SJC-13006

COMMONWEALTH vs. SHAWN LESSIEUR.

Middlesex. March 1, 2021. - October 21, 2021.

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

Homicide. Deoxyribonucleic Acid. Practice, Criminal, New trial, Witness, Affidavit, Assistance of counsel. Evidence, Scientific test. Witness, Credibility. Constitutional Law, Assistance of counsel.

Indictments found and returned in the Superior Court Department on May 8, 2008.

Following review by this court, 472 Mass. 317 (2015), a motion for a new trial, filed on June 26, 2019, was considered by Elizabeth M. Fahey, J.

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

Sharon Dehmand for the defendant.
Hallie White Speight, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. In 2009, the defendant was convicted of murder in the first degree in the 1994 shooting death of Mark Jones.[1] The primary evidence at trial was the testimony of a coventurer, who told the jury that he drove the victim and the defendant to an apartment complex in Lowell, using the defendant's vehicle, and parked there at the defendant's request; the defendant got out, purportedly looking for a place to urinate, and the victim followed. They went around the side of the building, and he then heard two shots. The convictions, and the denial of the defendant's first motion for a new trial, were affirmed on direct appeal. See Commonwealth v. Lessieur, 472 Mass. 317, cert. denied, 577 U.S. 963 (2015).

In 2018, the defendant's motion for postconviction forensic testing under G. L. c. 278A of blood found in the snow under the victim's head, was allowed, and the results of deoxyribonucleic acid (DNA) testing, of a type that had not been available at the time of trial, showed the presence of DNA that was neither the victim's nor the defendant's. At issue here is the defendant's second motion for a new trial. The motion stems from the new DNA results, as well as a new affidavit from a potential witness.

[1] The defendant also was convicted of carrying a firearm without a license. That conviction is not before us.

A Superior Court judge denied the defendant's motion for a new trial without a hearing, and a single justice of this court then granted the defendant's petition under the gatekeeper provisions of G. L. c. 278, § 33E, and allowed the defendant's appeal from the denial of his motion for a new trial to proceed before the full court. Having carefully reviewed the new DNA evidence, the statements by a witness who was not available at trial, and trial counsel's affidavit, we discern no error in the motion judge's decision to deny the motion for a new trial. The motion does not raise any error that suggests a miscarriage of justice at the original trial, or that otherwise indicates a need for a new trial. Accordingly, we affirm the Superior Court judge's order denying the defendant's motion for a new trial.

1. Evidence at trial. The facts surrounding the victim's death and the resulting investigation are set forth in detail in our decision on the defendant's direct appeal. See Lessieur, 472 Mass. at 318-323. We summarize those facts here and supplement them with other facts from the trial record relevant to the motion now before us. See Commonwealth v. Sullivan, 469 Mass. 340, 341 (2014).

In the early morning hours of March 18, 1994, the victim's body was discovered next to a building at the University Heights apartment complex in Lowell. The area was not readily accessible; indeed, after an initial report of shots fired,

Lowell police responded to the scene and did not see any signs of someone who had been injured or a body. Several hours later, another individual, about whom little is apparent in the record, called 911 to report having found a body. The body was located in an open area near woods. The area was very dark, the ground was covered in snow, and it was difficult to see anything. When emergency medical technicians (EMTs) and advanced life support (ALS) specialists arrived, they saw that a male was lying in the snow, with his face covered in blood and an apparent injury to the cheek. When EMTs rolled the victim onto his side in their efforts to determine the source of the bleeding, they found a pool of blood in the snow under the victim's head. The victim was transported to a hospital, where he was pronounced dead.

During the subsequent police investigation of the scene, evidence from the blood in the snow was collected, in addition to a cigarette butt, two discharged cartridge casings, and two live cartridges. In the course of their initial investigation, police interviewed fifty to one hundred people but did not establish any concrete leads, and the case remained unsolved.

