SJC-12799

COMMONWEALTH vs. LARRY WATKINS (No. 1).

Middlesex. October 7, 2020. - February 11, 2021.

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

Practice, Criminal, Postconviction relief, New trial. Estoppel. Homicide. Felony-Murder Rule. Robbery. Joint Enterprise.

Indictments found and returned in the Superior Court on December 10, 1975.

Following review by this court, 375 Mass. 472 (1978), a motion for a new trial, filed on September 4, 2018, was considered by John T. Lu, J., and a motion for reconsideration was also considered by him.

A request for leave to appeal was allowed by Kafker, J., in the Supreme Judicial Court for the county of Suffolk.

Konstantin Tretyakov, Assistant District Attorney, for the Commonwealth.
Richard J. Fallon for the defendant.

BUDD, C.J. In 1976, a jury convicted the defendant, Larry Watkins, on indictments for murder in the first degree, armed robbery, and kidnapping in connection with the abduction and

shooting death of Edward Keen and the theft of Keen's wallet and automobile. The defendant's convictions were affirmed on appeal. See Commonwealth v. Watkins, 375 Mass. 472, 492 (1978). More than forty years later, a judge of the Superior Court granted the defendant's motion for a new trial on the murder indictment, after concluding that the evidence at trial was insufficient to support the defendant's murder conviction on a theory of joint venture felony-murder. Before us is the Commonwealth's appeal from the motion judge's order granting a new trial. We reverse.

Background. 1. Facts. We summarize the facts in the light most favorable to the Commonwealth, reserving certain details for discussion of specific issues.

On November 17, 1975, the defendant and a companion, Theresa Nelson, were walking in Boston when Nelson hailed a passing motor vehicle driven by the victim. The victim stopped, and Nelson and the defendant entered the vehicle. After traveling for a period of time, the defendant pulled out a pistol and Nelson took the victim's wallet. At some point thereafter, the defendant forced the victim into the trunk of

the vehicle, and the defendant and Nelson met the defendant's brother, Theodore.[1,2]

The defendant, Nelson, and Theodore then drove for approximately one hour. When they stopped, the defendant gave his gun to Theodore, the two men got out of the vehicle and opened the trunk, and Theodore shot the victim. The victim's body was discovered in Newton the morning after the shooting.

After a jury trial the following year, the defendant was convicted of murder in the first degree, armed robbery, and kidnapping.[3]

2. Prior proceedings. In his direct appeal, the defendant argued that the judge committed several errors prior to and during the trial that required reversal. This court affirmed the convictions, concluding after plenary review of the whole case pursuant to G. L. c. 278, § 33E (§ 33E), that "the verdict was neither against the law nor the evidence" and that "[t]he

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[1] Because Theodore and the defendant have the same surname, we use Theodore's first name to avoid confusion.

[2] There was conflicting testimony as to whether the defendant and Nelson met with Theodore prior to or after the victim was forced into the trunk. We assume for the purposes of this appeal that Theodore was not present when the victim was forced into the trunk.

[3] In separate proceedings, Theresa Nelson was convicted of armed robbery and kidnapping, and Theodore was convicted of kidnapping and murder in the first degree. See Commonwealth v. Watkins, 377 Mass. 385 (1979).

interests of justice require neither a new trial nor the entry of a verdict of a lesser degree of guilt than was found by the jury." Watkins, 375 Mass. at 492.

The defendant thereafter filed a number of motions for a new trial. No action was taken on the first motion, filed in 1990. In 2003, the defendant moved to withdraw that motion and filed a second one, claiming among other things that there was insufficient evidence to convict him on the theory of joint venture felony-murder,[4] and that the judge made several errors in instructing the jury.[5] The motion judge denied the motion, finding that no "substantial issue" had been raised. The defendant filed a gatekeeper petition seeking leave from a single justice to appeal from the decision pursuant to § 33E, which, as will be discussed in further detail infra, also was denied.

