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SJC-12307

COMMONWEALTH vs. JORGE RODRIGUEZ-NIEVES.

Hampden. December 7, 2020. - April 9, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, & Wendlandt, JJ.

Homicide. Evidence, Disclosure of evidence, Exculpatory. Practice, Criminal, Disclosure of evidence, New trial, Comment by prosecutor, Instructions to jury, Assistance of counsel, Capital case.

Indictment found and returned in the Superior Court Department on September 2, 2014.

The case was tried before John S. Ferrara, J., and a motion for a new trial, filed on March 18, 2019, was considered by him.

Merritt Schnipper for the defendant.
John A. Wendel, Assistant District Attorney, for the Commonwealth.

WENDLANDT, J. The defendant, Jorge Rodriguez-Nieves, was convicted of murder in the first degree on a theory of extreme atrocity or cruelty in the stabbing death of Angel Morales. Prior to the defendant's trial, the prosecutor failed to

disclose material, exculpatory evidence in his possession, in violation of the principles set forth in Brady v. Maryland, 373 U.S. 83, 87 (1963). See Mass. R. Crim. P. 14 (a) (1) (A) (vii), as amended, 444 Mass. 1501 (2005). The defendant first learned of the evidence -- visceral testimony by the stepdaughter of the victim describing the victim's dying words -- when she took the stand as the Commonwealth's last witness. In this consolidated appeal from his conviction and from the denial of his motion for a new trial, the defendant contends that a new trial is necessary due to the prosecutor's failure to disclose the stepdaughter's statements and on the basis of newly discovered evidence from a forensic pathologist who opined that the victim would have been unable to speak after having been stabbed in the neck, which would have shown the stepdaughter's statement that he did to be medically impossible. The defendant has shown that the prosecutor's failure to disclose the stepdaughter's testimony prejudiced his ability to prepare and present his defense effectively, and that the pathologist's opinion probably would have been a real factor in the jury's deliberations. Accordingly, we set aside the verdict, vacate the conviction, and remand the matter to the Superior Court for a new trial. We emphasize that "the duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously

exculpatory evidence, go beyond winning convictions."[1] Commonwealth v. Tucceri, 412 Mass. 401, 408 (1992). "The Constitution requires both that a criminal defendant be given a fair and impartial trial and that the government's conduct of the trial be free from all that is deliberately devious or inconsistent with the highest standards of professional conduct." Commonwealth v. Vaughn, 32 Mass. App. Ct. 435, 435 (1992). "We ought not have to remind the Commonwealth once again 'to do the right thing.'" Id. at 440. Here, the prosecutor's efforts fell far short of that constitutional imperative.

Insofar as they may arise in connection with any retrial, we also address the defendant's other claims of error, including the prosecutor's use of familial language to describe the relationships among the victim, the defendant, and some of the witnesses; the denial of his request for an instruction on manslaughter; and the ineffective assistance of trial counsel for not having introduced evidence concerning the defendant's traumatic childhood and his life experiences.

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[1] See Bridgeman v. District Attorney for the Suffolk Dist., 476 Mass. 298, 315 (2017), quoting Mass. R. Prof. C. 3.8 (d), as appearing in 473 Mass. 1301 (2016) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . .").

1. Background. a. Facts. We recite the evidence at trial in the light most favorable to the Commonwealth, reserving some details for later discussion.

At around 11 A.M. on July 13, 2014, the victim was outside his Holyoke apartment building with family, preparing to attend a parade. Among the group gathering for the parade were his wife;[2] Geneciz Diaz, one of his stepdaughters; a second stepdaughter; and Diaz's two children. The defendant, who lived in the same building, also was outside, not far from the victim and his family.

The defendant was angry and yelled to the victim, whom he believed had spread a rumor that the defendant was spending time with a woman other than Maria Pimental, his long-time girlfriend.[3] The defendant, who appeared "furious," shoved the victim and suggested that they "go to the back of the building so we can see what happens." The victim said that he did not want any trouble; he was with his family and did not want to

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[2] While not legally married, the victim referred to his long-time girlfriend as his "wife," as did other friends and family members, and she referred to the victim as her "husband." We refer to this and the attendant relationships in the same familial terms that the witnesses used.

[3] The defendant and Maria Pimental had had a long-standing relationship of at least six years, lived together, and also were commonly referred to as "husband" and "wife." At trial, however, Pimental described the defendant as her "boyfriend."

fight. The victim and the defendant parted company, each returning to his respective apartment.

