SJC-11251

COMMONWEALTH vs. ERIC DENSON.

Hampden. September 13, 2021. - February 10, 2022.

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

Homicide. Evidence, Expert opinion, Identification, Hearsay, Prior inconsistent statement. Witness, Expert. Identification. Practice, Criminal, Capital case, Identification of defendant in courtroom, Argument by prosecutor, Instructions to jury, Assistance of counsel.

Indictments found and returned in the Superior Court Department on April 9, 2010.

Pretrial motions to suppress evidence were heard by Peter A. Velis, J., and the cases were tried before him; and a motion for a new trial, filed on January 30, 2019, was heard by Mark D. Mason, J.

Dana Alan Curhan for the defendant.
David L. Sheppard-Brick, Assistant District Attorney, for the Commonwealth.

CYPHER, J. On November 1, 2011, a jury convicted the defendant, Eric Denson, of murder in the first degree on the theories of deliberate premeditation and extreme atrocity or

cruelty after he stabbed Conor Reynolds (victim) in the neck. The defendant also was convicted of one count of assault and battery by means of a dangerous weapon against a second person.[1] The judge sentenced the defendant on the murder conviction to a term of life in State prison, to be served from and after his sentence for assault and battery, which was a term of from one and one-half years to one and one-half years and a day. This appeal followed.

After the appeal was docketed in this court, the defendant filed a motion for a new trial based on ineffective assistance of counsel,[2] which we remanded to the Superior Court. Following an evidentiary hearing at which trial counsel testified, the motion judge, who was not the trial judge, denied the motion. The defendant's appeal from the denial of his motion for a new trial was consolidated with his direct appeal.

On appeal, the defendant raises five principal arguments. First, he argues that the trial judge erred in excluding the

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[1] Prior to trial, the Commonwealth filed a nolle prosequi on an additional count of assault and battery by means of a dangerous weapon.

[2] In his motion for a new trial, the defendant also raised a number of alleged improper remarks in the prosecutor's closing argument. He does not appeal from the denial of the motion on the grounds of the prosecutor's alleged improper remarks, except to the extent that he argues that the prosecutor improperly relied on the hearsay statement "Eric be buggin'," as discussed in part 5, infra.

testimony of the defendant's expert on eyewitness identification, Dr. Steven Penrod (eyewitness expert). Second, he argues that the trial judge erroneously permitted an eyewitness to identify the defendant in court, where the witness had failed to do so out of court. Third, the defendant argues that the admission in evidence of the statement "Eric be buggin,'" as part of a witness's prior inconsistent statement, violated the rules of evidence pertaining to hearsay and the defendant's State and Federal constitutional rights. Fourth, the defendant maintains that the prosecutor, in his closing argument, improperly relied on the statement "Eric be buggin'" not for impeachment purposes but as substantive evidence. Fifth, the defendant claims that trial counsel was ineffective for (1) calling an expert on forensics and criminalistics, Dr. Edward Bernstine (forensics expert), who was vulnerable to impeachment based on certain deficiencies in his prior work at the State police crime laboratory (crime lab), and (2) failing to pursue an alternative theory to explain the presence of blood in the back seat of a vehicle in which the defendant rode on the night of the stabbing. Finally, the defendant argues that he is entitled to relief under G. L. c. 278, § 33E (§ 33E), because the weight of the evidence did not establish that the defendant was the assailant or, if it did, that he acted with deliberate premeditation or extreme atrocity or cruelty, and because his

age and immaturity should be considered to mitigate his sentence to murder in the second degree or manslaughter.

For the reasons stated infra, we conclude that there has been no reversible error. After considering each of the defendant's arguments and conducting a thorough review of the record, we also conclude that there is no reason to exercise our authority under § 33E to grant a new trial or to reduce the verdict. We therefore affirm the defendant's convictions and the denial of his motion for a new trial.

Background. 1. Facts. We summarize the facts that the jury could have found, reserving certain details for our discussion of the legal issues.