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[4] The Commonwealth presented two theories under which the defendant could be found guilty of murder in the first degree: joint venture felony-murder and joint venture murder with deliberate premeditation. The judge instructed on both theories and explained to the jury that they could find the defendant guilty under either or both. Because the jury returned a general verdict of guilty without indicating the theory or theories upon which they relied, there must be sufficient evidence to support both theories of guilt beyond a reasonable doubt. See Commonwealth v. Plunkett, 422 Mass. 634, 638 (1996).

[5] The defendant also pointed out that the conviction of armed robbery was duplicative of the felony-murder conviction.

In 2010, the defendant filed a third motion for a new trial, again challenging the validity of the judge's jury instructions. The motion judge declined to act on the motion, indicating in part that the "same or similar issues were raised in the [d]efendant's [2003 motion], and denied." The defendant did not seek to appeal from that decision.

In 2018, the defendant filed the motion for a new trial at issue here, again arguing that the Commonwealth presented insufficient evidence for the felony-murder conviction. The judge allowed the motion, concluding that although a "close question," the argument presented in the 2018 motion was "not so similar to [the] argument [raised in 2003] that principles of estoppel prevent consideration of his current claims." After moving unsuccessfully for reconsideration of the decision, the Commonwealth filed an application for leave to appeal pursuant to § 33E, which was allowed by a single justice.[6]

[6] The allowance of a gatekeeper petition normally depends on whether the appeal presents a "new and substantial question." See G. L. c. 278, § 33E. However, where the Commonwealth rather than the defendant petitions the gatekeeper, "the single justice's primary focus should be on the meritoriousness or 'substantiality' of the Commonwealth's position on appeal and less on the newness of the underlying issue," because "[i]t would make little sense to deny the Commonwealth an opportunity for appellate review if it appears that the judge below erred or abused [his or her] discretion in granting a new trial on an issue that was not, technically speaking, new." Commonwealth v. Smith, 460 Mass. 318, 322 (2011).

Discussion. Rule 30 (b) of the Massachusetts Rules of Criminal Procedure, as appearing in 435 Mass. 1501 (2001), authorizes a judge to "grant a new trial at any time if it appears that justice may not have been done." As a general matter, "[a] motion for a new trial is addressed to the sound discretion of the judge," Commonwealth v. Sanchez, 485 Mass. 491, 498 (2020), and "an appellate court will examine the motion judge's conclusion only to determine whether there has been a significant error of law or other abuse of discretion," id., quoting Commonwealth v. DiBenedetto, 458 Mass. 657, 664 (2011). Where, however, the motion judge did not preside at trial and did not conduct an evidentiary hearing, as happened here, we are in as good a position as the motion judge to assess the trial record and therefore review the motion judge's decision de novo. See Commonwealth v. Mazza, 484 Mass. 539, 547 (2020).

The Commonwealth contends that granting the defendant's motion for a new trial was error for multiple reasons. First, the Commonwealth argues that the motion judge lacked authority to consider the sufficiency of the evidence because this court had done so in the course of the plenary review undertaken pursuant to § 33E. Second, the Commonwealth argues that the defendant is estopped from challenging the sufficiency of the evidence to support his conviction on a theory of joint venture felony-murder because that issue previously was addressed in

response to the defendant's 2003 motion for a new trial. Finally, the Commonwealth contends that the evidence presented at trial was legally sufficient to sustain a guilty verdict on the theory of joint venture felony-murder.

1. Viability of a claim of insufficiency of the evidence after § 33E plenary review. The Commonwealth contends that the motion judge had no authority to consider the sufficiency of the evidence following our § 33E plenary review of the entire case in connection with the defendant's direct appeal. We do not agree.

