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STATE OF CONNECTICUT *v.* RICHARD
SANTOS, JR.
(AC 31071)

Gruendel, Beach and Borden, Js.

Argued February 20—officially released November 5, 2013

(Appeal from Superior Court, judicial district of New
Haven, Holden, J.)

Heather M. Wood, assistant public defender, for the
appellant (defendant).

Timothy F. Costello, assistant state's attorney, with
whom, on the brief, were *Michael Dearington*, state's
attorney, and *Stacey M. Miranda*, senior assistant
state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Richard Santos, Jr., appeals from the judgment of conviction, rendered after a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1); unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a); and carrying a dangerous instrument in violation of General Statutes § 53-206 (a). On appeal, the defendant claims that (1) his right to confront an adverse witness was compromised by the trial court's limitations on the disclosure and use of that witness' psychiatric records, and (2) the court erred by denying his motion to dismiss or, in the alternative, his request for an adverse inference instruction, because purportedly material evidence was unavailable. We disagree with both claims, and, accordingly, affirm the judgment of the court.

The record reveals the following relevant facts and procedural history. In the early morning hours of February 3, 2007, a stabbing occurred at 79 Foster Street, a red brick crack house in Meriden. The house was being rented to E.P.,¹ the so-called "landlord" of the premises, who had resided there for seven years. The defendant had been staying in a room on the second floor for about six weeks. Drug addicts and dealers were frequent visitors to 79 Foster Street. The dealers would give E.P. crack cocaine in exchange for access to his chemically dependent houseguests. As the defendant described the scene: it was "[a] house where you can go get high and stay over the night; if you had drugs, the door was going to open."

During the winter of 2007, E.P. was "extremely dependent" on crack. On the day the stabbing occurred, he had been getting high for about twenty-four hours straight, taking breaks only to sleep. The defendant, likewise, had been smoking crack for several days straight and, consequently, was "[t]ired, exhausted, paranoid, [and] cracked out."

Kewon Potts had been hanging out at 79 Foster Street on the afternoon of February 2, 2007, and had had an argument with the defendant over what the defendant perceived to be a low offer by Potts to buy a large crack rock. The defendant apparently also had taken issue with Potts' poor treatment of Potts' girlfriend, who spent time at 79 Foster Street. After the argument, Potts left. Later that day, the defendant said of Potts that, if he returned, "there might be trouble."

At about 1 a.m., Potts was walking home from a friend's house on the corner of Foster and Lincoln Streets when he passed 79 Foster Street. E.P. and the defendant, who were on the porch, called out to Potts to come inside. Potts was led into the house; E.P. immediately barricaded the door. The defendant pulled a folding knife that he frequently carried and began

attacking Potts, ultimately stabbing him in the head, left arm and chest. The struggle moved from the living room into the kitchen. Once there, E.P. blocked the back door, wielding a large rock as a weapon. The two men then attempted to force Potts into the basement. At this point, Potts' girlfriend burst into the kitchen and pleaded with E.P. and the defendant to stop.

The other persons present at 79 Foster Street became aware of the violent altercation and panicked; many fled the scene. In the midst of this chaos, E.P. and the defendant were distracted, and Potts was able to escape out the back door. He made his way to the driveway and then collapsed.

The defendant and E.P. left quickly thereafter. E.P. went to his mother's home in New Haven. The defendant went to Alberta Borelli's house, where his girlfriend, Mala Meekins, was staying. While there, the defendant made several telephone calls in which he stated that he had stabbed someone. E.P. and the defendant spoke by telephone from their respective locations after seeing local news reports of Potts' stabbing. The defendant was nervous because he thought he may have killed Potts. E.P. informed the defendant that Potts was alive, but in critical condition. The defendant later traveled to Michigan, where he discarded the knife.

