19-P-384 Appeals Court

COMMONWEALTH vs. JOHN FREDETTE.

No. 19-P-384.

Worcester. November 8, 2019. - March 25, 2020.

Present: Kinder, Neyman, & Wendlandt, JJ.

Homicide. Felony-Murder Rule. Assault and Battery. Kidnapping. Accessory and Principal. Practice, Criminal, Instructions to jury, Lesser included offense, Required finding, Hearsay, Assistance of counsel. Evidence, Hearsay. Constitutional Law, Assistance of counsel. Due Process of Law, Assistance of counsel.

Indictment found and returned in the Superior Court Department on February 15, 2012.

The case was tried before Janet Kenton-Walker, J.

Following review by the Supreme Judicial Court, 480 Mass. 75 (2018), a motion for a new trial was heard by her.

Joseph A. Hanofee for the defendant.
Ellyn H. Lazar, Assistant District Attorney, for the Commonwealth.

NEYMAN, J. In this consolidated appeal from a conviction of murder in the second degree and from an order denying his

motion for a new trial, the defendant contends that (1) the judge erred in declining to instruct the jury on accessory after the fact to murder, and on assault and battery as a lesser included offense; (2) there was insufficient evidence of force to prove the underlying felony of kidnapping; (3) the judge erred in admitting hearsay evidence under the state of mind exception; and (4) trial counsel rendered ineffective assistance. For the reasons set forth below, we affirm.

Background. 1. Prior proceedings. Following a trial in the Superior Court in 2014, a jury convicted the defendant, John Fredette, of murder in the first degree on a theory of felony-murder. During the pendency of his appeal to the Supreme Judicial Court, the defendant filed a motion for a new trial contending that the trial judge erred in not providing a merger doctrine instruction to the jury sua sponte, and that trial counsel rendered ineffective assistance. The defendant also filed an amended motion for a new trial alleging further instances of ineffective assistance of trial counsel. The motion judge, who was also the trial judge, allowed the motion because she concluded that the omission of an instruction on the merger doctrine created a substantial risk of a miscarriage of justice.[1] The Commonwealth appealed, and the Supreme Judicial

[1] The defendant claimed that the underlying felony of aggravated kidnapping merged with the killing and thus could not

Court held that the judge erred in allowing the motion for a new trial. Commonwealth v. Fredette, 480 Mass. 75, 79 (2018). However, the court vacated the conviction of murder in the first degree "because it was predicated on a theory of aggravated kidnapping . . . that did not exist at the time of the homicide."[2] Id. at 88. The court remanded the case to the Superior Court to determine whether the record supported a finding of murder in the second degree or whether a new trial was "necessary and appropriate in these circumstances." Id.

On remand, the judge denied the motion for a new trial[3] and issued an order reducing the defendant's conviction to murder in the second degree "based on a theory of felony-murder, with [unaggravated] kidnapping being the predicate felony." The defendant timely appealed therefrom.

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serve as the predicate felony for a felony-murder conviction. Commonwealth v. Fredette, 480 Mass. 75, 76 (2018). See Commonwealth v. Gunter, 427 Mass. 259, 271-272 (1998).

[2] The court was referring to G. L. c. 265, § 26, third par., inserted by St. 1998, c. 180, § 63; the murder for which the defendant was convicted occurred in 1994.

[3] Following remand from the Supreme Judicial Court, the defendant filed a "motion for the trial court judge to order a new trial on grounds raised in the first hearing on defendant's motion for a new trial . . . but not ruled upon." This motion renewed the arguments raised by the defendant, but not decided by the motion judge, in the defendant's prior motion and amended motion for a new trial.

2. Facts. In Fredette, 480 Mass. at 77-78, the Supreme Judicial Court summarized the facts the jury could have found as set forth by the judge in her decision on the defendant's motion for a new trial, supplemented with uncontroverted testimony from the trial. Those facts were as follows:

> "On the evening of February 15, 1994, the victim walked out of a bar in Worcester, leaving behind his favorite Boston Celtics jacket, house keys, a package of cigarettes, and an unfinished beer. He was never seen again. The victim's disappearance remained unsolved for eighteen years. On February 15, 2012, a Worcester County grand jury returned an indictment charging the defendant with murder. Matteo Trotto and Elias Samia, two of the defendant's cohorts in his illegal drug operation, were also indicted for the murder.
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> "The defendant had been arrested for trafficking in cocaine a few months before the victim disappeared, following an undercover investigation into the defendant's drug operation. The defendant and Trotto believed that the victim might have been the informant who provided the police with information leading to the defendant's arrest. To evade conviction, the defendant and Trotto concocted a scheme to have the victim testify on the defendant's behalf and offer an exculpatory, perjured story. According to this plan, the victim would testify that he was the confidential informant who provided the information to the police that established probable cause to arrest the defendant, and explain that the information he provided was false. To ensure that the victim would testify, the defendant and Trotto gave him copious amounts of cocaine, while also threatening his life.
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> "On the day of the defendant's trial, the victim never appeared in court to testify. As a result, on February 14, 1994, the defendant pleaded guilty to a reduced offense. He was sentenced to a State prison sentence, but execution of that sentence was stayed.
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> "On the evening of February 15, 1994, the victim was sitting in the bar when Trotto appeared, coaxed the victim outside, and ushered him into a motor vehicle occupied by

> the defendant and Samia. Soon after the victim entered the vehicle, the defendant and Samia began severely beating him. In the course of the beating, Samia shot and killed the victim. The defendant, Samia, and Trotto buried the victim's body in a shallow grave. The victim's body was never recovered." (Footnote omitted).

Id. at 77-78. In addition to the foregoing, the Commonwealth introduced abundant corroborative evidence, motive evidence, and consciousness of guilt evidence, including information regarding the dismantling and disposing of a 1985 Chevrolet Impala, the motor vehicle in which the crime occurred.[4] There was also evidence that the defendant told a witness that he would kill the victim if the victim "didn't show up in court" and "give false testimony for [the defendant's] benefit." Further, the Commonwealth introduced testimony regarding a 2008 conversation between the defendant and Samia during which they acknowledged beating the victim, and admitted to the shooting.[5]

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[4] The jury heard evidence that on the day after the murder, the 1985 Chevrolet Impala was dismantled and parts of it disposed of in a nearby pond. A car door and rear quarter panel were retrieved from the same pond in 2005. A special agent with the National Insurance Crime Bureau examined the retrieved motor vehicle parts, and determined them to be consistent with having been part of a 1985 Chevrolet Impala.

[5] During the 2008 conversation among the defendant, Samia, and a third party, the defendant said, in part, "We could have just kicked his ass," to which Samia responded, "You and I were fucking him up, and it got out of hand, and I had to take a gun and shoot him." The defendant "was upset that [Samia] shot [the victim] . . . because it took him, he said, a week to get the blood out of his clothing." In the same conversation, Samia stated that he was "followed every day" because of "the guy in the paper." Asked if he was worried about the "guy in the

Discussion. 1. Jury instructions. a. Accessory after the fact. The defendant contends that the absence of a jury instruction on accessory after the fact to murder constituted prejudicial error. See G. L. c. 274, § 4 (providing, in relevant part, that "[w]hoever, after the commission of a felony, harbors, conceals, maintains or assists the principal felon or accessory before the fact, or gives such offender any other aid, knowing that he has committed a felony or has been accessory thereto before the fact, with intent that he shall avoid or escape detention, arrest, trial or punishment, shall be an accessory after the fact . . ."). The argument fails at the outset because the defendant did not specifically request an instruction on accessory after the fact at trial. Rather, he "object[ed] to not including language in the joint venture instruction indicating that an action taken by the defendant[] to assist the perpetrator of a crime after the crime was completed, in and of itself, is not sufficient to convict the defendant under a theory of joint venture." Accordingly, we limit our review to whether the absence of an instruction on accessory after the fact was error, and if so, whether that

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paper," Samia replied, "Don't worry about it. No body, no case."

error created a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

We begin with the principle that "accessory after the fact is not a lesser included offense of murder." Commonwealth v. Talbot, 35 Mass. App. Ct. 766, 777 (1994). "[T]here is a substantial difference between the crime of murder and the crime of accessory after the fact to murder," Commonwealth v. Clark, 378 Mass. 392, 407 n.16 (1979), and "one cannot be both a principal in a crime and an accessory after the fact to the same crime." Commonwealth v. Berryman, 359 Mass. 127, 129 (1971). Thus, the judge was not obligated to give such an instruction. Compare Commonwealth v. Gould, 413 Mass. 707, 715 (1992) ("When the evidence permits a finding of a lesser included offense, a judge must, upon request, instruct the jury on the possibility of conviction of the lesser crime").