Mark Beaulieu, a resident of the University Heights complex at the time of the shooting, witnessed some of the events that took place at the scene. He was outside his apartment that night when he noticed a vehicle, parked near the Dumpster area for the complex, with its engine running. He heard two gunshots

and then saw someone come out from the side of the building and get into the passenger seat of the vehicle. Beaulieu estimated that, based upon the roof line of the vehicle, the passenger was "no taller than six feet" and had short hair, but Beaulieu was not able to provide any further description of the driver or the passenger. After the vehicle left the apartment complex, Beaulieu and his wife got into their own vehicle and followed the departing vehicle, but they were unable to see the occupants clearly or to discern its license plate number. Beaulieu described the vehicle as "Toyota[-]ish . . . Japanese make older boxy." Beaulieu and his wife eventually turned around and returned to their apartment to call police.

The officers who were dispatched in response to Beaulieu's call searched the area from which Beaulieu believed he had heard the gunshots but did not find anyone injured or a body; the area around the Dumpster was very dark and covered in snow. Shortly after midnight, in response to a second emergency call, EMTs responded to the area and located the victim. He had been shot once in the left cheek and once on the side of his head. He was fully clothed, except that his penis was outside of his pants.

Twelve years later, in April of 2006, police interviewed Nolyn Surprenant regarding the shooting for the first time. Surprenant told police that he and the defendant met in 1989 when the defendant was placed in Surprenant's foster home; they

had been close friends in the years surrounding the victim's death, and Surprenant sold drugs for the defendant. At the time of the victim's death, Surprenant had dropped out of high school and had moved out of his foster parents' home into an apartment that the defendant shared with his girlfriend. Surprenant, who was generally perceived to be the defendant's bodyguard, often drove the defendant's vehicles.

Surprenant explained that both he and the defendant had known the victim, and that the defendant had told Surprenant about two weeks prior to the shooting that the victim was planning to rob the defendant. The defendant also told Surprenant that he wanted to kill the victim. On the evening of the shooting, the defendant called Surprenant and asked him to retrieve a gun from the defendant's bedroom. The defendant told Surprenant that he was with the victim at the Chelmsford Street Projects in Lowell. Surprenant located the gun and drove the defendant's blue Toyota Corolla to meet him.

When the two men reached each other at the Chelmsford Street apartment complex, the defendant explained to Surprenant that he had told the victim that the three were going to drive to meet the defendant's drug dealer, whom they were going to rob. The victim then arrived to meet them, and the three men got into the defendant's vehicle. Surprenant, following the defendant's directions, drove. A few minutes later, Surprenant

stopped at a convenience store, where he gave the defendant the gun while the victim was not looking. All three then got back into the vehicle, and at the defendant's instruction, Surprenant drove to the University Heights complex. The defendant asked Surprenant to park next to the Dumpster and got out of the vehicle. The defendant said that he was going to "take a piss," and the victim responded that he would go with him. Surprenant remained alone in the vehicle; he turned off the lights but left the engine running.

Surprenant saw the defendant and the victim walk toward the side of one of the nearby apartment buildings, but eventually lost sight of them. Approximately three to four minutes later, Surprenant heard two gunshots. The defendant returned to the vehicle alone about thirty second later, and Surprenant drove out of the complex. The defendant said that he had "shot [the victim] while we was taking a piss while he had his dick in his hand." The defendant expounded that, although he had shot the victim in the head and the face, he wanted to go back to make sure the victim was dead. Rather than returning to the scene, however, the two drove to their former foster home, where Surprenant recommended that they go to the nearby Tyngsboro bridge where they could dispose of the gun. They drove to the bridge, and the defendant got out of the vehicle. Surprenant saw the defendant walk partway across the bridge, but then lost

sight of him. A few minutes later, the defendant returned to the vehicle and told Surprenant that he had thrown the gun off the side of the bridge. The two then drove back to their apartment.

Surprenant continued to sell drugs for the defendant until August 1994, when Surprenant was arrested. Although Surprenant and the defendant remained friends, they only discussed the shooting fleetingly, when the defendant informed Surprenant a few weeks after the incident that he had told a couple of people that he had killed the victim. Surprenant told his former girlfriend, Kristin Tatro, about the shooting in 1996 or 1997, and his brother, Jason, in 1999.

