SJC-09999

COMMONWEALTH vs. CURTIS McIRVING JOHNSON.[1]

Worcester. March 6, 2020. - October 21, 2020.

Present: Gants, C.J., Lenk, Lowy, Cypher, & Kafker, JJ.[2]

Homicide. Constitutional Law, Self-incrimination, Privileges and immunities. Witness, Self-incrimination, Privilege, Expert. Evidence, Testimonial privilege, Expert opinion, Identification, Testimony of third party respecting identification, Exculpatory. Identification. Criminal Responsibility. Practice, Criminal, Capital case.

Indictment found and returned in the Superior Court Department on November 15, 1991.

Following review by this court, 435 Mass. 113 (2001), a motion for funds for an expert witness was heard by Francis R. Fecteau, J.; the case was tried before John S. McCann, J.; and a motion for a new trial, filed on March 18, 2014, was heard by Richard T. Tucker, J.

Michael Malkovich for the defendant.

---

[1] As is our custom, we refer to the defendant by the name appearing in the indictment. The defendant now goes by the name Umar Salahuddin. For the purposes of this decision, we will refer to him simply as "the defendant."

[2] Chief Justice Gants participated in the deliberation on this case prior to his death.

Michelle R. King, Assistant District Attorney, for the Commonwealth.

KAFKER, J. In 1992, a jury convicted the defendant of murder in the first degree on the theory of deliberate premeditation.[3] On direct appeal, this court reversed that conviction due to an error in the jury instructions on deliberate premeditation. See Commonwealth v. Johnson, 435 Mass. 113 (2001) (Johnson I). The case was remanded for a new trial. In 2003, the defendant was retried and again convicted of murder in the first degree on the theory of deliberate premeditation. The defendant subsequently filed a motion for a new trial, which was denied. This matter is now before the court on direct appeal from the murder conviction stemming from the defendant's second trial, and has been consolidated with his appeal from the denial of his motion for a new trial.

On appeal, the defendant argues error as to (1) a witness's invocation of the privilege against self-incrimination; (2) the

[3] In his first trial, the defendant was also convicted of two counts of assault with intent to murder, two counts of assault and battery by means of a dangerous weapon, one count of unlawful possession of a firearm, one count of unlawful possession of ammunition, and one count of carrying a firearm without authority. The three firearm convictions were placed on file with the defendant's consent. See Commonwealth v. Johnson, 435 Mass. 113, 115 n.2 (2001) (Johnson I). The remaining ancillary convictions were affirmed in the direct appeal from the defendant's original murder conviction and are not at issue in the instant appeal. See id. at 116.

admission of select portions of that witness's voir dire testimony in lieu of live testimony at trial; (3) the failure to deem the defendant's borderline personality disorder as indicative of a lack of criminal responsibility; (4) the failure to take into account the defendant's youth and immaturity; (5) the failure to conclude that the Commonwealth did not disclose witness inducements; and (6) the denial of the defendant's motion for funds to hire an expert witness. The defendant has also made a number of arguments pursuant to Commonwealth v. Moffett, 383 Mass. 201, 208-209 (1981). The Commonwealth has moved to strike the defendant's Moffett brief. For the reasons discussed infra, we deny the Commonwealth's motion to strike the Moffett brief, but we nonetheless conclude that the defendant's conviction should be affirmed.

1. Facts. We summarize the facts that the jury could have found at the defendant's second trial, reserving certain details for our discussion of the legal issues.

On the evening of September 28, 1991, the defendant traveled from Springfield to Worcester by bus with his girlfriend's mother, Jannie Bynum, and his friend, Daniel Dade. The defendant had been drinking and was intoxicated. Upon his arrival in Worcester, the defendant accompanied Dade and Bynum to the home of Mary Railey, who was Bynum's sister. The defendant was noticeably drunk at the Railey residence. He

vomited into the bushes in front of the house and fell multiple times.

At the Railey residence, the defendant met Bynum's son, Ronald Bynum,[4] and Ronald's friends Edwin Montalvo and Rahim Kodjo. The defendant continued to drink during the course of the evening. Near midnight, Bynum asked her son and the others to order Chinese food from a restaurant in Worcester. The defendant got up to leave with the others, but fell on the floor. Bynum helped the defendant up and asked him not to go, given his intoxicated state, but he refused. The defendant subsequently left with Ronald, Kodjo, and Montalvo to get the food in Kodjo's automobile, a small silver Toyota.

Near midnight, the defendant and his companions entered the restaurant. The owner of the restaurant refused to serve the group and told them to leave. They began arguing with the owner, and the confrontation escalated. The defendant was the most vocal during the argument with the owner and spat in his face.

Albert Toney, who had been dining at the restaurant with a group of friends, approached the cash register to pay his party's bill around the same time that the defendant's group entered the restaurant. Toney's party included Robert Domiano,

---

[4] Because Jannie and Ronald Bynum share a surname, we refer to Ronald by his first name in this opinion.

John Ellison, Veronica Joyce (Ellison's sister), Paul Ferraro, and William Hackett. Toney, an off-duty police officer, observed the escalating altercation between the youths and the restaurant owner when he neared the register. Toney approached the group, identified himself as a police officer, and asked them to leave the restaurant. The defendant turned to Toney and said, "You ain't no fucking police officer."[5] Toney reiterated that he was in fact a police officer and again told the group to leave the restaurant. The defendant continued to insist that Toney was not a police officer. One of the defendant's companions eventually grabbed him and convinced him to leave the restaurant with them.