Faced with this hurdle, the defendant argues that the refusal to instruct as to accessory after the fact deprived him of his constitutional right to present a defense. Our courts have rejected this argument, so long as the jury instructions established the Commonwealth's obligation to prove the defendant's participation in the murder beyond a reasonable doubt. See Commonwealth v. Newson, 471 Mass. 222, 234 (2015) ("the judge's instructions clearly established that the defendant could not be found guilty of murder if his only

participation consisted of aiding another person after the fact in escaping from the police and disposing of weapons"); Talbot, 35 Mass. App. Ct. at 777 ("any danger that the defendant would be found guilty of murder on a joint venture theory based merely on evidence that he participated in the disposition of the body was avoided by the judge's clear and comprehensive instructions on joint venture" [quotation and citation omitted]). Here, as in Newson and Talbot, the judge's comprehensive instructions on murder and joint venture negated any risk that the jury convicted the defendant based on his conduct after the murder.[6] The instructions, set forth in note 6, supra, stated and reiterated the Commonwealth's obligation to prove the

[6] There is no danger, in the present case, that the jury could have convicted the defendant for his actions after the homicide. Apart from the fact that the jury convicted him on a theory of felony-murder, discussed supra, the judge instructed, inter alia, that "the Commonwealth must prove that [the defendant] knowingly participated in the commission of the murder"; that the defendant "did so with the intent required to commit that crime"; that "at the time [the defendant] knowingly participated in the commission of the murder, he possessed or shared the intent required for that crime"; that "[t]he Commonwealth must also prove more than mere association with the perpetrator of the crime either before or after its commission"; that "[m]ere presence at the scene of the crime is not enough to find [the defendant] guilty," but rather "there must be proof beyond a reasonable doubt that he intentionally participated in some fashion in committing the murder and that he had or shared the intent required to commit that crime"; and that "the defendant intended to kill [the victim]; that is, the defendant consciously and purposefully intended to cause [the victim's] death or shared that intent with . . . Trotto and . . . Samia."

defendant's participation in the murder beyond a reasonable doubt.

Finally, "[t]he judge could have concluded that charging the jury on a crime with which the defendant was not charged could serve to mislead or confuse the jury." Commonwealth v. Deane, 458 Mass. 43, 59 (2010). See Talbot, 35 Mass. App. Ct. at 777 (same). Therefore, the absence of an instruction on accessory after the fact did not create a substantial risk of a miscarriage of justice.[7]

b. Assault and battery. Next, the defendant contends that the judge erred in refusing to instruct the jury on assault and battery as a lesser included offense of murder. The argument is unavailing.

The jury convicted the defendant of felony-murder, and "[a]ssault and battery is not a lesser included offense of felony-murder." Commonwealth v. Donovan, 422 Mass. 349, 352 (1996). Accordingly, "[w]e need not decide whether the judge properly denied the defendant's request for an instruction on assault and battery." Id. Even assuming that the judge should

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[7] Even assuming that the objection to the joint venture instruction preserved the issue now raised on appeal, we discern no abuse of discretion in the judge's refusal to provide such an instruction for the reasons we have discussed. See Deane, 458 Mass. at 59 (no abuse of discretion "in refusing, over the defendant's objection, to instruct the jury distinguishing accessory after the fact from joint venture").

have provided an instruction on the lesser included offense of assault and battery as to the allegation of murder predicated on deliberate premeditation, no prejudice arose here where the jury did not convict the defendant of murder based on deliberate premeditation, and convicted solely on the basis of felony-murder. See id. (refusal to instruct on lesser included offense of assault and battery in murder case "did not result in a substantial likelihood of a miscarriage of justice because the jury rejected the option of murder in the second degree and found the defendant guilty of murder in the first degree under a theory which . . . does not include the lesser included offense of assault and battery"). See also Commonwealth v. Nichypor, 419 Mass. 209, 212 (1994), quoting Commonwealth v. Chipman, 418 Mass. 262, 270 n.5 (1994) ("Where a crime can be committed in any one of several ways . . . [t]hen the defendant should be convicted if it is proved that he committed the crime in any of those ways").