On the night of March 13, 2010, the victim and a number of friends from his high school attended a birthday party at a nightclub (club) in Springfield. The defendant also was present and was seen by a friend of his at the party wearing a black leather jacket and a black and red baseball hat. The club had two doors, one closer to the street with a black mailbox on it (mailbox door) and one further from the street which was being used as the primary entrance to the club (main entry door).

Shortly before 11 P.M., the victim, his girlfriend, and several of their friends were standing in the rear of the club, close to where the mailbox door was located. A physical altercation broke out between members of the victim's group and

students from another high school. The victim, who was not involved, approached the group and attempted to break up the fight. An adult chaperone approached and told the victim and his friends that they would have to leave if they did not stop fighting. At the same time, a second adult chaperone brought an unidentified young man to the main entry door and told the owner of the club, who was standing there, that the young man was a troublemaker. The club owner removed him from the club through the main entry door.

As the victim and his girlfriend continued to speak to the first chaperone, a second young man wearing a black leather jacket and a red baseball hat, with dark skin, suddenly approached the victim, "got in his face," and told him to back up. Before the victim could respond, the second young man put his left hand on the victim's right shoulder and stabbed the victim in the neck with a knife. As the assailant brought the knife away from the victim, it nicked the arm of another member of the victim's group, causing him to bleed.

The club owner, returning to the area of the fight after having just ejected the "troublemaker" through the main entry door, saw the second young man holding a knife up to the victim's throat. From behind, the club owner pulled the assailant away from the victim and carried him to the mailbox door. The assailant wriggled out of the club owner's grasp and

fell almost in the threshold of the doorway. The assailant got up and walked away from the club toward a nearby convenience store and gasoline station (gas station).

Two young women who knew the defendant personally, Ashely Hudson and Harmony Alvarado, were standing outside the club when they saw the defendant get thrown out. Hudson testified that that she saw the defendant get tackled out of the mailbox door.[3] Alvarado observed another person come up to the defendant. Using the defendant's nickname, "E," the person yelled, "What the fuck are you doing, E? Run." The two men then ran together in the direction of the gas station.

As the club owner was removing the assailant from the club, Michael Shea, a friend of the victim, followed and left the club after the assailant was ejected. Hudson testified that she did not see anyone else being thrown out of the club between the time when the defendant exited and the time when Shea came outside. Two other friends of the victim followed close behind Shea. As they ran outside, one of them asked who had stabbed the victim, and the club owner pointed at the person in the red hat, whom Shea was chasing. The two young men ran with Shea to the edge of the gas station property. Shea yelled for the person that he was chasing to come back. The person turned

[3] Alvarado testified that the defendant was thrown out of the main entry door.

around, asked why they were chasing him, and made a threatening gesture.[4] At that point, the pursuit ended, and Shea and the other two friends of the victim returned to the club.

Meanwhile, the defendant's cousin and a friend left the parking lot of the gas station in a sport utility vehicle (SUV) that belonged to the cousin's sister. Both men recognized the defendant. There was another man with the defendant whom neither the cousin nor his friend recognized. At the same time as he saw the defendant, the cousin noticed a commotion in the parking lot of the club and saw younger individuals who appeared to be running from the club. The cousin drove back into the gas station parking lot, where the defendant got into the SUV using the rear passenger door and sat behind the front passenger's seat. The person with the defendant said something to the effect of "Get him out of here" or "Bring him home."

The victim, shortly after being stabbed, made his way out of the club to the parking lot through the mailbox door, aided by his girlfriend. A witness who had been inside the club testified that after the assailant was thrown out of the mailbox door, the victim left through the same door seconds later. Outside the club, the victim had difficulty breathing and was unable to remain standing. He leaned against a vehicle, and his

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[4] Shea testified that the person had his hands in his pockets and looked as if he were going to take his hands out.

girlfriend helped him to the ground and tried to get him to talk. Police officers who responded to the scene provided the victim with first aid until an ambulance arrived. The victim was transported to a local hospital, where he was pronounced dead.

