SJC-11503

COMMONWEALTH vs. IDELFONSO VELEZ.

Middlesex. November 2, 2020. - May 25, 2021.

Present: Gaziano, Lowy, Cypher, & Kafker, JJ.

Homicide. Constitutional Law, Assistance of counsel. Insanity. Mental Impairment. Intoxication. Practice, Criminal, Assistance of counsel, New trial, Capital case.

Indictments found and returned in the Superior Court Department on September 30, 2010.

The cases were tried before Sandra L. Hamlin, J.; and following review by this court, 479 Mass. 506 (2018), a motion for a new trial was heard by Laurence D. Pierce, J.

Theodore F. Riordan for the defendant.
Jessica Langsam, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. A Superior Court jury convicted the defendant on two indictments charging murder in the first degree in the stabbing deaths of Trisha Bennett and Angel Ortiz. In these appeals from his convictions and from the denial of his motion for a new trial, following a remand for an evidentiary hearing

in the Superior Court, see Commonwealth v. Velez, 479 Mass. 506, 515 (2018), the defendant contends that he is entitled to a new trial because he was deprived of his constitutional right to the effective assistance of counsel. The defendant argues, among other things, that it was manifestly unreasonable for trial counsel to forgo possible mental health defenses in favor of a third-party culprit defense.

We conclude that the defendant was not deprived of his right to the effective assistance of counsel, and, having conducted a plenary review of the record pursuant to G. L. c. 278, § 33E, we discern no basis upon which to disturb the verdicts. Accordingly, we affirm the convictions and the order denying his motion for a new trial.

1. Background a. Prior proceedings. In September of 2010, the defendant was indicted on two counts of murder in the first degree for the deaths of Bennett and Ortiz. The defendant filed a motion to suppress statements he made to police on the ground that his waiver of his Miranda[1] rights, and subsequent statements, had not been voluntarily made due to his intoxication, sleep deprivation, and mental illness. The motion was denied after an evidentiary hearing.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

During a February 2012 pretrial hearing, trial counsel informed the judge that the defense would "not be using the insanity defense in this case." One and one-half months later, at a subsequent pretrial hearing, trial counsel assured the judge that he would not be raising mental health defenses, including "any other issues relating to [the defendant's] mental health status as it may bear on the issue of intent."

The defendant's trial began on September 21, 2012, before a different judge. His defense was that a third party, Jonathan Gonzales, committed the crimes. On October 17, 2012, the jury returned verdicts of guilty on two counts of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty. On August 6, 2014, represented by new appellate counsel, the defendant filed a motion for a new trial on the ground that his trial counsel had been ineffective for not having pursued a defense of intoxication (based on the ingestion of drugs and alcohol) or a "mental impairment defense relative to the defendant's mental health." The defendant later filed a supplemental pleading arguing, in part, that trial counsel did not properly investigate the mental impairment defense, and that the third-party culprit defense essentially was doomed to fail. Another Superior Court judge (the trial judge having retired) denied the defendant's request for postconviction relief without a hearing. In reviewing that

decision, this court concluded that "it [was] necessary to understand [trial] counsel's reasoning at the time he informed the judge that he would not pursue lack of criminal responsibility or mental impairment defenses." Velez, 479 Mass. at 513. We remanded the matter to the Superior Court for an evidentiary hearing to determine whether trial counsel's strategy to forgo a mental impairment defense in favor of the third-party culprit defense was manifestly unreasonable. Id. at 515.

A different Superior Court judge (motion judge) then held a two-day evidentiary hearing at which trial counsel and the defendant testified. The defendant also introduced in evidence certain of his medical records that had been available to trial counsel but that counsel had not obtained from the defendant's mental health providers. Finding trial counsel's strategy to forgo defenses of mental impairment and intoxication not manifestly unreasonable, the motion judge denied the defendant's motion for a new trial.

b. Facts. The facts in the underlying case were discussed at length in our prior decision. See Velez, 479 Mass. at 507-511. We focus here on the evidence presented at the hearing on the defendant's motion for a new trial. The following are summarized from the motion judge's findings, supplemented with

undisputed facts in the record. See Commonwealth v. Torres, 433 Mass. 669, 670 (2001).

The defendant was represented by an experienced criminal defense attorney, who had been on the so-called "murder list," enabling him to represent defendants charged with murder in the first degree, for twenty-five years. Trial counsel entered an appearance at the defendant's arraignment, and continued to represent him throughout the trial proceedings.