Toney briefly spoke with the owner of the restaurant, paid his bill, and left the restaurant with his party. As Toney and his friends left the restaurant, the teenage boys began yelling obscenities at them from outside. Toney told his friends to ignore them. Toney's party turned to the right and began heading up the sidewalk, in the opposite direction from the defendant's group.

Moments later, members of Toney's group heard footsteps running up behind them. Toney turned around to see the

---

[5] A waitress in the restaurant testified that she heard the defendant respond to Toney by saying that "being a police officer doesn't mean shit."

defendant, who pulled out a gun from underneath his jacket. The defendant said, "You ain't no fucking police officer," and shot Toney.[6] The defendant then said to Domiano, "Are you a fucking police officer, too?" and shot him. He also shot Ellison.[7] Domiano died moments after being shot. Toney and Ellison survived their gunshot wounds.

After shooting the victims, the defendant ran back in the direction from which he had come, entered the passenger's side of Kodjo's automobile, and left the scene with his companions. Another off-duty police officer, Jesus Novoa, subsequently spotted the defendant and two other males enter another Chinese restaurant in Worcester shortly before 1 A.M. to order food.

2. Analysis. a. Denial of funds for expert witness. Because the issue of eyewitness identification has relevance to a number of issues presently on appeal, we first address the issue as it relates to the denial of expert funds. Prior to his second trial, the defendant moved for the allowance of funds to

---

[6] Witnesses testified to variations of what the defendant said to Toney. Toney testified that the defendant said, "You ain't no fucking police officer." Joyce and Ferraro testified that the shooter asked, "Are you a cop?" Hackett testified that the shooter stated, "I know he's a cop. I know he's a cop," before asking Toney, "Are you a cop?" Hackett also testified that the shooter then asked Domiano, "Are you a cop, too?" before shooting him.

[7] There is conflicting testimony as to whether Ellison was shot before or after Toney.

obtain an expert on eyewitness identification, pursuant to G. L. c. 261, § 27C. The motion was denied. The motion judge concluded that the defendant had failed to demonstrate that such expert testimony would assist the jury, or that "issues of eyewitness identification testimony should not be considered to be within the traditional knowledge and function of the jury." We review the denial of expert funds under G. L. c. 261, § 27C, for abuse of discretion. See Commonwealth v. Kenney, 437 Mass. 141, 148 (2002).

In ruling on a motion for expert funds, a judge must first determine whether retention of the expert is "reasonably necessary" to assure that the defendant can present "as effective a case as he would have if he had the financial resources to afford to pay such an expert." Edwards, petitioner, 464 Mass. 454, 461 (2013). As a general matter, "the admission of expert testimony is left to the sound discretion of the trial judge." Commonwealth v. Gomes, 470 Mass. 352, 366 (2015), S.C., 478 Mass. 1025 (2018). In recent years, however, we have emphasized the importance of expert testimony as to eyewitness identification. Indeed, since the time of the defendant's trial, the model jury instructions have been altered prospectively to include more detailed guidance on eyewitness identification. See id. In particular, the changes to the model jury instructions emphasize the inaccuracy of

cross-racial eyewitness identifications. See id. at 382 (Appendix) ("research has shown that people of all races may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own"). See also Commonwealth v. Bastaldo, 472 Mass. 16, 25-28 (2015) (discussing circumstances in which cross-racial instruction should be given).

Despite the importance of providing this context on eyewitness identifications, however, we conclude that the denial of funds was not an abuse of discretion in the facts of the instant case. At the outset, we note that there was ample testimony, and defense counsel even conceded in closing arguments, that the defendant was among the group of teenagers inside the restaurant arguing with the owner immediately prior to the shooting. There was uncontested testimony at trial that the defendant had accompanied the other three youths to the restaurant on the evening of the shooting. Four separate individuals -- Toney, Ellison, a waitress in the restaurant, and a bartender -- also identified the defendant as the teenager arguing most vociferously with the owner in the restaurant. Three of the four witnesses further testified that the defendant spit on the owner as part of this altercation. Thus, the issue of mistaken identification primarily centers on whether the

defendant was mistakenly identified as the shooter outside the restaurant immediately after this argument.

Here, both Ellison and Toney positively identified the defendant as the shooter outside. On October 2, 1991, within days of the shooting, Ellison and Toney were each shown a photographic array that contained the defendant's picture. Ellison identified the defendant both as the individual arguing inside the restaurant and as the shooter. Toney identified the defendant as being the person with whom he had argued and who had spit on the owner inside the restaurant. Approximately one and one-half months later, on November 22, Toney also identified the defendant as the shooter from a photographic array. Both men had the opportunity to observe the defendant in the restaurant for a period of minutes before the shooting, and both came within close proximity to the shooter outside. Ellison testified that he came within three feet of the shooter, while Toney testified that he came within ten to fifteen feet of the shooter.[8] Finally, we note that Ellison is white, while Toney is African-American -- the same race as the defendant.