Minutes later, both were back outside. Still angry, the defendant was shouting and cursing. The defendant warned that he would "take [the victim's] heart out of his chest" and threatened the victim, "Son of a bitch, I'm going to kill you." The victim elicited assistance from his brother-in-law, a long-time friend of the defendant. The brother-in-law tried to calm the defendant, but the defendant rushed past the brother-in-law and towards the victim, while pulling a knife from his pants. The victim fled to a parking lot, where he tripped and fell. The defendant caught the victim, held him down, and stabbed him once in the neck. The victim stood momentarily, held his neck, which was spurting blood, and then fell. There was "massive bleeding."

Although none of the other witnesses to the events surrounding the stabbing testified that the victim spoke after he had been stabbed,[4] Diaz testified that the victim "looked at me and he said: Take care of the children. He was saying my daughter . . . was his princess. . . . He told me to take care of the girls and he fell." Diaz, again the only person to do so

[4] Diaz and the victim's third stepdaughter saw the stabbing, and his wife, the second stepdaughter, and his brother-in-law witnessed the immediate aftermath.

among the percipient witnesses (all of whom were the victim's family), said that the defendant "stood up and . . . walked over to [a nearby] stop sign to laugh." When paramedics reached the scene shortly after 11:15 A.M., they found the victim face down in a pool of blood and unresponsive. The victim was transported to an emergency room, where doctors detected no signs of life, and he was declared dead.

Later that day, the defendant explained to Pimental that he had argued with the victim and had "cut" his neck. The defendant asked Pimental to "get a ticket so that [they] could go to Puerto Rico."[5] The defendant was arrested that evening. His pants were stained with blood, and a search of his apartment revealed a chef's knife in a drawer in the kitchen that later tested positive for blood. Blood samples from the pants and the knife were consistent with the victim's deoxyribonucleic acid (DNA).

The medical examiner who conducted the autopsy testified that the stab wound was about five inches deep and would have required "a significant amount of force" to inflict. The wound

[5] By the time of trial, the defendant's appearance had changed; whereas previously he had kept his beard and head shaved, he had allowed both to grow. The defendant also was "thinner" at the time of the stabbing than he was at trial. Pimental testified that the defendant told her that he hoped his changed appearance "would confuse . . . [t]he witnesses."

penetrated muscle, transected the left internal jugular vein and the right carotid artery, and partially transected the trachea. He explained, "[G]iven that two large vessels were transected, there would have been a combination of spurting potentially from the arterial bleed and profuse bleeding from . . . the jugular vein." The medical examiner opined that the victim would have been "choking on his own blood" and likely had been conscious and experiencing pain for "minutes" before he lost consciousness and died. The medical examiner was not asked, and did not testify, whether, given the nature of the wound, the victim could have spoken.

b. Procedural history. The defendant was indicted on a charge of murder in the first degree. At trial, the Commonwealth proceeded on theories of deliberate premeditation and extreme atrocity or cruelty. The judge instructed the jury on both theories, over trial counsel's objection to the latter.[6] The jury convicted the defendant of murder in the first degree on a theory of extreme atrocity or cruelty.

c. Postconviction investigation. Diaz's testimony regarding the victim's dying words and the defendant laughing had not been part of her statements to police on the day of the

[6] The judge also instructed on murder in the second degree. He declined the defendant's request to give an instruction on voluntary manslaughter.

stabbing, which were memorialized in a police report and disclosed to the defendant. When asked on cross-examination about these differences, Diaz stated that she had given the information to the prosecutor "last week."

After his conviction, the defendant retained a forensic pathologist to consider the question whether the victim could have spoken after he had been stabbed. The pathologist opined that "it is highly unlikely [the victim] would have been able to speak clearly [following the stabbing], or even have vocalized understandable words at all, with the wound he sustained." Given the victim's injuries, she asserted, the "speech-suppressing inflow of blood . . . would have occurred almost instantaneously . . . and prohibited intelligible speech."

The defendant also obtained the prosecutor's notes, which showed that, at least two days prior to calling Diaz to take the stand, the prosecutor became aware of her changed statements and understood their relevance to the theory of extreme atrocity or cruelty. The prosecutor's notes of his conversation with Diaz[7]

[7] The prosecutor's hand-written notes stated, "Oly [(the defendant's nickname)] -- STOP SIGN -- LAUGHS"; "DAVID [(the victim)] -- STANDS -- Holds NECK 'TAKE CARE KIDS'"; "D [(the victim)] stands up -- looks @ G [(Diaz)] --> says holds own neck -- take care of baby -- falls again"; "O [(the defendant)] @ stop sign -- looks + laughs @ us"; and "sees Δ [(the defendant)] look back + laugh!" An additional note, dated "4/30/16," includes the word "Cunneen" and sets forth the evidentiary requirements for the introduction of a dying

recorded her changed statements; on one page, the word "Cunneen" is scribed, an apparent reference to the factors to be considered in deciding whether a killing was committed with extreme atrocity or cruelty as set forth in Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983).