The defendant was arrested and charged, by way of substitute information, with three counts: assault in the first degree, unlawful restraint in the first degree and possession of a dangerous instrument.²

E.P. was a witness for the state. Before trial commenced, the defendant filed a motion seeking in camera review of E.P.'s psychiatric records, which were in the possession of the Department of Correction.³ The court granted the defendant's motion and reviewed the records after E.P.'s direct testimony had concluded. Four pages from the records were disclosed to the defendant. Defense counsel requested a continuance to research the mental disorders that the disclosed records indicated E.P. had been diagnosed with. To accommodate this request, the state agreed to take two of its witnesses out of order so that the majority of E.P.'s cross-examination could be postponed until the next day, giving defense counsel the evening to prepare.⁴

In advance of defense counsel's cross-examination regarding E.P.'s mental health issues, the court defined the parameters of permissible use of the records. The court's position was, essentially, that such issues did not afford defense counsel the "opportunity to [conduct] a full scale assault on that condition." Accordingly, the court prohibited defense counsel from sharing the records with a social worker or any other mental health expert. The court did state that if there was a need to reconsider that decision in light of the testimony, it would do so.

The following morning, after defense counsel had had the opportunity to review the disclosed records, she noted that she had had difficulty deciphering certain abbreviations and notations in the records. She was able to discern from the records that E.P. had a history of experiencing auditory hallucinations. Defense counsel reiterated her request for permission to review the records with a mental health expert, asserting that, without such assistance, the records were “meaningless” The court denied that request, and further stated that it was considering vacating its earlier order disclosing the records. Defense counsel argued that the court’s ruling would deny her client the right to effective assistance of counsel, his right to present a defense and his right to confront adverse witnesses. She therefore asked the court to strike E.P.’s testimony. That motion also was denied by the court.

The defendant then made an offer of proof, in which E.P. answered questions from defense counsel related to the disclosed records. Following the offer of proof, the court finalized the scope of questioning it would allow related to the mental health disclosure. The court agreed to permit testimony with respect to the medications E.P. was taking at the time of the incident and on the day of his testimony; any mental illnesses with which E.P. had been diagnosed, and whether he was affected by them on February 3, 2007, or during his testimony; and whether he was experiencing auditory or visual hallucinations on the day that Potts was stabbed. The court declined to permit cross-examination on whether E.P.’s mental illnesses had affected his thought processes at any other time.

Accordingly, E.P. testified that he had been diagnosed with schizoaffective disorder and bipolar disorder. He further stated that he was presently taking Lithium, Ativan, Abilify and Trazodone to treat these disorders. E.P. testified that he took these medications every day. The medication did not, according to E.P., affect his ability to perceive or remember. With respect to the time of the Foster Street stabbing, E.P. asserted that, although he had not been taking medication, he had not experienced symptoms from either of the disorders and did not suffer from hallucinations at that time.

After concluding her questioning related to E.P.’s mental health issues, defense counsel impeached his earlier testimony by raising other credibility issues. E.P. conceded that he had been “mis-telling” the police what occurred on February 3, 2007, when he was initially interviewed, about six weeks after the incident. At that time, he gave a statement that he had not witnessed the stabbing of Potts. E.P. additionally admitted that he hoped his testimony would result in a favorable modification of his sentence.

Thereafter, the defendant testified in his own defense.

He admitted that he had fought with Potts, and that he had hit him in the face, kicked him in the groin and “stomped him.” “When I fight,” the defendant explained, “I try, at all odds, to win” He admitted that he always carried a knife, but stated that he could not remember if he was carrying it that day. He also conceded that Potts started bleeding at some point, which caused the defendant to panic and flee from the house because, in the defendant’s words, “wherever there’s blood, there’s trouble.”

In her closing argument, the defendant’s attorney characterized her client’s version of events as follows: “[H]e’s taking responsibility for what he did, for his actions, for what he remembers.” Defense counsel did not deny that the defendant had stabbed Potts; instead, she summarized the crux of his testimony as: “I don’t know whether I stabbed Mr. Potts.”

The jury found the defendant guilty on all charges. The court imposed a total effective sentence of fifteen years incarceration, suspended after twelve years, followed by three years probation. This appeal followed.

I

The defendant first claims that his sixth amendment right to confrontation of adverse witnesses was infringed by the extent of the court’s limited disclosure of E.P.’s psychiatric records, certain limitations the court imposed on the scope of E.P.’s cross-examination and its denial of the defendant’s request to enlist the assistance of an expert in interpreting the disclosed records. The defendant relatedly claims that the court erred by precluding his trial counsel from sharing the disclosed records with a mental health professional to prepare for cross-examination. We conclude that any error was harmless.