Surprenant initially recounted the events surrounding the shooting in 2006, while sitting in a police cruiser, after police drove him to the University Heights apartment complex. He subsequently returned to the Lowell police station later that evening, where he made a video-recorded statement. Surprenant also led police to the Tyngsboro bridge, where the defendant purportedly had disposed of the gun; police then took him home. The following month, Surprenant was arrested in conjunction with the shooting, and his attorney negotiated a deal whereby Surprenant would testify against the defendant in exchange for serving a term of five years of imprisonment on a manslaughter charge.

2. Proceedings at trial. As both parties acknowledge, the trial was largely a referendum on Surprenant's credibility. His account was the only direct evidence linking the defendant to the crime. The defense cross-examined Surprenant extensively. Defense counsel highlighted the inconsistencies between Surprenant's trial testimony and his prior statements to police, in addition to soliciting testimony from two men who reported that Surprenant had given them different accounts of the shooting. The theory of defense, which the defendant sought to establish through cross-examination, was that either Surprenant himself, or a third-party culprit, had shot the victim. In particular, defense counsel focused the jury's attention on the favorable terms of the plea agreement that Surprenant had reached with the Commonwealth. The prosecutor sought to bolster Surprenant's credibility in part through the introduction of his prior consistent statements to his brother and Tatro, as well as to police.

While physical evidence played a limited role in the proceedings, it served largely to buttress Surprenant's account of events. The prosecutor solicited testimony from the medical examiner, who testified that stippling on the victim's skin indicated that he had been shot at close range. The medical examiner also testified that the locations of the bullet wounds were consistent with the description that Surprenant provided as

to what the defendant had told him as they drove away from the scene. A ballistics expert testified that the bullet casings recovered at the scene, and projectiles obtained during the victim's autopsy, showed to a reasonable degree of certainty that the casings and projectiles had been fired from the same weapon.

Most significantly with respect to the defendant's present motion, a serologist also testified. The serologist explained that DNA evidence on the cigarette butt recovered from the scene, as well as DNA evidence take from the blood under the victim's head, matched that of the victim. The serologist explained further:

> "With the analysis from the blood in the snow, I obtained an indication of a DNA mixture, and what I mean by a mixture is that there's indication that there is more than one profile of DNA type present in that particular sample. However, with this sample I was able to see that there was a major profile or a more predominant profile than the other, and that major male profile that was obtained from the snow matched that of the DNA profile of Mark Jones."

Neither the prosecutor nor defense counsel asked any questions to further clarify the content of what was described as the DNA mixture, or the possibility that the other DNA profiles present in the sample would be able to positively identify a third-party culprit.

3. Newly available evidence. As stated, the defendant argues that two types of newly available evidence -- the DNA

evidence and a statement by a witness who was unavailable at trial -- undermine the justice of his conviction.

a. DNA evidence. In 2012, a Superior Court judge allowed the defendant's motions under G. L. c. 278A, §§ 3 and 7, for postconviction DNA testing of both the blood evidence taken from underneath the victim's head and the live bullet cartridges. Because of advances in technology since the initial testing had been conducted in 2002,[2] the testing of the blood evidence collected from the snow under the victim's head produced a more detailed analysis of the aforementioned "DNA mixture" that the serologist described at trial. Specifically, testing revealed an allele[3] from that mixture that matched neither the victim's nor the defendant's DNA. The allele thus indicated an unexplained third contributor to the blood evidence taken from the snow.

b. Witness affidavit. In the months following the victim's death, Gale Grzyb[4] gave several inconsistent statements

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[2] The 2018 testing was conducted using a PowerPlex Fusion 6C STR kit, a methodology that was not available when the DNA initially was examined. The initial testing was conducted using a Profiler Plus/COfiler STR kit.

[3] "A DNA profile for an individual is that combination of alleles, or versions of genes, possessed by the individual at the loci tested." Commonwealth v. Gaynor, 443 Mass. 245, 248 n.1 (2005).

[4] At the time of the shooting, Grzyb was known as Gale Johnston.

to police regarding her interactions with the victim on the day of the shooting. More than twelve years later, prior to trial, defense counsel assigned an investigator to locate and interview her, but the investigator was unable to find her, she was not subpoenaed, and she did not testify at trial.