d. Motion for a new trial. Following his postconviction investigation, the defendant filed a motion for a new trial. The defendant argued that, while the words attributed to the victim by Diaz likely would have been a real factor in the jury's deliberations, newly discovered evidence (the forensic expert's opinion) showed that the victim could not have spoken after he was stabbed. The defendant argued further that the Commonwealth's failure to disclose Diaz's changed statements prejudiced him in investigating and rebutting the theory of extreme atrocity or cruelty; the Commonwealth knew or should have known that Diaz's statement concerning the victim's dying words was false; and a new trial or a reduction in the verdict should be ordered pursuant to this court's authority under G. L. c. 278, § 33E.

The motion judge, who was also the trial judge, found that "there [was] evidence of bad faith, prejudice, and an impact on

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declaration. Diaz testified late in the afternoon, two days later, as the Commonwealth's final witness.

trial strategy" in the prosecutor's failure to disclose Diaz's changed statements, and noted that, had he known at trial of the prosecutor's conduct, he might have sanctioned the Commonwealth "perhaps by excluding [Diaz's] testimony regarding [the victim] having spoken to her." The judge credited trial counsel's affidavit in which he averred that, had the evidence been disclosed in a timely fashion, counsel would have called a forensic pathologist, who, as set forth in the expert's affidavit that accompanied the defendant's motion, would have opined that the victim would have been unable to speak after having been stabbed in the neck. Concluding that the expert's opinion would have served merely as impeachment evidence, and that the defendant had been able to impeach Diaz effectively with her prior inconsistent statements, as well as with the differences between her testimony and that of the other percipient witnesses, the judge denied the motion.

2. Discussion. a. Standard of review. A new trial may be granted where it appears that justice may not have been done. See Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). We review the denial of a motion for a new trial "to determine whether there has been a significant error of law or other abuse of discretion, . . . and whether any such error create[d] a substantial likelihood of a miscarriage of justice." Commonwealth v. Vargas, 475 Mass. 338, 355 (2016). Where, as

here, the motion judge was also the trial judge, we give special deference to the judge's decision. See Tucceri, 412 Mass. at 412. "If the new trial claim is constitutionally based, this court will exercise its own judgment on the ultimate . . . legal conclusions." Id. at 409.

In determining whether the prosecutor's failure to disclose Diaz's changed statements requires a new trial, we consider (i) whether the prosecutor violated the constitutional duty to disclose material, exculpatory evidence in the Commonwealth's possession, custody, or control, and (ii) if so, whether the defendant has shown that he was prejudiced in his ability "to make effective use of the evidence in preparing and presenting his case" when he first learned of the evidence in the heat of trial. Commonwealth v. Adrey, 376 Mass. 747, 755 (1978). See Commonwealth v. Wilson, 381 Mass. 90, 107 (1980), quoting United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir.), cert. denied, 429 U.S. 924 (1976) (prosecution must disclose material, exculpatory evidence in its possession "at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case").

Newly discovered evidence "warrants a new trial if that evidence 'casts real doubt on the justice of the conviction,' in the sense that the evidence 'would probably have been a real factor in the jury's deliberations.'" Commonwealth v. Brescia,

471 Mass. 381, 389 (2015), quoting Commonwealth v. Cowels, 470 Mass. 607, 616–617 (2015). See Tucceri, 412 Mass. at 408 ("There is no reason why the nondisclosure issue could not be advanced by a motion for a new trial to which the regular principles of Mass. R. Crim. P. 30 [b] . . . apply").

b. Duty to disclose. The Commonwealth has a constitutional duty, grounded in the defendant's right to due process, to disclose in a timely manner material, exculpatory evidence over which it has possession, custody, or control. See Brady, 373 U.S. at 87 ("suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material"); Commonwealth v. Sullivan, 478 Mass. 369, 380 (2017), quoting Commonwealth v. Ellison, 376 Mass. 1, 22 (1978) ("The Brady obligation comprehends evidence which provides some significant aid to the defendant's case . . ."). We need not dwell long on the question whether there was a Brady violation here. It is indisputable that there was.