In addition to the positive eyewitness identifications of Ellison and Toney, a number of other witnesses testified as to

[8] At the defendant's original trial, Toney apparently testified that he had been within five feet of the shooter at the time of the shooting. See Johnson I, 435 Mass. at 124-125.

the distinct physical characteristics of the shooter, which matched the defendant's distinct appearance relative to his companions. Although there was somewhat conflicting testimony as to whether witnesses perceived members of the defendant's group to be black or Hispanic, the evidence indicated that the defendant had a noticeably darker complexion than the other three teenagers. Further, the defendant weighed 200 pounds and was heavy set, while all of his companions weighed between one hundred and 140 pounds and had thin builds. Those witnesses who were unable to identify the shooter testified that the shooter was heavy set and of a darker complexion. Moreover, Joyce testified that the youth who had spit on the owner, and who wore "goofy" clothing, was also the shooter.

Although Toney's identification of the defendant as the shooter took place nearly two months after the shooting, Ellison's identification took place within days of the incident. Further, both men did not merely observe the defendant in the few traumatic moments of the shooting. Rather, Ellison and Toney had observed him for a number of minutes inside the restaurant before the time of the shooting. Thus, although he was not known to them at the time of the shooting, they did have some familiarity with his face immediately prior to the shooting. Moreover, while we are particularly concerned with cross-racial identifications, see Bastaldo, 472 Mass. at 18,

only one of these identifications was cross-racial. Additionally, these identifications were further bolstered by the other witnesses to the shooting, who testified that the shooter had a dark complexion and heavy-set build. Finally, the defendant's statement to Toney inside the restaurant, "You ain't no fucking police officer," links him to the shooter's subsequent statement to the same effect outside the restaurant. Given the distinctiveness of the defendant's features, as compared with the other youths at the scene, and the testimony matching the defendant's distinctive features with those of the shooter, in combination with the two separate eyewitness identifications, the motion judge's denial of funds for expert eyewitness testimony was not an abuse of discretion. See Commonwealth v. Bly, 448 Mass. 473, 495 (2007) ("we defer here to the judge's discretion because there was substantial corroboration of [witness's] eyewitness identification").

b. Bynum's invocation of privilege against self-incrimination. We turn now to Bynum's invocation of the privilege against self-incrimination at the defendant's trial. The defendant asserts a number of arguments on the basis of Bynum invoking the privilege.

i. Background. Bynum told police that, shortly after the shooting, the defendant told her, "I did something bad, Ms.

Ann,[9] you just don't know." She also testified before the grand jury that the defendant had admitted to her that he shot two people. Prior to the defendant's first trial, however, there was some indication that Bynum's trial testimony might change, and that the Commonwealth would seek to introduce her earlier statements about what the defendant had said. See Johnson I, 435 Mass. at 132. Defense counsel sought to exclude these admissions in light of the defendant's state of intoxication on the day of the shooting. See id. at 133. A voir dire hearing was conducted to determine whether the defendant's admissions were given voluntarily, and Bynum was called to testify. See id.

At the voir dire hearing, Bynum provided testimony that contradicted statements she had previously made under oath to the grand jury and to the police. At first, she testified that after the shooting the defendant had simply stated to her "you just don't know," and nothing else. When pressed further, she testified that the defendant had in fact stated, "You don't know what I done, Miss Ann, you just don't know." Finally, she testified that he had also told her, "I did something bad, Miss Ann, you just don't know." During the voir dire hearing, she also denied the veracity of her earlier statement to the grand

[9] According to her niece, Bynum also went by the name Ann.

jury that the defendant had admitted to shooting two people. Rather, she stated that this was instead an "assumption" that she had made about the defendant's involvement, not something he had actually said. Because Bynum's voir dire testimony contradicted her grand jury testimony, she was appointed counsel and later invoked her privilege against self-incrimination under the Fifth Amendment to the United States Constitution. See Johnson I, 435 Mass. at 132-133. The trial judge ruled her unavailable to testify at the defendant's first trial and admitted the portions of her voir dire testimony that described the hours leading up to the shooting and the period after the shooting, including the defendant's statement to Bynum that "I did something bad." Id. at 134-135. The defendant's statement about shooting two people was not admitted. See id.

On the direct appeal from the defendant's original murder conviction, the defendant argued that trial counsel was ineffective for requesting the voir dire and allowing portions of the voir dire testimony to be admitted at trial, rather than seeking to exclude Bynum's testimony in its entirety. See id. at 133. We disagreed, ruling that trial counsel's strategy of seeking to suppress the defendant's omissions was not "manifestly unreasonable," see Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), and that this strategy was in fact "largely successful." Johnson I, supra at 134. While the jury did hear

testimony that the defendant had told Bynum, "I did something bad," Johnson's admission, "I shot two people," was excluded. Id. As trial counsel was also unsure of what Bynum intended to testify to at trial, the voir dire "also provided him an opportunity to learn the content of Bynum's trial testimony, if admitted, and forced her to contradict herself (if she were to do so) under oath." Id.

We further concluded that the admission of Bynum's voir dire testimony was not improper because the voir dire testimony addressed "substantially the same issues" as the trial, and provided "reasonable opportunity and similar motivation . . . for cross-examination of the declarant" by the defendant. Id. at 135, quoting Commonwealth v. Trigones, 397 Mass. 633, 638 (1986). We observed that trial counsel's cross-examination of Bynum during the voir dire not only addressed the issue of voluntariness, but also was aimed at "establish[ing] Bynum's repudiation of her earlier testimony regarding one of the statements." Johnson I, supra.