Trial counsel investigated the possibility of asserting defenses based on either a lack of criminal responsibility or impaired capacity due to mental illness or intoxication. To do so, counsel obtained the defendant's mental health records from three hospitals, a community health center, and an addiction treatment center. The records documented that the defendant had been diagnosed with psychiatric illnesses, including bipolar disorder, schizoaffective disorder, and posttraumatic stress disorder, and had been treated with antidepressants, mood stabilizers, and antipsychotic medications. The medical records also indicated that the defendant had reported experiencing auditory and visual hallucinations.[2] Notably, on January 1, 2010

[2] For example, the defendant informed a physician at a community health center that he "hears a voice that calls his name or tells him to do something like 'go check the door to see if it's locked,' 'go take out the trash.'" In May of 2010, while psychiatrically hospitalized following an emergency room

(four months before the stabbings), the defendant presented at a major medical center's emergency room with depression and suicidal thoughts, and was psychiatrically hospitalized.[3] After approximately two weeks of stabilization and adjustment of his medications, he was released to a drug treatment center, where he relapsed within a few days and attempted to commit suicide through ingesting pills, cocaine, and alcohol. Thereafter, the defendant again was hospitalized for psychiatric observation and treatment from January 15 to 19, 2010.

In addition to obtaining the defendant's medical records, trial counsel consulted with two mental health professionals. One of these experts, psychiatrist Dr. David Rosmarin, interviewed the defendant on multiple occasions and also reviewed the defendant's mental health records. On January 24, 2012, Rosmarin and trial counsel met for three hours to discuss potential mental health defenses. The meeting included a review of the defendant's "detailed" forensic interview. It was Rosmarin's opinion that he could not offer expert testimony to

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admission, the defendant told clinicians that, for the past two to three weeks, he had heard voices and seen "shadows."

[3] Trial counsel did not obtain medical records from two providers -- the mental health unit at the Middlesex County house of correction, from 2007 and 2008; and the crisis stabilization unit at a Boston hospital, from January 2010 -- that were referenced in other medical records.

support mental health defenses based on a lack of criminal responsibility or on mental impairment.

The other expert witness that trial counsel retained, Dr. Eric Brown, is a clinical and forensic psychologist. Counsel engaged Brown to examine the defendant's mental health as it related to an ability to waive his Miranda rights or to provide a voluntary statement to police. Brown did not interview the defendant; he based his opinion on police reports, as well as the defendant's mental health records, both prior to and following the stabbings. At the hearing on the motion to suppress hearing, Brown testified that the defendant was suffering from schizoaffective disorder, a serious mental illness, as well as posttraumatic stress disorder. As a result of these mental illnesses, Brown opined, the defendant was unable knowingly and intelligently to waive his constitutional rights and to "interact in an intellectually rational way for any series of interviews."

The judge who decided the defendant's motion to suppress[4] credited Brown's testimony that the defendant was suffering from a serious mental illness and was not taking prescribed medications. She rejected Brown's opinion that the defendant was unable knowingly, intelligently, and voluntarily to waive

[4] This is the fourth judge whose rulings are discussed here.

his Miranda rights and to interact rationally with police officers. The judge noted that Brown's opinion was contradicted "by the objective evidence of the manner in which the defendant interacted with medical personnel and with the police." The judge concluded, "[N]otwithstanding that the defendant was off his medications at the time of the incident, Dr. Brown could not point to any significant record information about the defendant's behavior on the night in question that supported his hypothesis that the defendant was unable to interact in a rational way following the incident."

Before trial, counsel and the defendant repeatedly discussed the relative benefits of raising defenses based on the defendant's mental condition. On September 6, 2012, trial counsel wrote to the defendant to document counsel's efforts to obtain an expert witness to support a defense of lack of criminal responsibility, and the viability of asserting such a defense without an expert witness. In the letter, counsel stated that he "did substantial research and investigation into [the insanity defense] but determined that it would ultimately be a weak defense." The primary reason noted was that trial counsel had consulted with two expert witnesses and the defendant did not "have a formal diagnosis of mental disease at the time of the commission of the crime." Furthermore, the note continued, the defendant had "fabricated statement[s] to 911,

the [emergency medical technicians] and the police immediately after the homicide which indicates appreciation of wrongfulness."[5] Finally, the letter stated, there was evidence that the defendant was able to conform his conduct to the requirements of the law. Trial counsel also explained that the defendant's "intentional use of alcohol and illicit drugs would be an issue." Although not stated in the letter, trial counsel also had informed the defendant in prior conversations that the so-called "diminished capacity defense" was not a realistic option given the lack of expert testimony.[6]

Ultimately, trial counsel and the defendant reached a joint decision to pursue a third-party culprit defense pointing at Gonzales. This defense, as with the defenses based on the defendant's mental condition, had pluses and minuses. The

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[5] Trial counsel believed that the defendant's statements to police were inconsistent with an insanity defense "where the defendant would be admitting to the commission of the crimes." In three separate interviews, the defendant told police officers that he and the victims had been attacked by two intruders, one armed with a knife. He did not recognize them because their faces were concealed, but thought that they were "Spanish based on their eyes."