The prosecutor had in his possession Diaz's changed statements at least as early as two days before she testified, yet he failed to disclose them. Diaz's statements, while in and of themselves inculpatory, also were exculpatory because they were not reflected in her report of the events to police on the day of the stabbing. The difference in the two statements

provided a basis upon which to impeach Diaz, who was the Commonwealth's key witness on the issue of extreme atrocity or cruelty. See Commonwealth v. Murray, 461 Mass. 10, 20 (2011) (evidence may be exculpatory where it can be used to impeach witness); Ellison, 376 Mass. at 22 (evidence that "challenges the credibility of a key prosecution witness" is exculpatory). The statements were material[8] because Diaz was the only witness to testify that the victim spoke and that the defendant laughed after the victim had been stabbed, each of which comprised strong evidence in support of the theory of extreme atrocity or cruelty.[9] See Cunneen, 389 Mass. at 227 ("indifference to or

[8] Because there was a specific request for witness statements, see note 12, infra, the defendant need only show that there is a substantial basis for claiming the undisclosed evidence was material, see Commonwealth v. Gallarelli, 399 Mass. 17, 22 (1987).

[9] The trial judge explicitly recognized the significance of Diaz's testimony. When the defendant objected to its introduction, the judge observed that "there's no question [the testimony was] prejudicial on the idea of extreme atrocity or cruelty," but determined that it was "very probative." Later, when the defendant objected to instructing the jury on the theory of extreme atrocity or cruelty, the judge explained that Diaz's testimony regarding the victim's dying words and the defendant's laughter was sufficient to warrant the instruction. Furthermore, the prosecutor emphasized Diaz's testimony in his closing argument. He remarked that "[t]he fact that [the defendant] turns and laughs just speaks for itself," and repeatedly focused the jury's attention on the victim's statements in his final moments.

To be sure, other evidence, particularly the medical examiner's testimony, could have supported the theory of extreme

taking pleasure in the victim's suffering" and "consciousness and degree of suffering of the victim" are among factors relevant to determination whether killing was accomplished with extreme atrocity or cruelty).[10]

c. Prejudice to defendant. We turn to consider whether the prosecutor's failure to meet his disclosure obligations with respect to Diaz's statements prejudiced the defendant.[11] "Whether and the extent to which the defendant was disadvantaged in defending himself are the pivotal issues when considering the prejudicial quality of exculpatory, material evidence" not

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atrocity or cruelty. See Commonwealth v. Anderson, 445 Mass. 195, 200-202 (2005) (single gunshot wound to face during robbery was sufficient for finding of extreme atrocity or cruelty where evidence presented supported Cunneen factors on extent of injuries, manner and degree of force, and defendant's indifference). This evidence, however, was far from overwhelming. Compare Commonwealth v. Rivera, 482 Mass. 259, 273 (2019) (defendant stabbed victim thirteen times in head and chest with butcher's knife); Commonwealth v. Whitaker, 460 Mass. 409, 417-418 (2011) (defendant dealt at least five blows to victim's head, striking her with hammer, ten-pound weights, log, and hedge trimmers, dragged her, and stomped on her).

[10] The reformulation of the Cunneen factors in Commonwealth v. Castillo, 485 Mass. 852, 865-866 (2020), is not applicable to the defendant's trial in 2016.

[11] The Commonwealth contends that to warrant a new trial, the defendant must show that, given a timely disclosure, he could have altered his trial tactics so as to create a reasonable doubt that otherwise would not have existed. We have applied that standard "[w]here the defense has not made a specific request for the evidence whose disclosure is delayed." Wilson, 381 Mass. at 114. That situation is not present here. See note 12, infra.

timely disclosed. Commonwealth v. Lam Hue To, 391 Mass. 301, 309 (1984). "In measuring prejudice, 'it is the consequences of the delay that matter, not the likely impact of the nondisclosed evidence, and we ask whether the prosecution's disclosure was sufficiently timely to allow the defendant 'to make effective use of the evidence in preparing and presenting his case.'" Commonwealth v. Almeida, 452 Mass. 601, 609-610 (2008), quoting Commonwealth v. Stote, 433 Mass. 19, 23 (2000).[12]