At the defendant's second trial, Bynum again invoked her Fifth Amendment privilege against self-incrimination. She was appointed counsel, and her attorney represented to the court that he believed Bynum could risk exposure to prosecution as a joint venturer or conspirator by testifying. The Commonwealth also explicitly represented that it "would not make any promises

toward [Bynum] that if this case were to be [re-presented] to the grand jury, [it] wouldn't seek indictments against her." The Commonwealth further represented that Bynum could potentially face charges as an accessory after the fact, a conspirator, or a joint venturer. On this basis,[10] the trial judge determined that Bynum's invocation of the privilege was valid. Bynum was again deemed unavailable to testify, and select portions of her voir dire testimony were admitted in evidence, as had occurred at the first trial.

On appeal, the defendant argues that the trial judge erred both in allowing Bynum to avoid testifying at the second trial by invoking the privilege and in admitting Bynum's voir dire testimony. The defendant argues that Bynum could not properly invoke the privilege because the statute of limitations for perjury had run by the time of the second trial, and that Bynum did not risk prosecution as a coconspirator or joint venturer. Additionally, although he did not raise the argument at trial, the defendant now contends that, to the extent Bynum could invoke the privilege, she waived it by testifying at the voir

---

[10] Where a witness asserts the privilege against self-incrimination, but the judge is unable to adequately assess the validity of that assertion, the judge may conduct an in camera hearing with the witness and the witness's counsel, pursuant to Commonwealth v. Martin, 423 Mass. 496, 504 (1996), to determine the validity of the claim of privilege. No such Martin hearing was conducted in the instant case.

dire hearing. While we conclude that it is unlikely that Bynum could validly assert the privilege at the second trial, we do so for reasons separate and apart from those advanced by the defendant. We further conclude that the admission in evidence of Bynum's voir dire testimony, in lieu of live testimony at the second trial, did not create a substantial likelihood of a miscarriage of justice.

ii. Validity of asserting privilege. A witness may invoke the Fifth Amendment privilege against self-incrimination whenever he or she "reasonably believes that the testimony could be used in a criminal prosecution or could lead to other evidence that might be so used." Pixley v. Commonwealth, 453 Mass. 827, 832 (2009). This test is liberally applied and embraces not only testimony that would support a conviction, but also testimony that would "furnish a link in the chain of evidence needed to prosecute" the witness (citation omitted). Commonwealth v. Funches, 379 Mass. 283, 289 (1979). Where the privilege is properly invoked, the "witness's valid assertion of the Fifth Amendment privilege against self-incrimination trumps a defendant's right to call the witness." Pixley, supra at 834.

Because we construe the privilege liberally in favor of claimants, see Commonwealth v. Koonce, 418 Mass. 367, 378 (1994), a witness may invoke the privilege unless it is "'perfectly clear, from a careful consideration of all the

circumstances in the case, that the witness is mistaken, and that the answer[] cannot possibly have such tendency' to incriminate" (emphasis in original). Funches, 379 Mass. at 289, quoting Hoffman v. United States, 341 U.S. 479, 488 (1951). At the same time, however, it is not sufficient that a witness's answers result in "a mere imaginary, remote or speculative possibility of prosecution." Pixley, 453 Mass. at 832, quoting Commonwealth v. Martin, 423 Mass. 496, 502 (1996). The circumstances must "clearly indicate a possibility of self-incrimination," and mere threats of prosecution, absent facts demonstrating that the threat is credible, are insufficient. See Martin, supra. If an activity is not illegal or otherwise could not be prosecuted, the privilege does not apply. Id.

At the outset, the defendant is correct to observe that Bynum did not risk exposure to prosecution as a joint venturer in the murder. To be convicted as a joint venturer, an individual must have "knowingly participated in the commission of the crime charged, alone or with others, with the intent required for the offense." Commonwealth v. Lopez, 484 Mass. 211, 214 (2020), quoting Commonwealth v. Rakes, 478 Mass. 22, 32 (2017). Thus, to be convicted of murder in the first degree on the theory of deliberate premeditation as a joint venturer, an individual must have knowingly participated in the murder and

shared the necessary specific intent to kill. See Rakes, supra at 34.

Here, the murder amounted to a crime of opportunity -- none of the teenagers knew Domiano. Given that Bynum was not present at the scene of the crime, and did not know the victim, there is no evidence to support her participation in the shooting or lethal intent toward the victim. See Commonwealth v. Gonzalez, 475 Mass. 396, 416 (2016) ("Where a defendant is tried on the theory that he or she committed deliberately premeditated murder by way of a joint venture, proof that the defendant knew of and shared her coventurers' lethal intent is crucial . . ."). Thus, given that Bynum was not present during the shooting, it was indeed "perfectly clear" that she did not face a risk of prosecution as a joint venturer for murder in the first degree. See Martin, 423 Mass. at 502.