“A criminal defendant has a constitutional right to cross-examine the state’s witnesses, which may include impeaching or discrediting them by attempting to reveal to the jury the witnesses’ biases, prejudices or ulterior motives, or facts bearing on the witnesses’ reliability, credibility, or sense of perception. . . . Thus, in some instances, otherwise privileged records . . . must give way to a criminal defendant’s constitutional right to reveal to the jury facts about a witness’ mental condition that may reasonably affect that witness’ credibility.” (Citations omitted.) *State v. Slimskey*, 257 Conn. 842, 853–54, 779 A.2d 723 (2001).

Any error in the limited disclosure of E.P.’s psychiatric records was harmless. When a claim regarding an evidentiary ruling is of constitutional magnitude, the state has the burden of proving that the constitutional error was harmless beyond a reasonable doubt. *State v. Dehaney*, 261 Conn. 336, 355 n.12, 803 A.2d 267 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003). “Whether a constitutional violation is

harmless in a particular case depends upon the totality of the evidence presented at trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial." (Citation omitted; internal quotation marks omitted.) *State v. Madigosky*, 291 Conn. 28, 45, 966 A.2d 730 (2009).

The state argues that any error was harmless because it "presented a strong case involving multiple independent eyewitnesses who corroborated E.P.'s testimony that the defendant stabbed Potts" We conclude that the state has met its burden in proving that any error was harmless.

Several eyewitnesses testified that the defendant stabbed Potts. Frederick Elbert testified that on the morning in question, while he was upstairs he heard a commotion downstairs. He ran downstairs to the kitchen and saw the defendant stabbing Potts. Jolie Shelton testified that she saw the defendant and Potts wrestling in the kitchen and, afterward, saw blood where the encounter had occurred. Potts testified that the defendant stabbed him seven times, and he showed the jury his scars. Additionally, Meekins testified that she allowed the defendant to come to the house where she was staying on February 3, 2007, because he "had did something bad" and "needed some place to go" While the defendant was there, Meekins overheard him call "five or six people" to tell them that he had stabbed someone. She also noticed specks of blood on the defendant's white sneakers. The following day, Meekins saw the defendant with a folding knife. See *State v. Madigosky*, supra, 291 Conn. 45 (harmlessness analysis should consider "whether the testimony was cumulative, [and] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points" [internal quotation marks omitted]).

The defendant's testimony was damaging to his case. In his testimony, the defendant admitted to participating in a serious assault of Potts. The defendant admitted to stomping and kicking Potts, and stated that he was fighting "to win" He further testified that he always carried a knife, but that he could not recall whether it was in his possession that day. When the defendant noticed that Potts was bleeding, he sensed

trouble and fled. As defense counsel put it in closing argument, the defendant was willing to take responsibility for what he remembered doing to Potts. As to whether he stabbed Potts, the defendant did not deny stabbing him, nor did he accuse E.P.; he simply claimed not to remember stabbing Potts.

The defendant was able to cross-examine E.P. about his mental illness to some extent. As noted previously, the jury heard evidence regarding his history of schizoaffective disorder and bipolar disorder, as well as his having experienced hallucinations in the past. As argued by the dissent, the jury did not hear details of diagnosis and treatment, nor did it receive an explanation of the disorders. Even the limited disclosure, however, provided a general sense of E.P.'s mental health history. Furthermore, E.P.'s credibility was effectively impeached many times over, not only with respect to his mental health and substance abuse issues, but also because of his conviction for his own role in the stabbing, his inconsistent statements, his significant criminal history, and his admitted desire for a sentence modification. It is exceedingly unlikely that the jury relied uncritically on E.P.'s testimony. See *State v. Madigosky*, supra, 291 Conn. 45 (extent of cross-examination otherwise permitted relevant to determination of whether error was harmless).

In light of the defendant's rather devastating testimony, in conjunction with testimony from multiple eyewitnesses, the state has met its burden of proving that any error was harmless beyond a reasonable doubt.

II

The defendant next claims that the court erred by rejecting his motion to dismiss, or alternatively, denying his request for an adverse inference instruction, based on the unavailability of two kitchen knives seized from 79 Foster Street, which were destroyed pursuant to a court order following the disposition of the state's case against E.P.⁵ The following additional facts are relevant to the resolution of this issue.