2. Kidnapping. The defendant argues that the Commonwealth presented insufficient evidence of force or threat of force to sustain a conviction for the underlying felony of kidnapping.[8]

[8] As discussed above, the Supreme Judicial Court vacated the conviction of murder in the first degree "because it was predicated on a theory of aggravated kidnapping . . . that did not exist at the time of the homicide." Fredette, 480 Mass. at 88. On remand, the judge issued an order reducing the defendant's conviction to murder in the second degree "based on

We apply the familiar test to determine "whether, after viewing the evidence in the light most favorable to the [Commonwealth], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979). "If, from the evidence, conflicting inferences are possible, it is for the jury to determine where the truth lies, for the weight and credibility of the evidence is wholly within their province." Commonwealth v. Lao, 443 Mass. 770, 779 (2005). See Commonwealth v. Nelson, 370 Mass. 192, 203 (1976) (evidence need not require jury to draw an inference; sufficient that evidence permits inference to be drawn).

"[T]he elements of the crime of kidnapping required the Commonwealth to prove . . . that the defendant, (1) without lawful authority, (2) forcibly confined the victim (3) against [his] will. G. L. c. 265, § 26."[9] Commonwealth v. Boyd, 73

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a theory of felony-murder, with kidnapping being the predicate felony." In this regard, we note that in Commonwealth v. Brown, 477 Mass. 805, 832 & n.4 (2017) (Gants, C.J., concurring), the Supreme Judicial Court "eliminated felony-murder in the second degree as a theory of murder for cases tried after Brown was decided." Fredette, 480 Mass. at 77 n.4. The trial in the present case occurred before the court decided Brown. See discussion in part 5, infra.

[9] General Laws c. 265, § 26, "also defines and punishes alternate and more popularly understood acts of kidnapping

Mass. App. Ct. 190, 193 (2008).[10] Here, the defendant challenges only the element of force.

Force may be actual or constructive. See Commonwealth v. Caracciola, 409 Mass. 648, 652-654 (1991). "[A]ctual force is applied to the body, constructive force is by threatening words or gestures and operates on the mind." Id. at 652, quoting Commonwealth v. Novicki, 324 Mass. 461, 467 (1949). In the context of kidnapping, "there need not be physical force applied against the victim; if the victim is subdued by the display of potential force, [that] is sufficient" (quotation omitted). Commonwealth v. Titus, 32 Mass. App. Ct. 216, 221 (1992).

In the present case, the evidence was sufficient to prove the element of force beyond a reasonable doubt. The victim thwarted the defendant's plan and failed to appear to testify on the defendant's behalf. As a result, the victim was "afraid" that the defendant and Trotto would "come after [him]." He was in fear because he "had screwed up with big shots." He was

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involving both the confinement and asportation of the victim." Commonwealth v. Boyd, 73 Mass. App. Ct. 190, 193 n.4 (2008).

[10] At trial, the judge instructed the jury consistently with the elements of aggravated kidnapping under G. L. c. 265, § 26. On review, we look to the elements of kidnapping only, and ignore the additional element required to prove "aggravated" kidnapping. See G. L. c. 265, § 26, third par. (delineating aggravated kidnapping as doing so "while armed with a dangerous weapon and inflict[ing] serious bodily injury").

"[v]ery nervous" and knew that Trotto "was somebody you don't cross." On the night of the incident, the victim was at a Worcester bar. A car pulled up across the street. There were three people in the car. Trotto exited the car and went to the front door of the bar, and peered inside as if he were looking for someone. Trotto then entered part of the way into the bar and "motioned to [the victim]." Trotto held up one finger and pulled it toward his body "in a motion that indicates he was drawing [the victim] towards him." The victim "left the bar and went outside with [Trotto]." Trotto and the victim "were walking very close together." The victim walked in front and Trotto walked behind him. As they arrived at the car across the street, Trotto "steered" the victim toward the front seat and physically "ushered him" into the car. The defendant and Samia were "fucking [the victim] up" in the car when "it got out of hand," and Samia took out a gun and shot the victim. These facts provide sufficient evidence from which a jury could reasonably infer that the victim was constructively pulled from the bar, literally pushed into the car, and forcibly confined. See Commonwealth v. Dykens, 438 Mass. 827, 841 (2003) ("[a]ny restraint of a person's liberty is a confinement or an imprisonment"); Titus, 32 Mass. App. Ct. at 220 (in considering whether defendant forcibly confined or imprisoned victim "jury

could have considered," among other things, victim's testimony that she was "scared" of defendant).