Nor could Bynum validly invoke the privilege on the basis of possible exposure to perjury charges. "[A] witness may not claim the privilege out of fear that [she] will be prosecuted for perjury for what [she] is about to say . . . ." Commonwealth v. Borans, 388 Mass. 453, 457 (1983), quoting United States v. Partin, 552 F.2d 621, 632 (5th Cir.), cert. denied, 434 U.S. 903 (1977). While Bynum's voir dire testimony at the first trial contradicted her prior grand jury testimony, such that any additional testimony "might suggest that [she] had

perjured [herself] in testifying on the same subject" in the prior proceedings, the statute of limitations had long since passed for perjury (citation omitted). Borans, supra. See G. L. c. 277, § 63.[11]

Separate and apart from the perjury charge, however, Bynum also risked exposure to a charge of accessory after the fact. She interacted with the defendant shortly after the shooting and was concerned about her son, who was arrested in connection with the shooting soon after, and her nephew later gave the defendant

---

[11] The criminal limitation statute provides in relevant part:

> "An indictment for murder may be found at any time after the death of the person alleged to have been murdered. An indictment or complaint for [certain enumerated sexual offenses], for conspiracy to commit any of these offenses, as an accessory thereto, or any [one] or more of them may be found and filed at any time after the date of the commission of such offense . . . . An indictment for [rape, assault with intent to commit rape, or human trafficking for sexual servitude], or for conspiracy to commit either of these offenses or as an accessory thereto or any [one] or more of them may be found and filed within [fifteen] years of the date of commission of such offense. An indictment for [armed robbery, assault with intent to rob or murder, unarmed robbery, stealing by confining or putting in fear, or incestuous marriage or sexual activities], for conspiracy to commit any such crime, as an accessory thereto, or any [one] or more of them may be found and filed within [ten] years after the date of commission of such offense. An indictment for any other crime shall be found and filed within [six] years after such crime has been committed."

G. L. c. 277, § 63.

a ride to the bus station to leave Worcester. Given Bynum's incentive to protect her son and her opportunity to potentially assist in hiding evidence or helping the defendant flee the area, she possibly risked incriminating herself as an accessory. See Commonwealth v. Rivera, 482 Mass. 145, 151 (2019) (examples of conduct constituting accessory after the fact include aiding principals in fleeing, hiding or destroying evidence, and assisting in disposal of stolen goods). However, it appears that the limitations period has elapsed for this charge as well. See G. L. c. 277, § 63. Cf. Commonwealth v. McLaughlin, 431 Mass. 241, 250 (2000) ("The plain meaning of the [criminal limitation] statute places conspiracy to commit murder in the six-year catchall provision"). Nonetheless, the defendant has not raised the argument on appeal that Bynum's exposure as an accessory is defeated by the statute of limitations.[12] Rather,

[12] At the second trial, defense counsel raised the fact that the statute of limitations had long since passed for perjury. In response, the judge posited that Bynum could have moved out of State after the first trial, which would have tolled the statute of limitations. See G. L. c. 277, § 63 ("Any period during which the defendant is not usually and publicly a resident within the [C]ommonwealth shall be excluded in determining the time limited"). Defense counsel indicated that, to his knowledge, Bynum had never left the State. The judge responded, "that would have to be an inquiry that I'd make under the grounds that she's asserted her Fifth Amendment, and I can't go down that road." When defense counsel pressed the issue, the judge indicated that because the Commonwealth had represented to the court that Bynum faced criminal exposure and because Bynum's appointed counsel believed she could claim the privilege, "I'm

he contends that the factual record does not support Bynum's potential incrimination as an accessory. Thus, while it appears that Bynum did not face a risk of prosecution at the defendant's second trial due to the passage of time, the precise basis for this conclusion involves issues that the defendant has not addressed here. Accordingly, we evaluate the effect of the admission in evidence of Bynum's voir dire testimony, in lieu of live testimony at the second trial, to determine whether it amounted to a substantial likelihood of a miscarriage of justice.[13]

---

locked out of a lot of that area, simply because I can't get into it when you assert those rights."

We note this exchange to clarify that, when ruling on a witness's ability to invoke the privilege, a judge has a duty to "satisfy himself that invocation of the privilege is proper in the circumstances of the case." Martin, 423 Mass. at 503. Accordingly, the judge could have "invite[d] the parties to provide the court with information" as to whether the limitation period had been tolled. See Pixley, 453 Mass. at 833. Further, in the "rare circumstances" where information provided in open court would be inadequate to make a Fifth Amendment determination, the judge had the authority to conduct an in camera Martin hearing with the witness and her counsel to make such a determination. See id.

[13] The defendant also raises the separate argument that Bynum's voir dire testimony at the first trial effectively served to waive the privilege, thereby requiring live testimony at the second trial. This argument was not raised at trial and we need not address it because we conclude that the admission in evidence of Bynum's prior voir dire testimony at the second trial, in lieu of live testimony, did not create a substantial likelihood of a miscarriage of justice, for the reasons discussed infra. See Commonwealth v. Womack, 457 Mass. 268, 277 (2010).

The defendant has failed to identify significant exculpatory information that would be provided by Bynum's live testimony at the second trial. Rather, the defendant argues that he could have impeached Bynum much more effectively than she had been during the voir dire hearing if she had been called to testify at the second trial. The defendant contends that this would have allowed him to mitigate the most damaging portions of Bynum's voir dire testimony that were heard by the jury. Thus, to evaluate the effect of using Bynum's prior voir dire testimony rather than her live testimony at the second trial, we must examine the significance of the portions of Bynum's voir dire testimony that were admitted at trial.

Bynum's voir dire testimony was largely duplicative of other testimony presented to the jury. Much of Bynum's voir dire testimony provided background information as to why the defendant was in Worcester on the night of the shooting and why he had gone to the restaurant. This information, while helpful, was not crucial to the case against the defendant. The most important part of this background information -- the fact that the defendant had accompanied the other teenagers to the restaurant to order Chinese food for Bynum that evening -- was separately testified to by Bynum's niece. Additionally, as mentioned supra, both a waitress and a bartender in the restaurant, as well as Toney and Ellison, all identified the

defendant as the primary member of the group of teenagers who was arguing with the owner of the restaurant immediately prior to the shooting.[14] Thus, Bynum's voir dire testimony was in this regard cumulative of other testimony that placed the defendant at the scene of the shooting.