Before trial, the defendant filed a motion to dismiss, pursuant to *State v. Morales*, 232 Conn. 707, 657 A.2d 585 (1995), aff'd after remand, 39 Conn. App. 617, 667 A.2d 68, cert. denied, 235 Conn. 938, 668 A.2d 376 (1995), or, alternatively, requested an instruction that the jury could draw an adverse inference based on the state's failure to preserve certain evidence. The motion was based on the destruction of, among other items, two knives that were seized from a "utensil basket" next to the kitchen sink at 79 Foster Street.

During a pretrial hearing on November 25, 2008, the court heard arguments on the defendant's motion. It was undisputed that the knives were destroyed pursuant to a court order some time after E.P.'s sentencing in June, 2008. Although the prosecutor explained that

the court clerk's office automatically docketed a motion for the return or destruction of seized property once a criminal case has been disposed of, the defendant argued that the failure to preserve this evidence constituted "extreme negligence" or recklessness on the part of the state. Defense counsel argued that the destroyed knives, if tested for DNA evidence, might have supported the theory that E.P., and not the defendant, had perpetrated the stabbing.⁶ The court first denied the motion to dismiss, stating that the defendant had proffered "merely . . . a suggestion that, had the evidence been there, it would have been exculpatory."

Before ruling on the defendant's request for an adverse inference instruction to the jury, the court heard testimony regarding the two knives from E.P. and a detective from the Meriden Police Department, who had executed the search warrant and seized them. E.P. testified that he owned very few utensils, probably just "a spoon, fork, and butter knife, and a steak knife." He also identified a rack that was located next to the kitchen sink at 79 Foster Street that he used for storing dishes. He could not recall whether there were any knives in the rack on the day of Potts' stabbing.

Detectives William Grodzki and Robert Pocobello of the Meriden Police Department described the circumstances of the execution of two search warrants at 79 Foster Street. Pocobello was part of the group of officers that executed the warrants. He recalled that two knives were seized from a "utility basket" in the kitchen. Pocobello further testified that he did not "see anything visible," such as blood, on the knives. Grodzki testified that most of the evidence seized from 79 Foster Street had been "ordered destroyed."

The court denied the request for an adverse inference instruction. The court specifically noted that the knives were destroyed pursuant to a court order and had "nothing to do . . . with police intervention"

In determining whether the unavailability of evidence has deprived the defendant of due process of law, "the trial court must balance the totality of the circumstances surrounding the missing evidence, including the following factors: the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence." (Internal quotation marks omitted.) *State v. Morales*, supra, 232 Conn. 727.

We note, first, that the court did not err in rejecting the motion to dismiss. The trial court has the discretion to "fashion [a] remedy that appropriately ameliorates or offsets the prejudice that the defendant has suffered as a result of the unavailability of the evidence." *Id.*, 729. The remedy of dismissal, "because it is the most

drastic remedy available . . . ought to be reserved for those cases in which no lesser remedy can plausibly vindicate the defendant's right to a fair trial." *Id.*, 739–40 (*Borden, J.*, concurring).

The totality of the circumstances surrounding the unavailability of the kitchen knives similarly militated against the need for an adverse inference instruction. First, the knives were not material evidence. The mere fact that evidence was deemed interesting enough, at one time, to be seized by the police does not make it material. "The measure of materiality is whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (Internal quotation marks omitted.) *State v. Joyce*, 243 Conn. 282, 301, 705 A.2d 181 (1997), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998).

The superficially innocuous placement of the knives in a drying rack next to the sink, coupled with testimony that there were no visible bloodstains on them, supports the trial court's rulings. The lack of apparent bloodstains also undermines, to a degree, the defendant's contention that DNA testing could have been performed fruitfully on the knives. See *State v. Morales*, 39 Conn. App. 617, 623–24, 667 A.2d 68 (viability of scientific testing "purely speculative"), cert. denied, 235 Conn. 938, 668 A.2d 376 (1995). Last, the defendant did not request testing of the evidence until September 2, 2008, although counsel had been appointed in May, 2007. "The fact that a defendant failed to request the evidence goes to the issue of materiality and whether the defendant deemed it significant." *State v. Morales*, *supra*, 232 Conn. 712 n.7; see also *State v. Joyce*, *supra*, 243 Conn. 302 ("defendant's argument that the [unavailable evidence] was highly relevant [was] undermined by the fact that there was no evidence that the defendant ever requested a test" [internal quotation marks omitted]).