In addition, the Commonwealth introduced evidence that the victim left half a glass of beer, keys, cigarettes, money, and his Celtics jacket at the bar. There was testimony that the victim always had his cigarettes with him, was never known to leave a half a beer behind, and always wore his Celtics jacket. This evidence, viewed under the Latimore standard, and in conjunction with the evidence described above, further demonstrated that the victim had no intention of leaving the bar, and did not willingly enter the car or willingly stay therein. Viewed together with Trotto's coercive and physical actions, the totality of the evidence sufficed to prove the element of force beyond a reasonable doubt.[11]

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[11] The defendant also contends that the prosecutor caused reversible error by improperly speculating in closing argument that the victim entered the back seat (as opposed to the front seat) of the vehicle at some point. The argument is unpersuasive. As the defendant objected to the statement at trial, we review "to determine whether the prosecutor's remarks were improper and, if so, whether any improprieties were prejudicial." Commonwealth v. Tu Trinh, 458 Mass. 776, 785 (2011). Here, even assuming, arguendo, that the brief statement was not a reasonable inference drawn from the evidence, we discern no prejudice. The statement involved a collateral matter and did not cut to the heart of the case; the judge provided clear and repeated instructions that closing arguments are not evidence; and the purported error, viewed in context of the entire closing argument, the evidence at trial, and the judge's instructions, could not have made a difference in the jury's conclusions. See id. (analyzing claim of improper argument in light of entire argument, judge's instructions to

3. Victim's statements. The defendant next claims error in the admission of hearsay evidence. Specifically, he contends that the judge should not have allowed witnesses to testify to various statements to the effect that the victim was in fear of Trotto, or feared that the defendant and Trotto would come after him because he did not go to court and testify as he had promised.[12] As the defendant timely objected, we review for prejudicial error. See Commonwealth v. Magraw, 426 Mass. 589, 599-600 (1998), quoting Commonwealth v. Qualls, 425 Mass. 163, 170 (1997) (where state of mind evidence was improperly admitted, critical question becomes whether court fairly can say that "the jury could not have been influenced by the [erroneously admitted evidence]").

"A murder victim's state of mind becomes a material issue if the defendant . . . claim[s] that the death was . . . a result of self-defense, that the victim would voluntarily meet

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jury, and evidence at trial). See also Commonwealth v. Perez, 444 Mass. 143, 151 (2005). We are confident that this lone alleged misstatement did not impact the jury's deliberations. See Tu Trinh, 458 Mass. at 785 ("aside from the isolated remarks we discuss below, the argument properly concentrated on the evidence presented at trial; the closing taken as a whole was not improper").

[12] The judge also allowed the victim's sister to testify that the last time she spoke to the victim, he ended their conversation by saying, "I love you," instead of his typical practice of ending the conversation by asking, "Does this sound like I'm hanging up?" before doing so.

with or go someplace with the defendant, or that the defendant was on friendly terms with the victim." Magraw, 426 Mass. at 594. In the present case, the parties disputed the issue of force as it related to the underlying felony of kidnapping. The defense contended throughout trial that the victim willingly and voluntarily entered the car occupied by Trotto, Samia, and the defendant.[13] In these circumstances, the judge did not err in allowing the Commonwealth to introduce material evidence that the victim feared the defendant and would not have voluntarily entered the car. See id. See also Commonwealth v. Williams, 46 Mass. App. Ct. 700, 704 (1999) (evidence of victims' fear of defendant properly admitted where defendant's claim of self-defense raised issue of victims' state of mind).

Furthermore, the judge's clear limiting instruction explained that evidence of the victim's fear was "being admitted only for the purpose of proving, if it does, [the victim's] state of mind on the night of February 15, 1994," and was "only relevant on the issue of whether on that night [the victim] entered the car or remained in the car willingly or against his will."[14] The judge repeated the instruction twice during the

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[13] As early as his opening statement, defense counsel contended that the victim "willingly and voluntarily got into that car."

[14] The judge instructed as follows regarding the testimony of a friend of the victim:

trial following the admission of additional state of mind evidence, and repeated it again in her final jury charge. See Commonwealth v. Gilbert, 366 Mass. 18, 28 (1974) (trial judge's limiting instruction "effectively minimized any prejudicial impact possibly stemming" from introduction of evidence regarding murder victim's state of mind). See also Magraw, 426 Mass. at 595.