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[12] The provisions of Mass. R. Crim. P. 14 (a) (1) (A) (vii) are deemed a specific request for all "statements of persons the party intends to call as witnesses." "Because rule 14 was intended to facilitate the automatic production of mandatory discovery 'without the need for motions or argument,' . . . and because the Commonwealth's obligation to produce is ongoing, . . . the defendant need not request any mandatory discovery items." Commonwealth v. Taylor, 469 Mass. 516, 521 (2014), quoting Reporter's Notes (Revised, 2004) to Rule 14, Massachusetts Rules of Court, Rules of Criminal Procedure, at 179 (Thomson Reuters 2014). This automatic discovery obligation put the prosecution on notice of the defendant's specific interest in evidence falling within the discovery topics enumerated in rule 14 (a) (1) (A) (i), (ii), and (iv)-(ix), see Committee for Pub. Counsel Servs. v. Attorney Gen., 480 Mass. 700, 731-732 & n.15 (2018) ("Rule 14 [a] . . . incorporates the constitutional disclosure requirements of Brady"), and served as a court order for the specific discovery mandated by the rule, see Commonwealth v. Frith, 458 Mass. 434, 439 (2010), citing Mass. R. Crim. P. 14 (a) (1) (C). In light of this automatic discovery obligation alone, the Commonwealth's present claim that the prosecutor was not on notice that the defendant sought witness statements is unsupportable. Moreover, on the first day of trial, the defendant filed a motion in limine to preclude the Commonwealth from introducing any undisclosed witness statements. At a hearing on the motion, the judge stated, "[I]f [the prosecution is] interviewing witness[es] in preparation for trial close in time to the trial and they've learned something new as a result, their obligation

The defendant has made the requisite showing of prejudice by detailing the manner in which, had he been informed timely of Diaz's statements, he would have altered his defense tactics to undermine the veracity of Diaz's statements. In particular, the defendant showed that, had trial counsel timely been made aware of Diaz's changed statements, he would have retained an expert to determine whether the victim could have spoken after having been stabbed. If the expert determined that it would not have been possible, counsel would have called the expert as part of the defense case, and also would have cross-examined the Commonwealth's expert on the issue. See, e.g., Vaughn, 32 Mass. App. Ct. at 441-443 (new trial was warranted where defendant showed that, had witness's changed testimony been disclosed timely, he would have altered his trial tactics and would have called expert to challenge witness's statements). Compare Commonwealth v. Gilbert, 377 Mass. 887, 895 (1979) (no prejudice in preparation where cross-examination of witness whose changed testimony was not disclosed "was not only extended but searching," and would not "have been materially improved by earlier warning about the witness's departure from the written statement").

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is to provide [the defendant] . . . with notice of the changed statement." The prosecutor certified his compliance with the discovery obligations of Mass. R. Crim. P. 14.

In support of his motion, the defendant attached the forensic pathologist's affidavit in which she opined that, given the nature of the victim's wounds, the victim almost certainly could not have spoken after having been stabbed. The defendant would not have had reason to seek out expert opinion before trial, nor introduce expert testimony at trial, because he had not been provided Diaz's statements that would have motivated such an expert.[13] Accordingly, the expert's opinion properly was considered newly discovered evidence. See Vaughn, 32 Mass. App. Ct. at 443 (exhibit that had been introduced at trial was newly discovered evidence insofar as Commonwealth's failure to disclose change in witness testimony gave defendant no reason to have called expert to examine exhibit independently). The pathologist's opinion probably would have been a real factor in the jury's deliberations. See Cowels, 470 Mass. at 623, citing Commonwealth v. Sullivan, 469 Mass. 340, 353 (2014).

Focusing on the medical examiner's testimony, the judge noted that there was sufficient evidence (other than Diaz's testimony) of extreme atrocity or cruelty, and the judge therefore dismissed the pathologist's opinion as mere

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[13] We reject the Commonwealth's suggestion that trial counsel should have had the clairvoyance to call such an expert when, at least as far as was known to the defense, there was no evidence that the victim had spoken after having been stabbed.

impeachment evidence. See Commonwealth v. Sleeper, 435 Mass. 581, 607 (2002) (failure of nongovernment expert, who gave opinion "that touched on the defendant's ability to form requisite intent," to clarify that he had "honorary" position as medical school instructor did not require new trial). This, however, overlooks the impact of Diaz's testimony, which was compelling evidence underlying the Commonwealth's case on the theory of extreme atrocity or cruelty. See Murray, 461 Mass. at 22 (impeachment evidence supported new trial where "credibility played a central role"). Her emotionally gripping testimony regarding the victim's dying words was the last testimony placed before the jury before they began their deliberations. Her depiction of the defendant laughing as the victim lay dying would have been fresh in the jurors' minds as they evaluated the Commonwealth's case. Far more than what counsel was able to do to respond to Diaz's testimony in the heat of trial, by attempting to challenge Diaz's credibility using only her prior inconsistent statement to police, the expert's opinion would have directly undermined Diaz's later version of events. The opinion powerfully suggests that Diaz's testimony was not medically possible, calling into question the veracity of her statement regarding the victim's dying words, as well as the

credibility of her memory that the defendant laughed.[14] See Cowels, 470 Mass. at 621, quoting Commonwealth v. Liebman, 388 Mass. 483, 489 (1983) ("a new trial may be warranted '[w]here the Commonwealth's case depends so heavily on the testimony of a witness' and where the newly discovered evidence 'seriously undermines the credibility of that witness'"). Contrast Commonwealth v. Baldwin, 385 Mass. 165, 176 (1982) (unexpected witness testimony, even if timely disclosed, would not have significantly weakened Commonwealth's case).