[6] The mental impairment defense often is colloquially referred to as "diminished capacity." Commonwealth v. Holland, 476 Mass. 801, 804 n.3 (2017). There is no diminished capacity defense in the Commonwealth. See Commonwealth v. Hardy, 426 Mass. 725, 729 n.5 (1998). A jury, however, may consider credible evidence of mental impairment in deciding whether the Commonwealth has met its burden of proving the defendant's state of mind. See Commonwealth v. Santiago, 485 Mass. 416, 421 (2020).

benefit of the third-party culprit defense, according to trial counsel, was that Gonzales had multiple motives to kill Ortiz. As outlined in trial counsel's opening statement, Gonzales wanted to kill Ortiz because (1) Bennett stopped dating Gonzales to date Ortiz; (2) Ortiz stole $10,000 from Gonzales by keeping the money that Gonzalez had posted for Ortiz's bail; and (3) Ortiz had beaten Bennett, and Gonzales was angered by the abuse. The third-party culprit defense also was bolstered by evidence that Gonzales made incriminating statements to one of his friends, Shannon Begg. In 2009, Gonzales told Begg that he wanted to hire someone to kill Ortiz. After the stabbings, when Gonzales became the subject of suspicion, he told Begg, "Fuck you all. I did it. And fuck you all."

Undoubtedly, there were numerous drawbacks to the third-party culprit defense. The Commonwealth alleged that the victims were stabbed after 2:51 A.M. At trial, the prosecutor was able to produce evidence that, at the time of the stabbings, Gonzales had been in Lowell, twenty-four miles away from the scene. A number of witnesses testified to having seen Gonzales at his apartment building in the early morning hours of May 1, 2010. This testimony was corroborated by video surveillance footage of Gonzales's vehicle arriving home at 2 A.M., and Gonzales walking out of the building at about 3 A.M. In addition, a cellular telephone used by Gonzales connected to a

cellular tower in Lowell at 2:25 A.M. To refute this evidence, trial counsel argued in his closing statement that Gonzales, who had unexplained access to large sums of cash, hired someone to kill Ortiz.

The third-party culprit defense also arguably was inconsistent with the physical evidence. The Commonwealth introduced evidence that blood on the defendant's jeans contained deoxyribonucleic acid (DNA) from both the defendant and Bennett. A blood spatter expert testified that the jeans were in "close proximity to the spatter-inducing event that bled out Ms. Bennett's blood." Testing of Bennett's fingernails revealed a mixture of Y-chromosome short tandem repeat (Y-STR) DNA[7] that matched DNA of the defendant and Ortiz. In addition, the Commonwealth pointed out that the entry doors were not damaged, suggesting there had not been a break-in.

At trial, the defendant pointed out that the Commonwealth's expert had conceded that the cause of the blood spatter was unknown. The defendant's blood spatter expert testified that the jeans were in close proximity to "a spatter-producing event," but due to the mixed DNA profile, he could not "say definitely which person [(the defendant or Bennett)] was the

[7] The Commonwealth's expert explained that Y-STR testing examines a type of DNA found only in males and that it is inherited from father to son, so that all males in the same lineage would have the same Y-STR DNA.

source of the spatter." The defendant also argued that the Y-STR DNA testing was not significant because, given the limitations of that type of DNA testing, the profiles could have matched large numbers of Hispanic males. Finally, the defendant argued that the third-party culprit defense was consistent with evidence of no forced entry because there were "many people with keys" to the apartment, and building security was lax.[8]

2. Discussion. In reviewing a claim of ineffective assistance of counsel in a case of murder in the first degree, we generally review under the more favorable standard of review of a substantial likelihood of a miscarriage justice. See Commonwealth v. Vargas, 475 Mass. 338, 358 (2016); G. L. c. 278, § 33E. Under this standard, "[w]e consider whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion." Vargas, supra, quoting Commonwealth v. Lessieur, 472 Mass. 317, 327, cert. denied, 577 U.S. 963 (2015).