In conducting plenary review under § 33E, "we consider not only the preserved and unpreserved claims of error argued by the defendant on appeal, but also other grounds for reversal or a reduction of the verdict that we may discover as a result of our independent review of the entire record." Commonwealth v. Smith, 460 Mass. 318, 320 (2011). As part of that review, we consider whether the evidence at trial was sufficient to support the conviction. See Commonwealth v. Mercado, 466 Mass. 141, 154-155 & n.12 (2013) (concluding upon § 33E review that there was insufficient evidence from which jury could have found defendant guilty of murder in first degree on theory of felony-murder, even though defendant did not raise this issue, but upholding conviction on alternative theories relied on by jury); Commonwealth v. Earle, 458 Mass. 341, 349 n.10 (2010) (given our

duty to review entire record in capital cases under § 33E, affirmance of murder conviction implies evidence sufficient to support it).

Once a defendant has had his or her conviction reviewed pursuant to § 33E, postappeal motions for a new trial based on claims that could have been, but were not, raised either at trial or on direct appeal are reviewed for a substantial risk of a miscarriage of justice. See Smith, 460 Mass. at 320-321. We have noted that "[e]rrors of this magnitude are extraordinary events and relief is seldom granted." Id. at 321, quoting Commonwealth v. Randolph, 438 Mass. 290, 297 (2002). This is especially so where a defendant's conviction has been reviewed pursuant to § 33E. Id.

However, the observation that relief is rare in these circumstances is an implicit acknowledgement that such relief is not entirely foreclosed. Although this court takes its § 33E review "obligation seriously and conducts a thorough review to the best of its ability," Smith, supra at 320 n.1, no one is infallible. Notwithstanding the public's weighty interest in the finality of criminal convictions, we must maintain a means of addressing "the possibility of error and of grave and lingering injustice." Randolph, supra at 294, quoting Commonwealth v. Amirault, 424 Mass. 618, 637 (1997).

"[C]onvictions based on insufficient evidence are inherently serious enough to create a substantial risk of a miscarriage of justice." Commonwealth v. Heywood, 484 Mass. 43, 49 n.7 (2020), quoting Commonwealth v. Melton, 436 Mass. 291, 294 n.2 (2002). As defendants convicted of murder in the first degree face a mandatory life sentence without possibility of parole, see G. L. c. 265, § 2, we are unwilling to adopt a rule that would treat our § 33E review as absolutely precluding all subsequent motions for a new trial that challenge the sufficiency of the evidence. Section 33E's gatekeeper limitations on appellate review, and the estoppel principles discussed infra, are sufficient safeguards against repetitive motions for a new trial and related appeals, and need not be augmented further.[7]

[7] For similar reasons, we decline the Commonwealth's related invitation to treat the defendant's claim as permanently waived and his conviction as "firmly settled" due to the passage of time and the failure of his prior postappeal motions. See Randolph, 438 Mass. at 296 n.11. We note that Mass. R. Crim. P. 30 (b) authorizes a judge to order a new trial "at any time if it appears that justice may not have been done" (emphasis added). See Amirault, 424 Mass. at 637 (motion for new trial can be made even decades after initial adjudication); Commonwealth v. Francis, 411 Mass. 579, 586 (1992) ("a defendant's delay in bringing a rule 30 motion does not in itself constitute waiver"). Moreover, as discussed supra, our case law concerning postappeal motions for a new trial permits us to consider even waived claims if they involve a substantial risk of a miscarriage of justice. See Smith, 460 Mass. at 320-321.

2. Estoppel. The Commonwealth also contends that even if a judge has authority to consider a motion for a new trial based on insufficiency of evidence after § 33E plenary review, the defendant is estopped from making the argument here because the issue has already been decided. We agree.

"A judge's authority to grant a new trial pursuant to Mass. R. Crim. P. 30 (b), while broad, is limited by principles of direct estoppel.[8] For direct estoppel to bar relief, 'the Commonwealth must show that the issues raised in the defendant's rule 30 (b) motion were actually litigated and determined . . . , that such determination was essential to the defendant's conviction, and that the defendant had an opportunity to obtain review of the determination.'" (Citation omitted.) Sanchez, 485 Mass. at 498, quoting Commonwealth v. Rodriguez, 443 Mass. 707, 710 (2005).