Given that Diaz's testimony was crucial to the conviction of murder in the first degree on the theory of extreme atrocity or cruelty, the failure to disclose, and the defendant's resulting inability effectively to challenge the credibility of that testimony with the expert evidence that what Diaz testified she observed could not have been physically possible, "casts real doubt on the justice of the conviction." Commonwealth v. Grace, 397 Mass. 303, 305 (1986). Therefore, a new trial is required.[15]

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[14] The pathologist's testimony also would have served to contradict the prosecutor's invitation in closing argument that the jury use their "common sense" to conclude that the victim had made the statement Diaz described because there was no evidence that the victim's "voice box" had been cut.

[15] The concurrence maintains that this court should offer the Commonwealth a unilateral choice between conducting a new trial or accepting a reduction in the verdict to murder in the

To the extent that they might be relevant at any retrial, we turn to address the defendant's other arguments.

d. Use of familial language. As had been their usual practice, at trial the witnesses referred to Pimental as the

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second degree. "[T]he power to reduce verdicts is not without constraint." Commonwealth v. Sanchez, 485 Mass. 491, 505 (2020). We have exercised such discretion "where the weight of the evidence in the case, although technically sufficient to support the jury's verdict, points to a lesser crime." Commonwealth v. Rolon, 438 Mass. 808, 821 (2003). Here, the situation differs from the cases relied on by the concurrence where the error at trial involved a jury instruction or an improper closing argument that went to the defendant's intent, or where the defendant admitted at trial to murder in the second degree. See Commonwealth v. Niemic, 483 Mass. 571, 585-591 (2019) (improper use of impeachment evidence and appeal to sympathy in closing argument); Commonwealth v. Howard, 469 Mass. 721, 750 (2014), S.C., 479 Mass. 52 (2018) (permitting Commonwealth to choose new trial or reduction to murder in second degree, "which was the verdict urged by the defendant at his first trial"); Commonwealth v. Gonzalez, 469 Mass. 410, 423-424 (2014) (improper instruction on intoxication); Commonwealth v. Bell, 460 Mass. 294, 309-310 (2011), S.C., 473 Mass. 131 (2015), cert. denied, 136 S. Ct. 2467 (2016) (failure to instruct on felony-murder in second degree); Commonwealth v. Rutkowski, 459 Mass. 794, 799-800 (2011) (failure to instruct on mental impairment). In this case, the prosecutor's failure to disclose material, exculpatory evidence in his possession, and the resulting prejudice to the defendant, did not comport with the standards of justice. The error infected not only the element of extreme atrocity or cruelty, but also the entire trial. It cannot be ameliorated by providing the Commonwealth the unilateral choice suggested by the concurrence. Therefore, a new trial is warranted. See Brady, 373 U.S. at 87-88 ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . .").

defendant's wife; the two were not legally married, however, and the spousal privilege and spousal disqualification rule accordingly were inapplicable.[16] The defendant maintains that because the spousal privilege and spousal disqualification rule were not applicable to Pimental, it was improper for the prosecutor to describe their relationship, as well as the relationships of other witnesses, in marital and familial terms, where no legal marriage existed.

There was no error in the prosecutor's references to the various relationships in marital and familial terms. The witnesses described the relationships in that manner, and the prosecutor's use of the witnesses' own descriptions likely assisted the jury in understanding the nature of those relationships. Certainly, the prosecutor did not unfairly appeal to the jury's sympathies in describing the witnesses as family members, precisely as had the witnesses themselves.

e. Instruction on manslaughter. In the ambulance on the way to the hospital, while cutting the victim's clothing from his body, paramedics found a large kitchen knife tucked into the

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[16] See G. L. c. 233, § 20 ("neither husband nor wife shall be compelled to testify in the . . . criminal proceeding against the other"; "neither husband nor wife shall testify as to private conversations with the other"); Mass. G. Evid. § 504 (2021). Absent a legal marriage, no such privileges apply. See Goodridge v. Department of Pub. Health, 440 Mass. 309, 327 (2003); Wilcox v. Trautz, 427 Mass. 326, 332-333 (1998).

waistband of his shorts. The defendant maintains that the judge erred in rejecting his request that the jury be instructed on voluntary manslaughter. He argues that this evidence, viewed in the light most favorable to the defendant,[17] suggested that the defendant's reaction could have been in self-defense or in response to sudden combat. Neither theory, however, was supported by the evidence.