Bynum was also unable to provide any testimony as to what occurred at the time of the shooting, because she was not present at the scene of the crime. By contrast, there was testimony from numerous other witnesses at trial as to the defendant's presence and participation in the shooting. Both Ellison and Toney positively identified the defendant as both the teenager who argued with the owner in the restaurant and the shooter outside on the sidewalk. Further, as discussed supra, the defendant's physical appearance was very distinct from those of his companions. While all of the other teenagers were light-skinned and thin, the defendant had a noticeably darker complexion and was heavy set. The other witnesses in Toney's party testified that the shooter was heavy set and of a dark complexion, consistent with the features that distinguished the defendant from his companions. Moreover, there was testimony that the youth who had spit on the restaurant owner was also the

[14] In light of this testimony, it is perhaps unsurprising that defense counsel conceded in closing argument that the defendant had been present at the restaurant with Kodjo, Montalvo, and Ronald.

shooter, and three separate witnesses identified the defendant as the spitter. The defendant also used substantially the same language during the altercation inside the restaurant as the shooter did outside the restaurant -- "you ain't no fucking police officer."

Indeed, the only portions of Bynum's voir dire testimony that were significant and noncumulative involved statements that the defendant had allegedly made to her after the shooting. Notably, however, the most damning statement -- that the defendant had shot two people -- was not admitted at trial. Rather, the jury simply heard that the defendant told Bynum that he "did something bad," without further elaboration as to what he was referencing. To be sure, the defendant would have had the opportunity to impeach Bynum as to this vague inculpatory statement if she had testified at the second trial. However, any such impeachment as to this generalized and nonspecific inculpatory statement would not negate the other, significantly probative evidence provided at trial, such as the two separate eyewitness identifications of the defendant as the shooter. Thus, the admission of Bynum's voir dire testimony, in lieu of live testimony at the second trial, did not create a substantial risk of a miscarriage of justice.

c. Failure to disclose inducements to testify. The defendant also contends that Bynum was provided with inducements

to testify that were never disclosed to the defense. As discussed supra, Bynum did not actually testify at either of the defendant's trials. Rather, her voir dire testimony was admitted because she invoked the privilege against self-incrimination and refused to testify at the trial itself. The defendant nonetheless contends that Bynum was incentivized to provide testimony in support of the Commonwealth's case, and that this information should have been disclosed given that Bynum's voir dire testimony was ultimately admitted at trial. In support of his contention as to the existence of such inducements, the defendant notes that, at the time of the first trial, Bynum faced an outstanding warrant on a charge of larceny of property over one hundred dollars. The defendant contends that Bynum was arrested prior to the first trial, after recanting parts of her statement, and released two days later. It is clear that five days after the conclusion of the defendant's trial, Bynum was arrested on the outstanding warrant. The case was continued without a finding shortly thereafter, to be dismissed after five years if the money was repaid. The defendant suggests that Bynum was arrested in connection with this charge to ensure her cooperation with the district attorney, and that she received a more lenient disposition as a result, but that this information was never disclosed.

The Commonwealth has an obligation to disclose "any communication that suggests preferential treatment to a key government witness in return for that witness's testimony." Commonwealth v. Hill, 432 Mass. 704, 715-716 (2000). On the other hand, the mere fact that a witness may have "expected to, and did, receive favorable treatment after the defendant's trial," standing alone, does not constitute an inducement. Commonwealth v. Doherty, 394 Mass. 341, 346 & 348 n.9 (1985) (concluding that witness did not necessarily receive inducement merely because complaint against witness was not prosecuted).

Here, the defendant has failed to provide sufficient evidence to support his contention that Bynum was induced to testify. The defendant merely outlines the timing of Bynum's arrest and the disposition of her case. Yet the disposition in Bynum's case -- entry of a continuance without a finding and dismissal of the case after five years and repayment -- appears relatively unremarkable for the charge at issue. The defendant also suggests that Bynum may have been induced to testify in exchange for more favorable treatment of her son Ronald, who was also present at the scene of the shooting and faced criminal exposure. Where a defendant seeks to uncover an undisclosed arrangement, defense counsel "should, at a minimum, attempt to obtain information from the key witness's attorney and the prosecutor who supposedly negotiated the deal." Commonwealth v.

Upton, 484 Mass. 155, 163 (2020). Here, however, the defendant has provided no information from Bynum, Ronald, or either of their attorneys indicating that Bynum was induced to testify in exchange for more favorable treatment of her son. Rather, the defendant has merely provided an affidavit from a private investigator who avers that Bynum "was concerned that the Assistant District Attorney's office was threatening to bring charges against her son, Ronald Bynum, for the shootings." Without more, the motion judge did not abuse his discretion in denying the defendant's motion for a new trial on this basis.

d. Defendant's antisocial personality disorder. The defendant further contends that his motion for a new trial should have been granted on the ground of newly available evidence that he suffered from a mental disease or defect at the time of the shooting. We disagree.