In a new affidavit, which repeats certain key elements of her earlier statements, Grzyb now asserts that, on the day of the killing, she had been released on a day pass from Lowell General Hospital, where she was committed for a period of observation. While visiting her old neighborhood that day, Grzyb encountered the victim, with whom she was friendly, and gave him a ride to the University Heights apartment complex. According to Grzyb's averments in the affidavit, as the victim was getting out of her vehicle, another vehicle, with two male occupants, drove by. Grzyb had drawn sketches of these two men in 1994. In the drawing, one of the men arguably resembled an initial police sketch of one of the suspects in the case, who was never arrested. Grzyb avers that, when he saw the two men, the victim looked nervous, got out of her vehicle, and walked away from her toward the side of an apartment building. Although her view was blocked by a snowbank, Grzyb avers that she heard two gunshots as she subsequently drove away. Grzyb also concedes in the affidavit that she was a drug addict and active drug user during the relevant period in 1994.

4. Discussion. A motion for a new trial may be granted "at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). In reviewing a decision on a motion for a new trial, we examine the motion judge's conclusions to determine whether there has been a "significant error of law or other abuse of discretion" (citation omitted), Commonwealth v. Brescia, 471 Mass. 381, 387 (2015), or, otherwise put, whether the motion judge's conclusion was "manifestly unjust," Commonwealth v. Moore, 408 Mass. 117, 125 (1990). We will overturn the motion judge's decision only where "the decision falls outside the range of reasonable alternatives." Commonwealth v. Kolenovic, 471 Mass. 664, 672 (2015), S.C., 478 Mass. 189 (2017), quoting L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). Because the motion judge here was not the trial judge, and the motion judge's rulings did not rest upon credibility determinations following an evidentiary hearing, we regard ourselves in as good a position as the motion judge to assess the trial record. See Commonwealth v. Raymond, 450 Mass. 729, 733 (2008).

To prevail on a motion for a new trial based on newly discovered evidence, a defendant must meet the two-prong test set forth in Commonwealth v. Grace, 397 Mass. 303, 305 (1986). The defendant must establish, first that the evidence is "newly available" or "newly discovered" and, second, that the evidence

"casts real doubt" on the justice of the conviction. Sullivan, 469 Mass. at 350. See Commonwealth v. Cintron, 435 Mass. 509, 516 (2001).

a. DNA evidence. The Commonwealth does not dispute that the results of the scientific analysis at issue here constitute "newly available evidence" in the requisite sense. It contends only that the defendant's motion for a new trial does not satisfy the second prong of the test articulated in Grace, 397 Mass. at 305. We therefore consider whether the motion judge abused her discretion in concluding that the test results did not "cast[] real doubt on the justice of the conviction." Id.

Seen in that light, the new DNA evidence at issue here is unlike that which we have determined necessitated a new trial in other cases. In Commonwealth v. Cowels, 470 Mass. 607 (2015), for instance, new DNA evidence excluded both the victim and the defendants as sources of bloodstains that the prosecution's key witness stated at trial were proof that the defendants had used the witness's bathroom to wash up shortly after killing the victim. See id. at 608. Testing at the time of the defendants' trial in that case indicated that the stains did contain human blood, but could not identify or exclude the victim or the defendants as possible contributors. Id. Similarly, in Sullivan, 469 Mass. at 349-351, postconviction DNA testing found that purported bloodstains on the defendant's jacket that were

critical at trial in tipping the scales in favor of the Commonwealth contained neither blood nor the victim's DNA. Completing this recent trifecta is Commonwealth v. Cameron, 473 Mass. 100 (2015), in which new DNA testing determined that DNA evidence, which had been introduced at trial as inconclusive, actually excluded the defendant as a possible contributor to seminal residue on the underwear of an alleged rape victim. Id. at 101.