After the victim was transported to the hospital, police secured the scene and began collecting evidence. Many witnesses described the assailant as a Black man, about five feet, seven inches to five feet, nine inches tall, slim to average build, aged about sixteen to twenty years old, wearing a dark colored or black jacket, a red or black baseball hat, and a grey or black sweatshirt under the jacket.

Still photographs taken from surveillance footage at the gas station showed two Black men, one on either side of the gasoline pumps. The man on the left side of the photographs was wearing a red baseball hat, a black jacket, dark pants, and white tennis shoes. Witnesses identified the person on the left side of the gas station photograph as the assailant or as the person who walked, ran, or was chased from the club to the gas station just after the stabbing. Witnesses who knew the defendant personally were shown the gas station surveillance video recording, and each identified the person in the red hat and black jacket as the defendant.

During a later examination of the SUV, photographs were taken of the interior, and a reddish-brown stain that tested positive for human blood was located in the back seat. A later test revealed that the blood on the back seat likely had come from the victim. A blood sample taken from the rear interior door handle also was tested, and the victim could not be excluded as a contributor.

2. Procedural background. The defendant was indicted in April 2010. Prior to trial, the defendant moved to suppress all evidence of identifications made by thirteen witnesses, arguing that the identification procedures used by investigators were unnecessarily and impermissibly suggestive. In support of his motions to suppress, the defendant sought to admit the testimony of an expert on the inaccuracy of eyewitness identification. The judge hearing the motion, who later was the trial judge, held a Daubert-Lanigan hearing to determine whether the eyewitness expert would be permitted to testify at the suppression hearing. See generally Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Commonwealth v. Lanigan, 419 Mass. 15 (1994). The judge declined to allow the eyewitness expert to testify at the hearing, finding that the studies on which he relied did not relate to the type of identifications made in this case, but left open the possibility that he could testify at trial. Then, after a week-long evidentiary hearing,

the judge allowed the defendant's motions to suppress as to three of the witnesses and denied the motions with respect to the other ten witnesses.

During the trial, the judge conducted a voir dire of the eyewitness expert, as discussed in further detail infra. The judge prohibited the defendant from calling the eyewitness expert. The defendant moved for a mistrial, arguing that his counsel had made strategic decisions on the assumption that the eyewitness expert would testify. The judge denied the motion. The defendant also sought a stay of proceedings to allow him to seek interlocutory review of the judge's decision pursuant to G. L. c. 211, § 3, which the judge denied.

At trial, lead counsel for the defendant (trial counsel) called the forensics expert to comment on purported deficiencies in the police investigation and to call into question whether the blood found by investigators was deposited in the rear seat of the SUV by those investigators. After the Commonwealth cross-examined the forensics expert based on negative performance reviews that he had received for improperly handling samples during his time with the crime lab, trial counsel's co-counsel (co-counsel) moved for a mistrial. The motion was denied.

Discussion. 1. Standard of review. When considering a direct appeal from a conviction of murder in the first degree

along with an appeal from the denial of a motion for a new trial, we review the entire case pursuant to § 33E. See, e.g., Commonwealth v. Upton, 484 Mass. 155, 159-160 (2020); Commonwealth v. Goitia, 480 Mass. 763, 768 (2018). In so doing, we review "preserved issues according to their constitutional or common-law standard and analyze any unraised, unpreserved, or unargued errors, and other errors we discover after a comprehensive review of the entire record, for a substantial likelihood of a miscarriage of justice." Upton, supra at 160, citing Commonwealth v. Brown, 477 Mass. 805, 821 (2017), cert. denied, 139 S. Ct. 54 (2018).

2. Expert testimony regarding eyewitness identification. The defendant argues that the judge erroneously excluded the eyewitness expert's testimony at trial.[5] The defendant also invites us to recognize a presumption, in light of growing recognition of the potential inaccuracy of eyewitness identifications, that expert testimony on eyewitness identification should be admitted. "We review the exclusion of expert testimony under an abuse of discretion standard and consider whether the judge made a 'clear error of judgment in

[5] In light of our conclusion that there was no error in the exclusion of the eyewitness expert's testimony, we do not reach the defendant's further argument that any purported error violated his constitutional right to present his theory of defense.

weighing' the relevant factors 'such that the decision falls outside the range of reasonable alternatives.'" Commonwealth v. German, 483 Mass. 553, 569 (2019), quoting L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). See Commonwealth v. Richardson, 423 Mass. 180, 182 (1996).