Even assuming, arguendo, that the jury reasonably could have inferred that the defendant knew that the victim was armed, the defendant points to no evidence before the jury that he availed himself of any "reasonable opportunity to retreat" from the confrontation with the victim. See Commonwealth v. Glover, 459 Mass. 836, 842 (2011). Similarly, none of the percipient witnesses testified that the victim reached for a weapon or attempted to strike a blow. See Commonwealth v. Howard, 479 Mass. 52, 58 (2018); Commonwealth v. Espada, 450 Mass. 687, 697 (2008); Commonwealth v. Brum, 441 Mass. 199, 206 (2004). Compare Commonwealth v. Hinds, 457 Mass. 83, 91-92 (2010) (no instruction on voluntary manslaughter was warranted because there was no evidence that defendant attempted to retreat; he

[17] In deciding whether a defendant is entitled to an instruction on voluntary manslaughter, we view the evidence in the light most favorable to the defendant. Commonwealth v. Hinds, 457 Mass. 83, 88 (2010).

chose to leave his home and to confront victims on street); Commonwealth v. Avila, 454 Mass. 744, 769 (2009) (defendant could have retreated from confrontation on public street).

f. Ineffective assistance. In a case of murder in the first degree, we generally review a claim of ineffective assistance to determine whether there was a substantial likelihood of a miscarriage of justice. See Commonwealth v. Gulla, 476 Mass. 743, 745-746 (2017); Commonwealth v. Wright, 411 Mass. 678, 681 (1992), S.C., 469 Mass. 447 (2014). A tactical or strategic decision, however, is erroneous only if it was manifestly unreasonable when made. See Commonwealth v. Kolenovic, 478 Mass. 189, 193 (2017).

The defendant maintains that his trial counsel provided ineffective assistance because counsel did not introduce evidence of how the defendant's life experiences and history of mental health and behavioral problems had an impact on his decision-making on the day of the stabbing. In a case where "the major issue is the effect of the defendant's serious, long-standing mental illness on the conduct complained of," this court has held that the jury should be able to consider "the defendant's mental illness and its effect on his conduct" in weighing "whether the murder was committed with extreme atrocity or cruelty." Commonwealth v. Gould, 380 Mass. 672, 676-678, 685-686 (1980) (defendant had long-standing, constant,

delusional belief system, had been institutionalized for mental illness during four years preceding incident at issue in that case, and was suffering from paranoid psychosis and schizophrenia at time of killing).

Following the defendant's conviction, defense counsel retained a forensic psychologist, who interviewed the defendant,[18] reviewed his mental health and other records, and provided an analysis regarding the defendant's mental status at the time of the stabbing. The psychologist opined that, at the time of the incident, the defendant finally had "developed a relatively stable interpersonal relationship with a woman" and had achieved a "sense of financial stability." The victim threatened this stability by exposing the defendant's purported philandering; this threat would have become "overwhelming" for the defendant. The psychologist concluded that the defendant responded "in a manner rooted in his early life experiences," during which he had coped with "losses through a series of maladaptive behaviors and poor decisions."

The defendant argues that his counsel was ineffective for failing to introduce this evidence of his prior life experience,

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[18] The defendant reported to the psychologist that his life experiences included an unstable, traumatic childhood marked by a physically and emotionally abusive relationship with his mother, sexual abuse, periods of incarceration, sporadic mental health treatment, and homelessness.

which he argues would have shown that he suffered from an illness or mental impairment. The expert's assessment, however, falls short of suggesting a mental health defense, and counsel was not ineffective for not having raised it. See Commonwealth v. Walker, 443 Mass. 213, 225-228 (2005) (defendant's history of alcohol and drug abuse, prior suicide attempt, and discharge from armed services due to psychiatric problems were not sufficient to suggest potential mental health defense). Indeed, although the psychologist found "sufficient data to support the presence of a mental disorder," the expert expressly declined to opine that, at the time of the stabbing, the defendant had been suffering from a mental illness or impairment. Thus, as any mental health defense would have failed, counsel's decision not to introduce the information concerning the defendant's prior life experiences could not have been ineffective. See, e.g., Commonwealth v. Lessieur, 472 Mass. 317, 327 (2015).[19] Contrast Commonwealth v. Rutkowski, 459 Mass. 794, 796-797, 799 (2011)

[19] As we have previously, we also decline the defendant's invitation that we modify our standards to require that, in order for a jury to find a defendant guilty on a theory of extreme atrocity or cruelty, the jury would have to find that the defendant had the specific intent to commit an extremely atrocious or cruel killing. See Castillo, 485 Mass. at 864-865 ("As we said in Cunneen, 389 Mass. at 227, 'proof of malice aforethought is the only requisite mental intent for a conviction of murder in the first degree based on murder committed with extreme atrocity or cruelty'").