[8] The defendant claimed that other pieces of physical evidence demonstrated that the victims were killed by intruders. The police could not find any conclusive evidence linking Ortiz's DNA to the defendant's person or to a bloody knife found in the kitchen sink. The third-party culprit defense also was consistent with an unidentified bloody footprint on the victims' bed. The Commonwealth disputed the significance of the footprint, and suggested that the footprint had been deposited by a "tactical boot," i.e., footwear worn by first responders.

Where, as here, however, the defendant's claim of ineffective assistance is based on a tactical or strategic decision, we apply the more rigorous standard that, to be ineffective, the attorney's decision must have been manifestly unreasonable when made. Commonwealth v. Lang, 473 Mass. 1, 14 (2015). "Two principles guide the manifestly unreasonable test. First, 'we evaluate the [strategic or tactical] decision at the time it was made, and make every effort . . . to eliminate the distorting effects of hindsight.' . . . Second, '[s]ubstantively, [o]nly strategy and tactics which lawyers of ordinary training and skill in criminal law would not consider competent are manifestly unreasonable'" (quotations and citations omitted). Commonwealth v. Holland, 476 Mass. 801, 812 (2017). See Commonwealth v. Kolenovic, 471 Mass. 664, 674-675 (2015), S.C., 478 Mass. 189 (2017) (describing manifestly unreasonable test as "search for rationality in counsel's strategic decisions" as opposed to "whether counsel could have made alternative choices").

The defendant makes five arguments in support of his claim that his trial counsel was constitutionally ineffective. First, the defendant argues that the judge's finding that trial counsel and the defendant made a "joint decision" to pursue a third-party culprit defense is clearly erroneous. Second, the defendant maintains, trial counsel "abdicated" his sole

responsibility to decide a matter of trial strategy. Third, notwithstanding that trial counsel was unable to find an expert witness to testify in support of the defense, the defendant contends that it was manifestly unreasonable not to pursue a mental impairment defense. Fourth, trial counsel failed to consider whether he could explain the defendant's statements about home invaders as the product of hallucination. Fifth, trial counsel did not adequately explore the defense of intoxication. We address each argument in turn.

a. Motion judge's finding of a "joint decision." The defendant challenges the motion judge's finding that trial counsel and the defendant reached a "joint decision" to rely upon a third-party culprit defense. In reviewing a motion judge's findings of fact made after an evidentiary hearing, we accept the findings where they are supported by substantial evidence in the record. Commonwealth v. Perkins, 450 Mass. 834, 845 (2008). "When, as here, the motion judge did not preside at trial, we defer to that judge's assessment of the credibility of witnesses at the hearing on the new trial motion, but regard ourselves in as good a position as the motion judge to assess the trial record." Id., quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986).

At the motion hearing, both trial counsel and the defendant testified that the other had been in charge of the defense.

Trial counsel explained that his practice is to inform clients of the strengths and weaknesses of potential defenses and to make recommendations concerning trial strategy. He testified, "With every client I discuss strategies. What's the best defense, why is this strong, why is this weak, should he plead, should he [go to] trial, should he testify? I go over that many times and ultimately, the client makes the decision. I give recommendations. This is weak, this is stronger . . . . I do that in every single case. I did it in this case." It was the defendant, according to trial counsel, who made the ultimate decision to pursue a third-party culprit defense and to forgo a defense based on an impaired mental condition.

The defendant offered contradictory testimony about the decision-making process. According to the defendant, trial counsel selected the third-party culprit defense. The defendant testified:

> Q.: "What did [trial counsel] say to you about whose decision it was about trial strategy that was going to be used?"
>
> A.: "It was his."
>
> Q.: "Did he ever say to you that it's your decision?"
>
> A.: "No."

The defendant further testified that, by the time of trial, following multiple conversations about available defenses, he reluctantly went along with trial counsel's decision.

"[H]e convinced my mind; he changed my mind. Every time I bring the subject, he says no, third party culprit is the right defense and we're going to do it with this and with this, and I'm not an expert; I let him do what he -- he does best, which is represent people, so I couldn't change his mind no more, no matter how many times I tell him I don't want this defense." The defendant added that, over the course of the two years from the time his counsel was appointed until the trial, while the defendant wanted to pursue a defense of lack of criminal responsibility, trial counsel convinced him that the third-party culprit defense was the best alternative.

