into whether the prospective juror, a relative or close friend had ever been the victim or a witness to a violent crime, Juror No. 3 disclosed that approximately ten years prior to the instant matter, two of her nephews were murdered in Philadelphia, Pennsylvania. However, Juror

No. 3 also stated that said tragedy would not influence her in favor of one side or the other or impair her ability to be fair and impartial. Apparently the Defendant and the State believed that affirmation because neither asked the Court to remove her for cause. Nor did either exercise a peremptory challenge against her.

The loss of her nephews was clearly a more significant event than the Acevedo/Cotto incident, which at the time of the *voir dire*, had been reduced to menacing and offensive touching, both misdemeanors. It is equally apparent, based upon her testimony, that Juror No. 3 viewed the incident and/or any charges resulting therefrom to be lacking in substance as well as credibility. She also saw no connection between the Acevedo charges and Juror No. 3's association with the participants in that matter, and the crimes with which this Defendant was charged. However they are viewed, correct responses to *voir dire* Questions 14-16 would not have constituted "cause" given the sum totality of the existing circumstances.

The Court also notes that Juror No. 3 testified on

April 27 that the pendency of the charges against Mr. Acevedo had no affect upon her impartiality up to that point in the trial and would have none for the remainder of the proceedings. Again, the Court found her to be both candid and credible and the Defendant has again failed to present or reference any evidence to the contrary. He can not as a result, persuasively argue that there was a basis to challenge Juror No. 3 for cause.

Second, it is evident at this stage of the proceedings that if Juror No. 3 had accurately answered the relevant *voir dire* questions, it is the State, not the Defendant, that had the greater concern regarding her ability to be fair and impartial once she found out that the prosecution of the charges against Mr. Acevedo was continuing. Simply put, it was the State, albeit a different division thereof, that was prosecuting Juror No. 3's husband, not the Defendant. Any sympathy would therefore go to the Defendant, which is the argument that the State made on April 27 at the conclusion of Juror No. 3's testimony.

Third, and most significantly, when the State moved to have Juror No. 3 removed from the jury for the remainder of the penalty hearing after she disclosed that she had inaccurately answered the relevant *voir dire* questions, the Defendant objected. He argued instead that she should be allowed to participate in making a recommendation to the Court whether the Defendant should receive the death penalty or a mandatory life sentence.⁶¹ It appears that any bias that might result from the *Acevedo/Cotto* trial in Family Court, the Defendant felt would be against the State, not the Defendant, for continuing to prosecute what Juror No. 3 deemed to be a case without merit that the complaining witness did not wish to pursue.

Juror No. 3 also testified that she could follow the law and impose the death penalty if warranted based solely upon the facts and circumstances of the case. She

⁶¹ Curiously, the Defendant took this position after his motion for a mistrial had been denied. Apparently, the defendant felt that regardless of whatever pallor her misstatements during *voir dire* cast over the integrity of the trial up to that point in time, Juror No. 3 was not so tainted as to be prohibited from offering advice to the Court concerning whether the Defendant should live or die.

indicated that she could do so even though she had misgivings about the propriety of the death penalty. Notwithstanding her statements in that regard, the Defendant did not find her to be objectionable and she was seated as a juror. The Court will not reach a contrary conclusion solely based on unintended misstatements made in good faith about a misdemeanor prosecution the juror believed to be groundless. The Defendant's argument at this point in the process is self-serving and/or suspect at best.

Viewing the record in its entirety, there is no credible proof that Juror No. 3's impartiality was affected, adversely or otherwise, by the incident on December 18 or any of the related proceedings that followed. As noted above, *Greenwood* mandates a three prong test for determining whether a new trial should be ordered where there are alleged to have been inaccurate/incorrect answers to *voir dire* questions. No matter how it is viewed, the Defendant can only establish the existence of one part, i.e., the inaccuracy pertained to a material *voir dire* question. He has failed to

establish the other two parts of the test - that the juror's response was intentionally false and that a correct response would have provided a valid basis for a challenge for cause.⁶² That failure is fatal to the Defendant's quest for a new trial.⁶³

⁶² *Id.* at 556.

⁶³ *See Banther*, 823 A.2d at 484 (*citing Greenwood*, 464 U.S. at 555-56).

CONCLUSION

For the foregoing reasons, the Court does not find that the Defendant, based upon Juror No. 3's responses to the *voir dire* under all the circumstances that existed and in light of the applicable law, is entitled to a new trial pursuant to Superior Court Criminal Rule 33. Accordingly, the Defendant's motion for a new trial, must be, and hereby is, **denied**.

IT IS SO ORDERED.

TOLIVER, JUDGE