At an evidentiary hearing on the defendant's motion for a new trial, the defendant presented expert testimony from William Rinn, a neuropsychologist. Rinn testified that the defendant was suffering from antisocial personality disorder at the time of the murder, as well as oppositional defiant disorder, intermittent explosive disorder, and conduct disorder. Rinn also explained that the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V), a revision of the publication of the American Psychiatric Association that was

issued after the conclusion of the defendant's second trial, recognizes antisocial personality disorder as a major psychological disorder that is no less significant than other mental disorders. A prior version of the manual, DSM-III, had classified disorders into different "axes." Under this older classification system, regular clinical disorders fell under "Axis I," personality disorders -- that is, disorders that began in childhood -- fell under "Axis II," and medical disorders fell under "Axis III." DSM-V removed the axis classification system, and does not make a distinction between personality disorders and other types of disorders.

The defendant argues that these changes between DSM-III and DSM-V constitute newly available evidence of mental disease or defect. He reasons that the removal of the "Axis II" classification of personality disorders, including the defendant's antisocial personality disorder, would have allowed the defendant to present a viable defense that he lacked criminal responsibility. See Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967). This argument was rejected by the motion judge, who concluded that although the defendant had antisocial personality disorder at the time of the murder, he nonetheless did not suffer from a mental disease or defect at the time of his offense. We agree, and conclude that the antisocial

personality disorder diagnosed here does not rise to the level of a lack of criminal responsibility.

"To prevail on a motion for a new trial based on new evidence, a defendant must establish 'both that the evidence is newly discovered [or newly available] and that it casts real doubt on the justice of the conviction.'" Commonwealth v. Bonnett, 482 Mass. 838, 844 (2019), quoting Commonwealth v. Grace, 397 Mass. 303, 305 (1986). Here, the evidence presented by the defendant fails on both counts. Rinn himself explicitly testified that while the DSM-V eliminates the Axis II classification, this merely amounts to a clarification, not a substantive change. According to his testimony, prior versions of the DSM similarly did not consider personality disorders to be "lesser" disorders; the changes to DSM-V were simply intended to clarify this preexisting view.

Even assuming that this clarification may be considered newly available evidence, there is no indication that it would have been a "real factor" in jury deliberations so as to cast real doubt on the justice of the defendant's conviction. See Bonnett, 482 Mass. at 844, quoting Grace, 397 Mass. at 305. Rinn testified that antisocial personality disorder is characterized by a "pervasive pattern of disregard for and violation of the rights of others," along with three or more additional symptoms, including "failure to conform to social

norms with respect to lawful behavior," deceitfulness, impulsivity, irritability and aggressiveness, reckless disregard for safety, and lack of remorse. The Commonwealth's expert, Dr. Fabian Saleh, characterized these symptoms as "learned behaviors" and testified that he was not aware of any prior instance of antisocial personality disorder being raised as a mental disease or defect. He further indicated that, according to the DSM, up to seventy-five percent of the United States prison population may be characterized as having antisocial personality disorder. In light of this testimony, the motion judge did not abuse his discretion in concluding that the antisocial personality disorder diagnosed here does not constitute a mental disease or defect. See Commonwealth v. Goudreau, 422 Mass. 731, 737 (1996) (Appendix) (mental disease or defect "does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct"). See also Model Jury Instructions on Homicide 2 (2018). Cf. State v. Shields, 289 Or. App. 44, 47 (2017) ("A defendant seeking to establish a [guilty except for insanity] defense . . . must show that, at the time of the crime, as a result of a mental disease or defect [which does not include a personality disorder or general antisocial behavior], the defendant lacked the substantial capacity to appreciate the criminality of his

conduct or to conform that conduct to the requirements of the law" [emphasis added]).[15]

e. Defendant's immaturity at the time of the shooting. Next, the defendant argues that we should expand upon the principles underlying Miller v. Alabama, 567 U.S. 460 (2012), and its State law counterpart, Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655 (2013), S.C., 471 Mass. 12 (2015), wherein mandatory sentences of life imprisonment without the possibility of parole were found to be unconstitutional as applied to juveniles. The defendant contends that while he was chronologically eighteen years of age at the time of the murder, he was emotionally and mentally much younger. Thus, he concludes that his lack of maturity at the time of the crime renders a mandatory sentence of life without the possibility of parole inappropriate, despite the fact that he was not a juvenile at the time of the crime.

---

[15] At oral argument, the defendant further argued that trial counsel was ineffective for failing to advance a defense of lack of criminal responsibility at the defendant's second trial, an argument that was rejected by the motion judge. We find this argument similarly unavailing. In his first trial, the defendant presented the dual defenses of misidentification and mental impairment. See Johnson I, 435 Mass. at 128. On appeal, we held that this dual defense strategy did not constitute ineffective assistance. See id. At his second trial, the defendant chose to proceed solely on the basis of a misidentification defense. We cannot say that this decision was manifestly unreasonable, particularly given that his dual defense strategy did not succeed at his first trial. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

In Miller, 567 U.S. at 479, the United States Supreme Court concluded that sentencing juveniles to a mandatory term of life in prison without the possibility of parole violates the Eighth Amendment to the United States Constitution. Following that decision, this court ruled that both mandatory and discretionary sentences of life without the possibility of parole for offenders under the age of eighteen violate art. 26 of the Massachusetts Declaration of Rights. Diatchenko, 466 Mass. at 667, 671. Both decisions were largely rooted in the developing body of scientific research on adolescent brain development indicating that a juvenile's brain fundamentally differs from the brain of an adult, particularly as to maturity and behavior control. See Miller, supra at 471-472 & n.5; Diatchenko, supra at 660, 670. We concluded that the numerous ways in which adolescent brain development affects a juvenile's personality and behavior preclude a judge from finding that an offender under the age of eighteen is "irretrievably depraved," such that imposition of life without the possibility of parole would be appropriate. Diatchenko, supra at 669-670.