The defendant argued insufficiency of the evidence in two of the four motions for a new trial that he filed. In his 2003 motion, the defendant argued that the evidence demonstrated at

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[8] The doctrine of direct estoppel prevents a defendant from relitigating an issue that already has been litigated and decided between the parties. See Commonwealth v. Williams, 431 Mass. 71, 74 n.4 (2000). In contrast, collateral estoppel (or issue preclusion) "provides that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit'" (emphasis added). Kimbroughtillery v. Commonwealth, 471 Mass. 507, 509 (2015), quoting Commonwealth v. Lopez, 383 Mass. 497, 499 (1981).

best that Theodore acted as an accessory after the armed robbery but failed to prove that he participated in the crime. The defendant went on to reason that because being an accessory to a crime is not punishable by life imprisonment, it cannot be a predicate for felony-murder. See G. L. c. 274, § 4. In the 2018 motion at issue here, the defendant argues that there was insufficient evidence to show that Theodore was even aware that an armed robbery had taken place, much less that he participated in it. Although the emphasis of the arguments made in the two motions differs slightly, the main thrust of both is that because the evidence was insufficient to show that Theodore was a joint venturer in the armed robbery committed by the defendant, the Commonwealth did not prove that the defendant was guilty of murder in the first degree on a theory of joint venture felony-murder.

In denying the defendant's gatekeeper petition in connection with the 2003 motion, the single justice concluded that the argument raised was not new, and more importantly,[9] that it was not substantial. See Smith, 460 Mass. at 320-321. The single justice addressed the core of the defendant's argument,

[9] As discussed supra, because a conviction based on insufficient evidence can create a substantial risk of a miscarriage of justice, see Heywood, 484 Mass. at 49 n.7, such a claim need not be new to result in a new trial.

commenting specifically about Theodore's participation in the armed robbery, concluding:

> "The fact that [Theodore] joined in the venture after the victim was already in the trunk is not dispositive. The jury could have readily found that the robbery had not concluded until the victim was killed and his body disposed. In these circumstances, they were warranted in finding that [the defendant] was a joint venturer in the felony murder even if [Theodore] actually killed the victim and the killing took place after [the defendant] had incapacitated the victim pending a decision about what should be done to assure a trouble-free getaway."

Thus, the question whether the evidence was sufficient for the jury to have found that Theodore was a joint venturer in the armed robbery undoubtedly has been considered and decided. The defendant therefore is estopped from raising the claim here, regardless of the subtle shift in the defendant's theory.[10] Cf.

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[10] Because we hold that the defendant is estopped from again raising an insufficiency of the evidence claim, we need not go further. We take this opportunity to note, however, that we agree with the observations made by the single justice when he denied the defendant's gatekeeper application in 2004. When considering an insufficiency of the evidence claim, we view the evidence "in the light most favorable to the prosecution" and "draw all reasonable inferences in favor of the Commonwealth." Commonwealth v. Rakes, 478 Mass. 22, 32 (2017). Even assuming that Theodore did not know about the armed robbery when he initially joined the defendant and Nelson in the vehicle, the jury could have inferred that Theodore became aware that the defendant had robbed the victim of his vehicle once the defendant gave Theodore the pistol and showed him that the victim was locked in the trunk. See Commonwealth v. Williams, 475 Mass. 705, 711 (2016) (defendant's knowledge of weapon and continued participation in robbery thereafter sufficient to implicate him as joint venturer in armed robbery). Thus, the Commonwealth provided evidence from which a jury could determine beyond a reasonable doubt that Theodore knowingly participated in the armed robbery with the defendant and that the victim was

Commissioner of Dep't of Employment & Training v. Dugan, 428 Mass. 138, 143 (1998) (observing that in civil cases, "even if there is a lack of total identity between the issues involved in two adjudications, the overlap may be so substantial that preclusion is plainly appropriate").

Conclusion. The motion judge's order granting a new trial to the defendant is reversed.

So ordered.

killed in furtherance of that predicate crime. See, e.g., Commonwealth v. Tejeda, 473 Mass. 269, 272-273 (2015), S.C., 481 Mass. 794 (2019).