During the voir dire at trial, the eyewitness expert testified that studies have demonstrated that witness confidence is the primary factor that appears to influence a jury's assessment of the accuracy of an eyewitness identification. He acknowledged that these studies dealt with facial identifications, as opposed to clothing-based identifications. He also described studies on the effects of various factors -- including viewing conditions, stress, exposure time, and race -- on the accuracy of eyewitness identifications. He testified specifically regarding a study on the effects of "clothing bias" as it relates to how clothing affects the ability of witnesses to identify individuals in facial arrays. He also addressed studies on the accuracy of facial identifications from surveillance video footage.

In granting the Commonwealth's motion to preclude the eyewitness expert's testimony, the judge found that the studies that the eyewitness expert highlighted were only "remotely related" to the case because they were not specific to identifications based on clothing, as necessary to assess the

accuracy of the identifications here. In addition, the judge concluded that the consistency among the various identifications and the corroborating evidence in the case "obviate[d] the necessity for this jury to be any[] further enlightened . . . regarding mistaken identification testimony." Finally, the judge determined, in part based on his familiarity with the jury up to that point in the trial and in light of the instructions that would be given, that the jury would be capable of evaluating the eyewitness testimony and considering the defense of misidentification.

The eyewitness expert's testimony supports the judge's finding that the studies relied on were not sufficiently related to the facts of the case to be relevant, and we have no reason to doubt the judge's additional reliance on his own observations of the jury's attentiveness. Cf. Commonwealth v. Morales, 453 Mass. 40, 47 (2009) (in sleeping juror case, judge entitled to rely on personal observations of jury as to question of juror attentiveness); Commonwealth v. Lawton, 82 Mass. App. Ct. 528, 543-544 (2012) (same). We further note that, while the judge did not have the benefit of our decision in Commonwealth v. Gomes, 470 Mass. 352, 379 (2015) (recommending revised jury instruction on eyewitness identification), S.C., 478 Mass. 1025 (2018), or of the Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices

(July 25, 2013),[6] his instructions to the jury nevertheless surpassed what was legally sufficient to address some of the specific issues that the defendant sought to raise through the eyewitness expert's testimony. The judge instructed the jury at length on the factors identified in Commonwealth v. Rodriguez, 378 Mass. 296, 310-311 (1979), S.C., 419 Mass. 1006 (1995). He then went beyond those factors to instruct the jury on honest but mistaken identification, erroneous perception, witness forgetfulness, and witness confusion. See Gomes, supra at 379-380 (appendix containing provisional instruction addressing, inter alia, research on mistaken identification and fallibility of witness memory). The judge then instructed the jury that, in addition to assessing the truthfulness of each eyewitness's testimony, they must decide whether their testimony regarding identification was "accurate in fact." In light of these instructions and the judge's assessment of the evidence and the proceedings, we discern no abuse of discretion in his exclusion of the eyewitness expert's testimony. See Commonwealth v. Kent K., 427 Mass. 754, 762 (1998) (in first-degree murder case, judge did not abuse discretion in excluding expert testimony on reliability of eyewitness identification on grounds that

[6] Available at https://www.mass.gov/doc/supreme-judicial-court-study-group-on-eyewitness-evidence-report-and-recommendations-to-the/download [https://perma.cc/WY4M-YNZN].

proffered testimony was "somewhat elementary, basic, and parallel[ed] to a great extent the instructions the jurors receive from judges in criminal cases").