The motion judge reconciled the differing testimony by trial counsel and the defendant by finding that "the decision to pursue a third-party culprit defense [and forgo a mental impairment defense] was a joint decision, made by trial counsel and the defendant, after multiple attorney/client consultations." See Commonwealth v. Colon, 449 Mass. 207, 215-216, cert. denied, 552 U.S. 1079 (2007), S.C., 479 Mass. 1032 (2018), quoting Commonwealth v. Spagnolo, 17 Mass. App. Ct. 516, 517-518 (1984) (motion judge's resolution of conflicting testimony "invariably will be accepted"). See also Commonwealth v. Linton, 483 Mass. 227, 239-240 (2019) (it was for judge to weigh and resolve conflicting testimony).

We discern no error in the motion judge's finding that the defendant and trial counsel, after consultation, reached an agreement to rely upon a third-party culprit defense. The judge's finding was supported by evidence that trial counsel investigated the possibility of raising a mental health defense by obtaining the defendant's mental health records and consulting with expert witnesses; trial counsel and the defendant repeatedly discussed the viability of these defenses; and the defendant ultimately agreed with trial counsel's recommendation that they rely upon a third-party culprit defense rather than a defense of mental impairment.

b. Abdication of responsibility for formulating trial strategy. The defendant argues that trial counsel was ineffective because he "abdicated his ultimate responsibility" to decide between a third-party culprit defense and a defense of mental impairment defense. According to the defendant, such a decision is a matter of trial strategy that is "within the sole purview of defense counsel, albeit with consultation [with] the defendant (emphasis supplied).

A criminal defendant's right to the effective assistance of counsel derives from the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. Commonwealth v. Patterson, 432 Mass. 767, 774 (2000), S.C., 445 Mass. 626 (2005). The Sixth Amendment guarantees to

each defendant "the Assistance of Counsel for his [or her] defense." Under art. 12, a defendant is entitled to "be fully heard in his defense by himself, or his council at his election." A defendant who elects to be represented by counsel does not "surrender control entirely to counsel." McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018). The Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." Faratta v. California, 422 U.S. 806, 820 (1975). The right to the assistance of counsel "contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense." United States v. Rosemond, 958 F.3d 111, 119 (2d Cir. 2020), cert. denied, 141 S. Ct. 1057 (2021), quoting Gannett Co. v. DePasquale, 443 U.S. 368, 382 n.10 (1979).

In practice, a defendant's Sixth Amendment right to autonomy means that certain decisions are so "fundamental" that they rest ultimately with the defendant. Jones v. Barnes, 463 U.S. 745, 751 (1983). These decisions include "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Id. See Commonwealth v. Miranda, 484 Mass. 799, 819, cert. denied, 141 S. Ct. 683 (2020); Commonwealth v. Martin, 425 Mass. 718, 721 (1997). See also Mass R. Prof. C. 1.2 (a), as appearing in 471 Mass. 1313 (2015) (requiring criminal defense lawyers to "abide by the client's decision,

after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify").

By choosing to be represented by counsel, however, and notwithstanding the right to personal autonomy, a defendant necessarily relinquishes some control of the case to the attorney. See Gonzalez v. United States, 553 U.S. 242, 248-249 (2008); Miranda, 484 Mass. at 819. "The adversary process could not function effectively if every tactical decision required client approval." Taylor v. Illinois, 484 U.S. 400, 418 (1988). See Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, J., concurring) (counsel has authority to make decisions over "day-to-day conduct of the defense"). "[T]he client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial." Taylor, supra. "Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate." American Bar Association Criminal Justice Standards for the Defense Function, Standard 4-5.2(d) (4th ed. 2017). Decisions regarding jury selection, for example, are within counsel's control, United States v. Boyd, 86 F.3d 719, 724 (7th Cir. 1996), cert. denied, 520 U.S. 1231 (1997), as are decisions

regarding joinder, Commonwealth v. Hernandez, 63 Mass. App. Ct. 426, 432 (2005).

To be sure, the line dividing decision-making authority between lawyer and client is not always clear. See Miranda, 484 Mass. at 820 & n.28 (there is no "precise test to determine whether a particular decision is 'tactical' as opposed to 'fundamental'"). The United States Supreme Court has emphasized that it is the defendant who controls the objective of the defense.[9] McCoy, 138 S. Ct. at 1508. Decisions such as whether to maintain innocence in the guilt phase of a capital trial in the face of overwhelming evidence "are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are (emphasis in original)." Id. "Once a defendant decides on an objective -- e.g., acquittal -- [t]rial management is the lawyer's province and counsel must decide, inter alia, what arguments to pursue" (quotations and citations omitted). Rosemond, 958 F.3d at 122.