The second factor we must consider is the likelihood of mistaken interpretation of the missing evidence by witnesses or the jury. "[T]he likelihood of such a mistake [by the jury and witnesses] can be minimized at the trial by permitting testimony on the issue" (Internal quotation marks omitted.) *State v. Polanco*, 126 Conn. App. 323, 334, 11 A.3d 188 (2011), rev'd in part on other grounds, 308 Conn. 242, 61 A.3d 1084 (2013). The unavailability of the knives was explained by the detectives; it was "ordered destroyed." The failure to preserve the evidence was rational given that the knives were being stored in such a manner that suggested to the authorities that they were being used as utensils and not as dangerous instruments. See *State v. Morales*, *supra*, 232 Conn. 723 (police not required to "preserve every shred of physical evidence, every object it seizes from a crime scene, no matter how remote or tangential to the case the item seems to be").

The third factor addresses the reasons for the unavailability of the evidence and requires an examination of the motive underlying the loss of the evidence. *Id.*, 722–23. “In examining the motives . . . our courts have considered such factors as whether the destruction was deliberate and intentional rather than negligent . . . or done in bad faith or with malice . . . or with reckless disregard . . . or calculated to hinder the defendant’s defense, out of other animus or improper motive, or in reckless disregard of the defendant’s rights.” (Internal quotation marks omitted.) *State v. Polanco*, supra, 126 Conn. App. 334–35. The evidence in this case was destroyed pursuant to a court order and, therefore, was not likely done in bad faith or in an effort to undermine the defendant’s case.

Finally, we must consider whether the unavailability of the knives caused prejudice to the defendant. As we have already observed, we can only speculate as to whether the knives would have been beneficial to the defense. Moreover, the defendant’s theory that E.P. was the stabber was contrary to the weight of the evidence. “In measuring the degree of prejudice to an accused caused by the unavailability of evidence, the trial court properly may evaluate the strength or weakness of the state’s case, as well as the corresponding strength or weakness of the defendant’s case.” *State v. Morales*, supra, 232 Conn. 727 n.22. Potts, as well as other witnesses, identified the defendant as the stabber. There was also testimony that the defendant had admitted stabbing Potts in several telephone calls he made in the aftermath of the assault. Significantly, the defendant did not deny that he had been involved in a serious altercation with Potts, or that he regularly carried a knife for protection; he merely stated that he could not remember whether he had stabbed him.

The judgment is affirmed.

In this opinion GRUENDEL, J., concurred.

¹ Because we discuss this witness’ privileged psychiatric records, we refer to him by his initials.

² On June 13, 2008, E.P. pleaded guilty to aiding and abetting assault in the first degree.

³ Defense counsel had become aware of the potential that E.P. had mental health issues when a private investigator interviewed E.P. at the Garner Correctional Institution. The private investigator believed that Garner housed inmates with mental health issues. His suspicion that E.P. was laboring under a mental illness was reinforced by E.P.’s behavior during the interview; the private investigator testified that E.P. seemed to move slowly, “his speech was very slow and labored” and “[h]e appeared to be medicated.” The defendant also introduced as an exhibit the transcript from E.P.’s sentencing, in which the court referred to E.P.’s history of psychological problems and his need for mental health treatment.

⁴ There was limited cross-examination of E.P. at the end of the day on December 4, 2008. Defense counsel elicited testimony regarding E.P.’s significant criminal history, his drug use and the general atmosphere at 79 Foster Street. Cross-examination was suspended when defense counsel was ready to delve into issues raised by the disclosures from E.P.’s mental health records.

⁵ The court characterized the defendant’s motion as a “request of the court . . . [as] a motion to dismiss, or, in the alternative, the adverse instruc-

tion regarding the destruction of the seized property.”

⁶ If one of these knives had been used in the stabbing, the theory goes, then the defendant’s discarded knife would not have been used in the crime.