By contrast to each of these circumstances, the discovery of the single nonmatching allele at issue here neither shows that evidence presented at trial was inaccurate, nor would have removed from the jury's consideration any evidence that was before them at trial. Perhaps more importantly, unlike the DNA evidence introduced and relied upon in Cameron, Cowels, or Sullivan, the DNA evidence introduced at the defendant's initial trial was not used to bolster the Commonwealth's case. The prosecutor did not attempt to prove that the "DNA mixture" described by the serologist demonstrated that the defendant was the perpetrator or confirmed Surprenant's narrative of events. See supra. On the other hand, in each of the three prior cases, the physical evidence that subsequently was reexamined was critical to the Commonwealth's case because it buttressed key testimony.

Relatedly, unlike these prior cases, the new evidence at issue here lacks the required "measure of strength in support of the defendant's position" and, thus, does not create a "substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial." See Grace, 397 Mass. at 305-306. The defendant maintains that the new evidence meaningfully contributes to his third-party culprit defense, because the allele necessarily was left at the time of the killing by the real perpetrator of the crime. The source of this allele, however, in our view is far from obvious. The victim's body apparently lay in a public location for hours before it was found. Evidence introduced at trial established that at least one resident in the nearby apartment building encountered the body, and EMTs, as well as ALS and other first responders, spent significant time in the area where the body was found, attempting to assist the victim, before the sample was obtained. Moreover, the area was near the Dumpsters that served the apartment complex, and where people could have walked, and deposited DNA, on the ground prior to the snowstorm that could have mixed with the blood, which one of the EMTs described as a "pool" underneath the victim's head. Nor was the nature of the crime -- a shooting in the face while the victim apparently was occupied in smoking and urinating -- one in which the perpetrator would be expected to be injured in a

confrontation with the victim. This was no knife fight where the individual wielding the knife might have been sliced as the victim fought for his life, nor barroom brawl. There was no testimony concerning hand-to-hand combat, and the area at the scene did not suggest any form of disturbance that would indicate a struggle had taken place in which the perpetrator also had been injured. Nor was any kind of struggle likely, given the evidence that both of the victim's hands had been occupied, and the almost certain immediate incapacitation of someone who has been shot twice in the face and is bleeding from those injuries.

On this record, the stray allele thus is not necessarily linked to the perpetrator, regardless of the perpetrator's identity. The new DNA evidence therefore lacks "the materiality, weight, and significance" to necessitate a new trial. See Grace, 397 Mass. at 306.

b. Witness affidavit. The defendant also argues that Grzyb's affidavit, alone or in conjunction with the new DNA evidence, requires a new trial. To meet the first prong of the test set forth in Grace, 397 Mass. at 305, the defendant relies on an affidavit by his trial counsel to the effect that Grzyb was "unavailable at the time of trial, or that the evidence could not have been procured by due diligence." Commonwealth v. Toney, 385 Mass. 575, 581 (1982). In that affidavit, trial

counsel asserts that, at the time of trial, he was aware of Grzyb's interviews with police and the statements she had made. He hired a private investigator who attempted to locate her, but, "despite our best efforts, she was not to be found." The defendant therefore maintains that Grzyb's affidavit became available only after a subsequent private investigator was able to locate and interview Grzyb, in another jurisdiction, in 2017.

Setting aside whether trial counsel's original efforts and the evidence of these efforts are sufficient to prove Grzyb's unavailability at the time of trial, in our view her current affidavit "inherently lack[s] persuasive force," such that it does not "cast real doubt on the conviction" as required under Grace, and, therefore, does not "require allowance of the new trial motion." Commonwealth v. Stewart, 422 Mass. 385, 389 (1996). See Commonwealth v. Sparks, 433 Mass. 654, 661 (2001). As articulated by the defense's own trial counsel in his affidavit, based on Grzyb's multiple interviews with officers and her varying statements to them in the months following the victim's death, he "believed that [Grzyb's] statements to the police were not credible and made little sense." We cannot fault this view of the evidence and conclude that a similar understanding applies equally well to Grzyb's most recent affidavit.