In Rosemond, 958 F.3d at 123, for example, the United States Court of Appeals for the Second Circuit held that a defendant is not deprived of his or her right to personal

[9] Of course, a defendant's right to control the objective of the defense does not relieve counsel of the obligation to investigate potential defenses as well as to formulate trial strategy. See Commonwealth v. Kolenovic, 471 Mass. 664, 675 (2015), S.C., 478 Mass. 189 (2017); Commonwealth v. Spray, 467 Mass. 456, 472-473 (2014).

autonomy or the effective assistance of counsel when trial counsel concedes one element of the charged crime while maintaining that the defendant is not guilty as charged. See Christian v. Thomas, 982 F.3d 1215, 1225 (9th Cir. 2020) ("counsel does not interfere with the objective of the defense by arguing alternative theories if he does so in pursuit of acquittal").

Consistent with McCoy, 138 S. Ct. at 1508, we have held that a competent defendant maintains autonomy over the decision whether to assert a mental health defense. See Commonwealth v. Companonio, 445 Mass. 39, 51-52 (2005); Commonwealth v. Federici, 427 Mass. 740, 744-745 (1998). In Federici, supra at 743-744, we considered a defendant's claim that the judge erred in failing to instruct the jury on the defense of lack of criminal responsibility over the defendant's own objections. On appeal, the defendant argued that "under art. 12 . . . , his trial counsel had complete control over the decision whether to raise the issue of lack of criminal responsibility." Id. at 744. Based on the necessity of safeguarding the defendant's autonomy in decisions relating to his defense, we held that, after consultation with counsel, a defendant has a "choice not to label himself as 'criminally insane.'"[10] Id. See Lang, 473

[10] We honor a defendant's refusal to "label himself as 'criminally insane'" in the exercise of his right of personal

Mass. at 21 (Lenk, J., concurring) (decision to present defense of lack of criminal responsibility rests entirely with defendant).

Subsequently, in Companonio, 445 Mass. at 40, we considered a claim of ineffective assistance based on a failure fully to investigate the possibility that the defendant was suffering from a mental impairment at the time of the killing. Although a "classic insanity defense" was not a viable option, trial counsel repeatedly spoke to the defendant about the possibility of pursuing an impairment defense based on mental disease or defect. Id. at 45. The defendant refused to allow trial counsel to raise this defense because, in his view, "crazy people go to hell." Id. On appeal, the defendant argued that trial counsel was ineffective for not forging ahead with the mental impairment defense notwithstanding the defendant's objections. Id. at 41-42. Relying on Federici, we concluded that trial counsel made a reasonable decision to forgo a mental impairment defense "in light of the fact that it was based on the defendant's personal choice against the advice of counsel." Id. at 51.

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autonomy, as long as "he is competent and does so with knowledge of the consequences" (citation omitted). Commonwealth v. Robidoux, 450 Mass. 144, 156 (2007).

Here, the defendant's argument that trial counsel was ineffective for "abdicat[ing] his sole authority" fails for two reasons. First, as discussed, the decision whether to forgo a mental health defense was not within trial counsel's exclusive control. See Companonio, 445 Mass. at 51-52; Federici, 427 Mass. at 744-745. As explained in McCoy, 138 S. Ct. at 1508, the defendant had the right to control the objective of his defense, and trial counsel did not have the "sole authority" to decide between a defense that could result in acquittal -- the third-party culprit defense, see Commonwealth v. Hoose, 467 Mass. 395, 412 (2014) -- and a defense that could result in a conviction of murder in the second degree -- the mental impairment defense, see Commonwealth v. Cassino, 474 Mass. 85, 95 (2016) -- no matter how unlikely those outcomes might appear to counsel.

Second, the divisions of authority become problematic where "the views of defense counsel and the client diverge." Miranda, 484 Mass. at 820. There is no prohibition against trial counsel and the defendant reaching an agreement, after meaningful consultation, to pursue a particular path that a defendant initially had rejected. See United States v. Holloway, 939 F.3d 1088, 1101 n.8 (10th Cir. 2019) (lawyer did not usurp ability of defendant to define objective of defense where both parties agreed to challenge intent element of offense). See generally

Hashimoto, Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case, 90 B.U. L. Rev. 1147, 1161 (2010) (issues surrounding scope and impact of autonomy interests arise when counsel makes choices without affirmative consent of defendant). In any event, by agreeing upon a trial strategy after multiple discussions with the defendant, trial counsel did not abdicate his responsibility to provide the defendant with competent representation.

c. Whether decision not to pursue mental health defense was manifestly unreasonable. The defendant challenges the judge's finding that, "[g]iven his lack of an expert, [trial counsel]'s strategic choice not to assert a defense relating to the defendant's mental health was not manifestly unreasonable." The defendant contends that the judge did not weigh properly the possibility of presenting a mental health defense, without an expert witness, against the viability of a feeble third-party culprit defense. He argues that "[o]ne cannot form an opinion on the inadvisability of pursuing a mental impairment defense without considering the viability of what would be the alternative defense."