4. Ineffective assistance. Finally, the defendant contends that the judge abused her discretion in denying his motion for a new trial predicated on his trial counsel's alleged ineffective performance. The argument is unpersuasive.

Pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), a judge may grant a new trial "if it appears that justice may not have been done." "In reviewing the denial

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> "You have heard some testimony from this witness about some statements that [the victim] allegedly made to him. This evidence, again, is only being admitted for a limited purpose. If you find this evidence credible, the evidence is not admitted to prove the truth of what [the victim] may have stated to [the witness] or that [the defendant], Mr. Trotto or Mr. Samia harbored certain thoughts or acted in a particular or certain way. The evidence is being admitted only for the purpose of proving, if it does, [the victim's] state of mind on the night of February 15, 1994.
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> "Should you believe this evidence, it's only relevant on the issue of whether on that night [the victim] entered the car or remained in the car willingly or against his will. And that is the only purpose for which you may consider the evidence."

of a motion for new trial, we examine the motion judge's conclusions only to determine whether there has been a significant error of law or other abuses of discretion" (quotation and citation omitted). Commonwealth v. Ferreira, 481 Mass. 641, 648 (2019). See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

"Motions for a new trial are granted only in extraordinary circumstances . . . ." Commonwealth v. Comita, 441 Mass. 86, 93 (2004). Where a motion for a new trial is based on ineffective assistance of counsel, the defendant must show that the behavior of counsel fell "below that . . . [of] an ordinary fallible lawyer" and that such failing "likely deprived [him] of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "[A]rguably reasoned tactical or strategic judgments" do not amount to ineffective assistance of counsel unless they are "manifestly unreasonable" when made. Commonwealth v. Rondeau, 378 Mass. 408, 413 (1979), quoting Commonwealth v. Adams, 374 Mass. 722, 728 (1978).

The defendant first contends that his trial counsel rendered ineffective assistance by failing to request a "reckless manslaughter" instruction. Although he does not specify whether by "reckless manslaughter" he means voluntary or involuntary manslaughter, the defendant relies on cases

concerning involuntary manslaughter. See Commonwealth v. Ferrara, 368 Mass. 182, 190 (1975) (evidence "permitted an inference of recklessness on the part of the defendants, and supported the verdicts of involuntary manslaughter"); Commonwealth v. Papa, 17 Mass. App. Ct. 987, 988 (1984), quoting Commonwealth v. Vanderpool, 367 Mass. 743, 747 (1975) (holding that defendant's conduct "constituted 'such a disregard of probable harmful consequences to another as to amount to [involuntary manslaughter by reason of] wanton or reckless conduct'"). The prejudice standard under the second prong of the Saferian ineffective assistance of counsel test is "effectively the same" as the substantial risk of a miscarriage of justice standard. Commonwealth v. Millien, 474 Mass. 417, 432 (2016). We thus review to determine whether the absence of an involuntary manslaughter instruction created "serious doubt whether the jury verdict would have been the same had the defense been presented." Id.

"Generally, a defendant is not entitled to an instruction on involuntary manslaughter where the felony-murder rule applies." Donovan, 422 Mass. at 352. "If the underlying felony is not punishable by life in prison, then murder in the second degree is the appropriate result." Id. at 352-353. "An instruction on involuntary manslaughter is appropriate in a felony-murder case, however, if there is evidence that the

defendant was merely engaged in wanton and reckless conduct that did not amount to malice . . . or if the victim died unintentionally as the result of a battery not amounting to a felony." Id. at 353. "In determining whether such an instruction was warranted, we consider the evidence in a light most favorable to the defendant" (quotation and citation omitted). Commonwealth v. Moseley, 483 Mass. 295, 303 (2019). Further, "[t]he traditional elements of involuntary manslaughter must be shown by evidence that the jury might believe before an instruction on involuntary manslaughter is required." Commonwealth v. Sires, 413 Mass. 292, 302-303 (1992).