(evidence of defendant's long history of bipolar disorder, depression, psychosis, and head injuries, which "were in play" at time of killing, warranted jury instruction on mental impairment with respect to extreme atrocity or cruelty charge).

g. Review under G. L. c. 278, § 33E. Because of the result we reach, we need not address the defendant's request that we exercise our extraordinary authority under G. L. c. 278, § 33E, and reduce the verdict to one of murder in the second degree.[20]

3. Conclusion. The judgment of conviction is vacated and set aside, and the matter is remanded to the Superior Court for a new trial.

So ordered.

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[20] Because the Commonwealth may seek to introduce certain autopsy photographs again at a subsequent trial, we do, however, briefly touch upon one of the autopsy photographs that was introduced, over the defendant's objections, that we have considered pursuant to our review of the entire record under G. L. c. 278, § 33E. Exhibit no. 21, a photograph of the victim's head and torso from the left side, with the blood cleaned from the body and lying on a gurney, was introduced to show the wound to the victim's neck. The upper right quadrant of the photograph, however, also shows the seriously damaged legs of at least one, and possibly two, unrelated bodies lying on gurneys. These images have no relevance to any issue in this case. On retrial, these portions of the image should be redacted, or a different image should be used. Of course, on remand the defendant may seek reconsideration of whether any of the other autopsy photographs were more prejudicial than probative.

LOWY, J. (concurring). I agree that the conviction must be vacated because the Commonwealth failed to disclose Diaz's testimony. Because that is the only reversible error, and it only implicated the defendant's conviction of murder in the first degree on a theory of extreme atrocity or cruelty, I would allow the Commonwealth "the option of either proceeding with a new trial on the murder indictment or accepting a reduction of the verdict to murder in the second degree." Commonwealth v. Gonzalez, 469 Mass. 410, 424 (2014).

We repeatedly have offered the Commonwealth a similar option in cases "where an error does not affect the lesser included offense that is supported by the evidence." Commonwealth v. Gilbert, 447 Mass. 161, 169 (2006). See, e.g., Commonwealth v. Niemic, 483 Mass. 571, 598-599 (2019) (Commonwealth given option of either retrying defendant for murder in first degree or accepting verdict of voluntary manslaughter because prosecutor's improper statements in closing argument tainted conviction of murder in first degree); Commonwealth v. Howard, 469 Mass. 721, 749-750 (2014), S.C., 479 Mass. 52 (2018) (Commonwealth given option of retrying defendant for murder in first degree or moving to have defendant sentenced for murder in second degree because erroneous admittance and use by prosecutor in closing argument of defendant's statements obtained after police failed to scrupulously honor invocation of

constitutional right to remain silent tainted conviction of murder in first degree); Gonzalez, 469 Mass. at 423-424 (same option given where absence of instruction on intoxication undermined conviction of murder in first degree based on extreme atrocity or cruelty); Commonwealth v. Bell, 460 Mass. 294, 309-310 (2011) , S.C., 473 Mass. 131 (2015), cert. denied, 136 S. Ct. 2467 (2016) (Commonwealth had option of retrying defendant for murder in first degree or choosing entry of verdict of felony-murder in second degree after proper jury instruction was not given); Commonwealth v. Rutkowski, 459 Mass. 795, 800 (2011) (Commonwealth given option of retrying defendant for murder in first degree or moving to have defendant sentenced for murder in second degree where absence of instruction on mental impairment undermined conviction of murder in first degree based on extreme atrocity or cruelty).

The fact that the error here was constitutional does not alter the analysis. See Howard, 469 Mass. at 750 (option given in light of violation of Miranda rights). Cf. Commonwealth v. Sanchez, 485 Mass. 491, 505 (2020) (verdict reduction improper where nature of error affected "all of the lesser included offenses to the same extent as the greater"). Consequently, the option to accept a reduction of the verdict to murder in the second degree should remain open to the Commonwealth.