As set forth in that affidavit, Grzyb's new account of her interactions with the victim on the day of his death, and what she saw that day, is meaningfully inconsistent with her prior statements and the trial testimony of multiple disinterested witnesses. For example, Grzyb asserts in her affidavit that she did not see the victim being shot, whereas she repeatedly has said in the past that she did see the shooting. Additionally, Grzyb's testimony that there were two running vehicles parked in the parking lot of the complex, near the Dumpsters, moments before the gunshots were heard is inconsistent with Beaulieu's testimony that just one vehicle was parked with its engine running.

While a new trial may be warranted where the Commonwealth's case relies heavily upon the testimony of a single witness, such as Surprenant, and the newly discovered evidence contradicts or strongly undermines that testimony, such as Grzyb's does, see Commonwealth v. Drayton, 479 Mass. 479, 490 (2018), the newly discovered evidence must bear indicia of reliability, see Cowels, 470 Mass. at 621. Given her differing prior accounts, and the inconsistencies with the testimony of another bystander witness, Grzyb's new affidavit does not do so.

c. Ineffective assistance of counsel. The defendant also argues that, even if we conclude that Grzyb's affidavit does not necessitate a new trial, we should decide that a new trial is

required because the defendant's trial counsel was constitutionally ineffective in failing to locate Grzyb at the time of his trial, thus resulting in a substantial likelihood of a miscarriage of justice at trial.

In considering ineffective assistance of counsel claims in cases of murder in the first degree on plenary review, we do not apply the familiar Saferian standard of review,[5] but instead apply "the more favorable standard of G. L. c. 278, § 33E, and review [the] claim to determine whether there was a substantial likelihood of a miscarriage of justice." Commonwealth v. Perez, 484 Mass. 69, 74 (2020), quoting Commonwealth v. Ayala, 481 Mass. 46, 62 (2018). Accordingly, we determine "whether defense counsel erred during the course of the trial," and "if so, whether that error was likely to have influenced the jury's conclusion" (citation omitted). Perez, supra. Where a defendant has received plenary review under G. L. c. 278, § 33E, however, subsequent claims of ineffective assistance of counsel that could have been raised in the defendant's direct appeal are reviewed under the standard of a substantial risk of a miscarriage of justice. Commonwealth v. Drew, 447 Mass. 635, 638-639 (2006), cert. denied, 550 U.S. 943 (2007).

[5] See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

In circumstances where tactical or strategic decisions are at issue, such as whether to pursue or call witnesses who might have provided potentially exculpatory testimony, see Perez, 484 Mass. at 74, "we conduct our review with some deference to avoid characterizing as unreasonable a defense that was merely unsuccessful," Commonwealth v. Valentin, 470 Mass. 186, 190 (2014), quoting Commonwealth v. White, 409 Mass. 266, 272 (1991). Thus, such decisions amount to ineffective assistance of counsel only if they were "'manifestly unreasonable' when made." Commonwealth v. Lane, 462 Mass. 591, 596 (2012), quoting Commonwealth v. Zagrodny, 443 Mass. 93, 102 (2004).

Here, we cannot say that defense counsel's strategic decision not to pursue Grzyb, and not to present her testimony to the jury, was manifestly unreasonable. As trial counsel averred in his affidavit, at the time of trial, he was aware of Grzyb's statements to police, and hired a private investigator in an ultimately unsuccessful attempt to locate her. Counsel then did not take additional steps to do so in light of his belief that Grzyb's statements "were not credible and made little sense." Rather than focusing on Grzyb's testimony, counsel believed that the defendant's "strongest theory of defense was to highlight reasonable doubt as to [his culpability] and to attack the motives and credibility of [Surprenant]." This strategy is not manifestly unreasonable,

given the contradictory nature of Grzyb's statements, as well as the discrepancies between her statements to police and those of another disinterested witness, as discussed supra.

d. Cumulative effect. The defendant also argues that he was prejudiced by the cumulative effect of these errors, and that, taken together, the "errors establish a substantial risk of miscarriage of justice." This argument is unavailing, given the relative weaknesses in the newly available evidence we have detailed. Any cumulative error thus was "no more prejudicial than any individual errors, which had minimal impact, if any." Commonwealth v. Duran, 435 Mass. 97, 107 (2001).

Order denying motion for a new trial affirmed.