In the present case, no view of the evidence suggested that the defendant "merely engaged in wanton and reckless conduct that did not amount to malice" or that "the victim died unintentionally as the result of a battery not amounting to a felony." Donovan, 422 Mass. at 353. According to Samia's admission, during which the defendant was present, he shot and killed the victim during a beating administered by the defendant. Furthermore, the defense did not claim, and the evidence did not show, that the killing was unintentional or the product of reckless conduct. To the contrary, the defense argued that Samia ruthlessly and intentionally murdered the victim, Samia acted alone when he shot and killed the victim, and that the defendant did not participate in the murder. As

there was no basis for an involuntary manslaughter instruction under any view of the evidence, no error stemmed from the absence of that instruction.[15] See Moseley, 483 Mass. at 304.

The defendant next argues that counsel rendered ineffective assistance by failing to introduce into evidence the statement of a witness, Martin Walsh. Walsh told the police that he saw the victim on the night of the incident enter an "older car like one of the older model Bonnevilles. . . . It was probably blue." The defendant claims that Walsh's statement "would have proven that [the victim] was not forced into the car against his will." The argument is unavailing.

Walsh was unavailable to testify regarding his observation of the victim because he died before the trial.[16] His out-of-court statement to the police was inadmissible hearsay if

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[15] Even assuming that the evidence could have been construed to warrant an involuntary manslaughter instruction, we cannot say on the record before us, that the absence of a request for such an instruction would have been a "manifestly unreasonable" strategic decision when made, in view of the defendant's trial strategy discussed, supra. Rondeau, 378 Mass. at 413.

[16] The affidavits of trial counsel filed in support of the motion for a new trial do not mention Walsh's statement or address the reasons why counsel did not attempt to introduce the statement at trial. See Commonwealth v. Lynch, 439 Mass. 532, 539 n.2, cert. denied, 540 U.S. 1059 (2003) (noting absence of affidavit from trial counsel supporting defendant's contention); Commonwealth v. Savage, 51 Mass. App. Ct. 500, 505 n.6 (2001) ("Conspicuously absent was an affidavit from trial counsel supporting the defendant's contention").

offered to prove the truth of the matter asserted in the statement. See Mass. G. Evid. § 801(c)(2) (2019). The defendant now claims that the statement should have been offered and admitted to establish the victim's state of mind pursuant to Mass. G. Evid. § 803(3)(B)(ii) (2019).[17] We disagree. Relevant here, the state of mind exception applies to "[s]tatements, not too remote in time, which indicate an intention to engage in particular conduct." Mass. G. Evid. § 803(3)(B)(ii). Walsh's statement did not indicate the victim's intent. Rather, the statement constituted a declaration of memory of a past event, which does not fall within the state of mind exception to the hearsay rule. See Commonwealth v. Lowe, 391 Mass. 97, 104, cert. denied, 469 U.S. 840 (1984), S.C., 405 Mass. 1104 (1989) ("An extrajudicial statement of a declarant is not ordinarily admissible if it is a statement of memory or belief to prove the fact remembered or believed"). As the statement was inadmissible hearsay, counsel was not ineffective for failing to try to introduce it at trial. See Commonwealth v. Seabrooks,

[17] The defendant characterizes Walsh's statement as "state of mind" evidence. In support of his argument, however, he relies on Mass. G. Evid. § 803(3)(B)(ii) and related case law, which assess the admissibility of statements "which indicate an intention to engage in particular conduct" as an exception to the hearsay rule. See, e.g., Commonwealth v. Ferreira, 381 Mass. 306, 310 (1980). Here, where Walsh's statement was neither admissible as a statement of present intention nor as state of mind evidence, the characterization matters not.

425 Mass. 507, 512 (1997) ("Allowing hearsay statements generally under the state-of-mind exception would entirely eviscerate the hearsay rule and its important purpose of securing the correctness and completeness of testimony through cross-examination").[18] See also Commonwealth v. Whitman, 453 Mass. 331, 342 (2009).

Finally, the defendant contends that trial counsel was ineffective for failing to call expert witnesses on the science of memory creation and the adverse effect of cocaine on cognition. The claim is likewise unavailing. The motion judge, who was also the trial judge, determined that trial counsel's behavior did not fall "'measurably below that which might be expected from an ordinary fallible lawyer' because it was not manifestly unreasonable for him to make the strategic choice not to call memory and cognition experts when, according to a letter provided, he took the position that the witnesses were lying, not that they had faulty memories." Indeed, trial counsel stated in a letter to the defendant's postconviction counsel,

> "I cannot in good conscience say that I did not have a strategic reason for not calling a memory expert or cocaine

[18] We note that we cannot say, on the present record, that the brief witness statement contradicted the evidence at trial. The statement lacked detail, did not state whether Walsh knew Trotto or the other defendants, and did not delve into whether Walsh saw anyone usher the victim into the car. In this regard, we further note that Walsh provided his statement in 1998, many years before evidence of the kidnapping and details of the murder had surfaced.