The defendant concedes that asserting a mental health defense without an expert witness "is a challenging task." Trial counsel testified that, in his extensive experience, the successful presentation of the defenses of a lack of criminal

responsibility or impaired capacity requires expert testimony. See Kolenovic, 471 Mass. at 675 (noting difficulty in defending murder case based on lack of criminal responsibility even with expert testimony). See also Commonwealth v. Wright, 479 Mass. 124, 139 (2018) (absence of expert testimony to support defense of lack of criminal responsibility is "clear reason[]" for trial counsel not to pursue such defense); Commonwealth v. LaCava, 438 Mass. 708, 714 (2003) (not unreasonable for trial counsel to abandon defense of lack of criminal responsibility where, along with other evidence of defendant's sanity, qualified expert witness opined that defendant was not suffering from mental disease or defect at time of shooting).

As the defendant contends, an evaluation of trial counsel's performance involves weighing the strength of an asserted defense "relative to the availability and strength of other potential defenses." Commonwealth v. Epps, 474 Mass. 743, 758 (2016). Here, however, we disagree with the defendant's contention that the motion judge did not take into account the viability of the third-party culprit defense. Although the judge made no explicit findings weighing the alternative possible theories of defense against one another, that finding is implicit in his conclusion that trial counsel's choice to forgo the mental health defense was not manifestly unreasonable. See Commonwealth v. DePina, 476 Mass. 614, 621 (2017) (although

explicit finding is preferred, "it is not essential where the evidence supports the judge's implicit finding").

In his findings, the judge noted that trial counsel had assessed the strengths and weaknesses of the third-party culprit defense. The judge stated, "[Trial counsel] explained that the strength of a third-party culprit defense included that the third-party culprit admitted to someone else that he had killed the two victims. In addition, the third-party culprit had a motive for committing the crimes, and the physical ability and opportunity to carry out the crimes. [Trial counsel] recalled that the third-party culprit had a reputation for carrying knives." On the other hand, trial counsel "acknowledged that he was advised by the Commonwealth prior to trial that there was alibi evidence, including a video, showing that the alleged third-party culprit was not present at the time of the murders." The judge also considered that the defendant and the Commonwealth contested "whether the third-party culprit defense was viable given the evidence at trial regarding Bennett's blood on the defendant's jeans, the defendant's DNA under Bennett's fingernails, a third footprint on the bed where Ortiz's body was found, the lack of forced entry, and Gonzales's alibi for the night of the murders." Against this backdrop, the judge framed the issue as "whether it was manifestly unreasonable for [trial counsel] to have proceeded with a third-party culprit defense

rather than a mental impairment or intoxication defense" (footnote omitted).

Contrary to the defendant's suggestion, the judge did not consider the reasonableness of abandoning the mental health defenses in a vacuum. Based on our review of the evidence, it is clear that "[t]rial counsel did not have particularly good cards in his hand." Commonwealth v. Candelario, 446 Mass. 847, 858 (2006). Despite diligent efforts, trial counsel could not find an expert witness who would testify in support of a mental health defense. At the same time, counsel was aware that the third-party culprit defense was vulnerable to attack by the Commonwealth due to alibi evidence tending to show that the purported third-party had been elsewhere, and physical evidence linking the defendant to the crimes. Thus, trial counsel had two viable, yet flawed, defenses from which to make a recommendation; we cannot say that trial counsel was ineffective for urging one over the other.

d. Possible hallucinations concerning intruders. The defendant contends that trial counsel was ineffective for failing to consider whether the defendant's statements about home invaders could be explained as the product of hallucinations. In our earlier decision in this case, we discussed whether the defendant's statements to police might have been the product of mental illness. Velez, 479 Mass. at

514. "Some of the evidence in the defendant's medical records indicates that, before the homicides, he suffered from hallucinations, including auditory hallucinations, that people were telling him to hurt people. After the homicides, he reported seeing people coming to hurt him. Such evidence, if developed and if admissible, might have supported such defenses. It might also have served to explain, in part, the defendant's statements to the police that others were in the apartment." Id. at 514-515.

