UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA PLAINTIFF

v. CRIMINAL ACTION NO. 3:98CR-35-S

BRENNAN JAMES CALLAN DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the court on a renewed motion by the defendant, Brennan James Callan, to contact the jurors in this case by letter pursuant to Local Rule 47.1.

Rule 606(b) of the Federal Rules of Evidence provides that, upon an inquiry into the validity of a verdict, a juror may not testify regarding the deliberation process or the jurors' mental processes or emotions in connection with the verdict. However, a juror may testify regarding whether extraneous prejudicial information was improperly brought to the jury's attention.[1] The cover letter that the defendant wishes to send proposes that jurors be contacted concerning the "jury deliberation process." Under Rule 606(b), juror testimony on this topic is prohibited.

In his renewed motion, however, the defendant states that he wishes to inquire whether the jury had "extraneous prejudicial information." The defendant claims that Juror #55 was a musician in a band which played on the Belle of Louisville on at least two occasions during Saturday night cruises. *See United States v. Herndon*, 156 F.3d 629, 636 (6th Cir. 1998) (defining extraneous influence). Although information regarding Juror #55's band membership is not in the record of this case, we will assume it is true for purposes of this opinion.

The defendant claims that Juror #55 failed to disclose this information.

[1]A juror may also testify whether any outside influence was improperly brought to bear upon any juror. FED. R. EVID. 606(b). However, outside influence is not in contention in this case.

By agreement of the parties, a questionnaire was sent to all prospective jurors in this case. This questionnaire was returned and available for the parties' use a number of days before the trial began. Furthermore, during jury selection, the attorneys had the opportunity to suggest additional questions for the court to ask the jurors.

Juror #55 answered all of the questions in the questionnaire. It is not contended that his answers were incorrect. He disclosed that he had been on the Belle ten or more times in the years preceding the trial and that he was acquainted with a Belle staff member. All but one of the jurors who sat in this case disclosed on the questionnaire that they had been on the Belle. Three of those jurors had been on the Belle six or more times. None of those jurors, including Juror #55, were asked, in the questionnaire or at the suggestion of the parties during the jury selection process, why they had been on the Belle many times or in what context they had ridden on the Belle. *See Salinas v. Rodriguez*, 963 F.2d 791 (5th Cir. 1992). The jurors were not asked whether they had ever worked on the Belle, although there was ample opportunity for such questioning both before and during the jury selection process.

In the questionnaire, Juror #55 was asked a "wrap-up" question that inquired: "Is there any additional information about you that the Court should know?" Although Juror #55 did not mention playing in a band on the Belle in response to this question, Juror #55's response was appropriate. Prospective jurors are given only minimal information regarding the nature of the litigation. They are not expected to predict the strategies the parties will use during litigation and to pose questions of themselves touching upon those strategies. It is the jurors' responsibility to answer those questions they are asked. It is the attorneys' responsibility to propose what those questions will be. Since no one asked Juror #55 why he had been on the Belle or if he had ever worked on the boat, he cannot be faulted for not asking himself, and then answering, those questions unprompted.

Despite innuendo to the contrary, Juror #55 performed his duties as a juror correctly and with integrity.

The defendant now proposes to talk to the jurors about potential "extraneous prejudicial information." He suggests that such information may have been introduced to the jury by Juror #55 because Juror #55 may have had knowledge of the procedure and time frame for employees leaving the boat after cruises and knowledge of the procedure used by band members to carry equipment off the boat at the end of a cruise. There is no evidence tending to show this happened, only the defendant's surmise. The request must be analyzed in the context of the facts that were actually in contention during the trial. The physical layout of the boat was not disputed. The configuration of the boat's plumbing system was not disputed. The timing and the cause of the sinking were not disputed. All of the evidence, including photographs, drawings, and diagrams of the Belle, was admitted without objection or admitted over an objection that did not pertain to the accuracy of the exhibit. Rather, the defendant contended at trial that he did not sink the Belle because he was at home when the water valve was opened. He also disputed evidence of motive. Therefore, even if Juror #55 had acquired knowledge of the timing and procedure for employees leaving the boat, this would not have prejudiced the defendant since there was no factual issue raised at trial regarding this matter.

A review of other court decisions in similar situations reveals that requests such as the defendant's are granted only when a substantial showing is made that prejudicial information was improperly conveyed to the jury. *See Green Construction Co. v. Kansas Power & Light Co.*, 1 F.3d 1005 (10th Cir. 1993); *United States v. Gravely*, 840 F.2d 1156 (4th Cir. 1988); *United States v. Davila*, 704 F.2d 749 (5th Cir. 1983); *King v. United States*, 576 F.2d 432 (2nd Cir. 1978); *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304 (5th Cir. 1977). It is not enough that the information be extraneous to the contentions made at trial; it must also be prejudicial. Therefore, even if Juror #55 had introduced extraneous information to the jury, he has made no showing that such information prejudiced him, nor has the defendant shown any likelihood that such a showing could be made with the inquiry he proposes.

When a defendant claims extraneous influence, a trial court may be required to hold a "*Remmer*" hearing to determine juror bias or misconduct. *Remmer v. United States*, 347 U.S. 227 (1954). A hearing is only required, however, when the alleged contact presents a likelihood of affecting the verdict. *United States v. Frost*, 125 F.3d 346, 377 (6th Cir. 1997). Furthermore, the defendant must prove that the unauthorized contact created actual juror bias; the trial court should not presume that a contact was prejudicial. *United States v. Maxwell*, 160 F.3d 1071, 1077 (6th Cir. 1998); *United States v. Frost*, 125 F.3d 346, 377 (6th Cir. 1997).

Juror #55 is not alleged to have had any inappropriate contact or communication with outside sources during the trial. Furthermore, the defendant has not shown that any information Juror #55 might have possessed was prejudicial. *See Maxwell*, 160 F.3d at 1077; *Frost*, 125 F.3d at 377. Accordingly, a *Remmer* hearing is not necessary in this case.

We have previously characterized the defendant's request as a "fishing expedition." *See Tschira v. Willingham*, 135 F.3d 1077, 1088 (6th Cir. 1998), *quoting United States v. Davila*, 704 F.2d 749, 754 (5th Cir. 1983). Although *Tschira v. Willingham* involved a request for interrogating the jury, rather than simply contacting them, the analogy is appropriate here because the defendant's request is justified only by supposition built upon innuendo. *Tschira v. Willingham*, 135 F.3d 1077, 1088 (6th Cir. 1998), *quoting United States v. Davila*, 704 F.2d 749, 754 (5th Cir. 1983). Accordingly, the defendant's renewed motion to contact the jurors in this case is **DENIED**.

IT IS SO ORDERED this _____ day of _____, 1998.

_____

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record