We have previously declined to extend our holding in Diatchenko to a defendant who was nineteen years old at the time of his offense. See Commonwealth v. Garcia, 482 Mass. 408, 412-413 (2019). We concluded that the science around juvenile brain development was a "rapidly changing field," and that the

"minimal record on brain development" provided in that case did not "allow us to reach an informed conclusion on whether individuals in their late teens or early twenties should be given the same constitutional protections as juveniles" (citation omitted). Id. at 413. We face a similar situation in the instant case. While the defendant has provided expert reports as to his maturity and development over the years, the instant record contains no scientific evidence as to the brain development of eighteen year olds generally. Accordingly, we again decline to extend our holding in Diatchenko to individuals over the age of eighteen. See id. See also Commonwealth v. Colton, 477 Mass. 1, 19 (2017) (declining to extend Diatchenko in case involving twenty-one year old defendant). Cf. Commonwealth v. Jones, 479 Mass. 1, 18 (2018) (declining to conclude that mandatory sentences of life without parole are unconstitutional where offender suffers from developmental disabilities).[16]

[16] At oral argument, defense counsel made the separate argument that this court should consider an individual defendant's level of maturity at the time of the offense as part of its plenary review of convictions of murder in the first degree under G. L. c. 278, § 33E. We agree that the mental maturity of an individual defendant is relevant to our analysis under § 33E. We conclude, however, that the circumstances of the instant case do not warrant a reduction from murder in the first degree to murder in the second degree. See Commonwealth v. Brousseau, 421 Mass. 647, 656-657 (1996) (while defendant's character and background are relevant considerations in choosing

f. Moffett briefing. We now turn to the Commonwealth's motion to strike a brief that was submitted by the defendant pro se, after the filing of his appellate brief by defense counsel. Two of the arguments outlined in the defendant's pro se brief had been included in defense counsel's appellate brief, pursuant to Moffett, 383 Mass. at 208. The Commonwealth contends that the defendant is not entitled to consideration of this pro se brief, given that his appellate counsel already filed a sixty-eight page brief that included two Moffett arguments. For the reasons stated infra, the Commonwealth's motion to strike is denied.

In Moffett, this court outlined the procedure by which appellate counsel is to handle arguments that he or she believes are frivolous, but that the defendant insists upon raising. In such instances, counsel is to "present the [defendant's] contention[s] succinctly in the brief in a way that will do the least harm to the defendant's cause." Id. If counsel believes it "absolutely necessary" to dissociate from the defendant's claims on the basis of professional ethics obligations, he or she "may so state in a preface to the brief." Id. See Care & Protection of Valerie, 403 Mass. 317, 318 (1988) ("counsel,

---

to exercise plenary power under § 33E, "established practice" is to decline to exercise such power on basis of those factors alone).

appointed as well as retained, has the responsibility not to advance groundless contentions"). Whenever counsel includes such a preface, he or she "must send a copy of the brief to the defendant, direct his attention to the preface, and inform him that he may present additional arguments to the appellate court within thirty days." Moffett, supra.

Here, defense counsel adhered to the Moffett requirements. He succinctly included two Moffett arguments in his brief, along with an appropriate disclaimer. Defense counsel's brief also contained a certification that he had provided a copy of the brief and the record appendix to the defendant, along with notice that the defendant could present additional pro se arguments within thirty days. While the defendant appears to have received assistance from counsel as to typing and formatting his pro se brief, the substance of his pro se submission appears to be his own.

The defendant's sixty-four page pro se brief advances the two Moffett arguments included in counsel's brief, as well as three additional arguments. The first two Moffett arguments are entirely in keeping with the procedure outlined supra for advancing arguments that appellate counsel believes lack merit. The remaining three arguments, however, do not appear to correspond to issues that were raised and disclaimed in counsel's appellate brief. Rather, they appear to be new

arguments raised by the defendant pro se in the first instance. It is unclear whether these additional arguments were ever discussed between counsel and the defendant, and no explanation has been provided as to why they were not included in counsel's appellate brief. If these issues were discussed, they should have been included in defense counsel's brief, along with a succinct description. Such discussion and a succinct reference in counsel's brief help ensure that a defendant has had the benefit of consulting with his or her attorney on each of the arguments he or she wishes to advance, prior to submitting a pro se brief.

Nonetheless, irrespective of whether the defendant had raised these additional issues with counsel prior to raising them himself, we would be required to conduct a plenary review of the record to determine whether a meritorious claim existed, pursuant to our duty under G. L. c. 278, § 33E. Having said that, we have reviewed the entirety of the record, pursuant to our duty under G. L. c. 278, § 33E, and conclude that nothing contained therein warrants an award of extraordinary relief. As part of our plenary review, we considered all of the additional issues raised by the defendant in his pro se brief. They provide no grounds for relief, and none of them warrants extended discussion.

Judgment affirmed.

Order denying motion for a new trial affirmed.