At the evidentiary hearing on remand following the initial denial of the defendant's motion for a new trial, trial counsel testified that he briefly considered the possibility that the defendant's statements had been the product of hallucinations. Ultimately, he relied on the expert advice of Rosmarin for guidance on this issue. Counsel testified that he likely addressed the issue with Rosmarin during their three-hour meeting, but, due to the passage of time, could not recall specific details of that conversation.

On this basis, the defendant has not shown that trial counsel was ineffective. See Commonwealth v. Seino, 479 Mass. 463, 472-473 (2018) (it is defendant's burden to establish ineffective assistance of counsel). A duty to investigate a mental health defense "arises when counsel is aware of information suggesting at least the viability of a [mental

health] defense." Holland, 476 Mass. at 807, citing Commonwealth v. Roberio, 428 Mass. 278, 280 (1998), S.C., 440 Mass. 245 (2003). In this case, in contrast with cases where we have concluded that the failure to investigate fell below the behavior expected from a reasonably effective attorney, trial counsel did conduct a thorough investigation into the viability of a mental health defense. He retained two experts to review the defendant's extensive medical records, had the defendant interviewed by one of the experts, reviewed the defendant's records himself, and obtained evaluations from both experts. Compare Commonwealth v. Field, 477 Mass. 553, 556-557 (2017). See generally Epps, 474 Mass. at 757-758 (discussing counsel's duty to conduct complete investigation of "potentially substantial defense" such as lack of criminal responsibility before deciding to forgo it).

In addition, trial counsel was not ineffective for failing to obtain two additional sets of medical records, for crisis interventions, which were mentioned in the records he already had obtained. The mental health records trial counsel provided to the expert witnesses documented the defendant's lengthy mental health history and diagnoses of serious mental illnesses, as well as attempts at suicide. The records contained an extensive list of psychiatric medications that he had been prescribed and the varying dosages that had been administered,

in multiple efforts to stabilize the defendant, and referenced instances of auditory and visual hallucinations that the defendant had experienced. The additional medical records that subsequently were obtained by appellate counsel largely referenced the same symptoms of mental illness. See Commonwealth v. Don, 483 Mass. 697, 707 (2019) (defendant was not prejudiced by trial counsel's failure to obtain largely redundant medical records).

e. Intoxication. The defendant also contends that the judge considered intoxication only in the context of the voluntariness of the defendant's statements to police, and disregarded the possibility that intoxication might have had an impact on his ability to form the intent to kill, premeditate, or commit a murder with extreme atrocity or cruelty. See Commonwealth v. Glass, 401 Mass. 799, 809 (1988). The defendant points out that the judge found that the voluntariness of the defendant's statements was not a live issue at trial and accordingly that trial counsel could not be faulted for not pursuing a futile argument.

The judge's findings concerning trial counsel's decision not to seek a humane practice instruction do not mean that the judge failed to consider that intoxication could have had an impact on the defendant's intent and knowledge, and potentially could negate a finding of murder in the first degree. In his

memorandum of decision, the judge explicitly recognized that the defendant had argued that trial counsel was ineffective for "pursuing a third-party culprit defense rather than an intoxication and/or mental impairment defense." Likewise, the issue presented at the hearing on remand was "whether it was manifestly unreasonable for [trial counsel] to have proceeded with a third-party culprit defense rather than a mental impairment or intoxication defense" (footnote omitted). Quoting our decision in Velez, 479 Mass. at 512 n.5, the judge noted that a defense of mental impairment could have been supported by evidence either of mental disease or defect or of intoxication: "a defense based on the defendant's mental health and substance use . . . could have been one of a lack of criminal responsibility . . . or of mental impairment." A successful defense of mental impairment, the judge observed, would negate the defendant's capacity to form a specific intent, or the ability to engage in deliberate premeditation, or to appreciate that his acts were extremely atrocious or cruel.

Based on the judge's recitation of the applicable standards and case law, we are confident that he did not overlook the role that intoxication could play in a defense of mental impairment, and in this case in particular.

f. Review under G. L. c. 278, § 33E. Pursuant to our duty under G. L. c. 278, § 33E, we have conducted a thorough review

of the entire record and discern no basis upon which to exercise our extraordinary authority to order a new trial or to reduce the verdicts.

Judgments affirmed.

Order denying motion for a new trial affirmed.