> abuse expert to offer testimony on the effects of the passage of time, memory distortion, or the effects of cocaine abuse on cognitive questioning. . . . [O]ur attack on certain witnesses was that they were not mistaken, but were deliberately lying."

Trial counsel further averred in the letter that he "believe[d] such a witness would have been susceptible to devastating cross-examination." Thus, trial counsel could not "sign an affidavit saying that [he] did not have a tactical or strategic reason for not [calling such expert witnesses]." The judge did not err in crediting trial counsel's explanation, and determining that his strategic choice was not "manifestly unreasonable" when made. Adams, 374 Mass. at 728. Accordingly, the judge did not abuse her substantial discretion in denying the motion for a new trial.

5. Disposition. As mentioned above, in Fredette, 480 Mass. at 88, the Supreme Judicial Court remanded the case "to the trial judge, who is in the best position to determine the appropriate next step." The court stated that the judge

> "may order the entry of a finding of a lesser degree of guilt, i.e., murder in the second degree based on the predicate felony of kidnapping as it existed at the time of the homicide, if the record supports it, or she may grant a new trial if that is necessary and appropriate in the circumstances."

Id. The judge determined that the record indeed supported a conviction of felony-murder in the second degree, denied the defendant's motion for a new trial, and ordered the entry of a

finding of murder in the second degree. We discern no abuse of discretion or error in the judge's determination.

In 2017, a majority of the Justices of the Supreme Judicial Court, through a concurring opinion of the Chief Justice, prospectively eliminated felony-murder in the second degree as a theory of murder.[19] Commonwealth v. Brown, 477 Mass. 805, 822 & n.4 (2017) (Gants, C.J., concurring). See Fredette, 480 Mass. at 77 n.4. The concurring opinion in Brown expressed concern, inter alia, that in some circumstances "the felony-murder rule erodes 'the relation between criminal liability and moral culpability,'" id. at 832, quoting People v. Washington, 62 Cal. 2d 777, 783 (1965), and that felony-murder liability . . . can yield a verdict . . . that is not consonant with justice." Id. at 836.

The present case is not one in which a conviction of felony-murder in the second degree is unjustified or "not consonant with justice."[20] Here, the defendant and his

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[19] See note 8, supra.

[20] Although much of the concurring opinion in Brown focused on the potential unfairness of a conviction for felony-murder in the first degree, and the opinion also prospectively eliminated the concept of felony-murder in the second degree, Brown, 477 Mass. at 832 n.4 (Gants, C.J., concurring), in the interest of justice, we consider whether the finding of guilt based on felony-murder in the second degree was "consonant with justice," id. at 836, notwithstanding the fact that the trial in this case occurred before Brown was decided.

coventurers concocted a scheme to have the victim offer perjured testimony in the defendant's drug trafficking case. After the victim refused to participate in the scam, "the defendant pleaded guilty to a reduced offense." Fredette, 480 Mass. at 78. "He was sentenced to a State prison sentence, but execution of that sentence was stayed." Id. The very next day, during the stay of execution, the defendant and his coventurers kidnapped the victim, and "began severely beating him," during which Samia "shot and killed the victim." Id. The totality of evidence epitomized violent, malicious, and deadly conduct motivated by the victim's refusal or failure to perpetrate the defendant's desired fraud upon the Commonwealth's justice system. In these circumstances, the record supports the judge's decision to order the entry of a finding of murder in the second degree based on the predicate felony of kidnapping. See Brown, 477 Mass. at 837 (Gaziano, J., concurring) ("The criminal law, in general, considers the harm caused by an individual in evaluating the severity of an offense"). As the Supreme Judicial Court recognized, the trial judge was "in the best position" to make that determination, Fredette, 480 Mass. at 88, and we agree that the result here is "just and fair in light of the defendant's criminal conduct." Brown, 477 Mass. at 836 (Gants, C.J., concurring).

Judgment affirmed.

Order denying motion for new trial affirmed.