We decline the defendant's invitation to create a presumption of admissibility for expert testimony on the potential inaccuracy of eyewitness identifications. Contrary to the defendant's assertion in his brief, this court has not suggested that such testimony should be admissible as of right in all cases. See Gomes, 470 Mass. at 359, quoting Commonwealth v. Santoli, 424 Mass. 837, 845 (1997) ("We have long recognized that 'a principle concerning eyewitness identifications may become so generally accepted that, rather than have expert testimony on the point, a standard jury instruction stating that principle would be appropriate'" [emphasis added]); Commonwealth v. Zimmerman, 441 Mass. 146, 153-156 (2004) (Cordy, J., concurring) (suggesting only that, in light of growing scientific consensus, expert testimony on cross-racial identification "should generally be admissible" where witness and person identified are strangers to one another). Because, as the case before us demonstrates, the nature and relevance of such testimony may vary based on the facts of each case, the best course is to entrust to the sound discretion of the trial judge the decision whether to admit this testimony.

3. Admissibility of in-court identification. During the investigation, Shea identified the person that he chased as the individual appearing on the left side of a still image taken from the gas station surveillance video recording. Police presented Shea with a photographic array containing the defendant's photograph, and he identified someone else as looking like the person he chased out of the club. At trial, over the defendant's objection, Shea identified the defendant as the person he chased out of the club. After Shea testified, the defendant moved for a mistrial.

The defendant argues that, because Shea failed to identify the defendant as the assailant in the out-of-court photographic array, his doing so in court was akin to a showup identification in its suggestiveness. See Commonwealth v. Collins, 470 Mass. 255, 262-263, 265 (2014) (in-court identification after witness failed to identify defendant during pretrial identification procedures admissible only for "good reason"). See also Commonwealth v. Crayton, 470 Mass. 228, 241-242 (2014) (first-time in-court identifications admissible only for "good reason"). The defendant acknowledges that Collins and Crayton, decided after his trial, apply only prospectively, and appears to concede that, as in those cases, the admission of the challenged testimony here was correct under our case law as it existed at the time of trial. See Collins, supra at 261-262,

266; Crayton, supra at 238, 241-242. He asks us to exercise our authority under § 33E to give him the benefit of those cases. Even if we were to do so, we would not disturb the defendant's convictions, as the defendant suffered no prejudice from the admission of Shea's in-court identification. See Commonwealth v. DePina, 476 Mass. 614, 624 (2017) (where defendant preserved issue through contemporaneous objection at trial, "we review to determine whether the error, if any, prejudiced the defendant[]").

Here, the evidence establishing that the defendant was the assailant was strong. Hudson, who knew the defendant personally, testified that, while she was standing outside, she saw the defendant being thrown out of the club through the mailbox door. She did not see anyone else being removed between the time when the defendant exited and the time when Shea came outside. Multiple witnesses testified that the club owner ejected the assailant through the mailbox door and that the victim exited through the same door moments later. Blood spatter on the mailbox door and the testimony of witnesses inside the club confirmed that the victim and, therefore, the assailant, both had exited through the mailbox door. In addition, the club owner testified that, before the stabbing occurred, he ousted the person identified as a troublemaker via the main entry door, not the mailbox door. The evidence also

showed that Shea chased the assailant as he fled to the gas station and suggested that the defendant was being chased when his cousin saw him approaching the gas station. This evidence, combined with the blood found on the door handle and in the rear seat of the SUV, presented a strong case that the defendant was the assailant. Finally, in his closing argument, the prosecutor explicitly relied on the identifications of the defendant by individuals who knew him, not individuals, like Shea, who did not know him and who testified only to their observations of the assailant.

In light of the evidence at trial and the prosecutor's closing argument, the impact of Shea's in-court identification of the defendant likely had a minimal effect on the jury. See Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994) (error not prejudicial where it "did not influence the jury or had but very slight effect" [citation omitted]). There was no error in its admission under our precedent at the time of trial, but even if we were to apply the rules later announced in Collins and Crayton, there was no prejudice.

4. Hearsay. The evening after the stabbing, Brian Failey, a friend of the defendant who was at the club on the night of the stabbing, gave a statement to a police officer. At trial, Failey first testified that he did not remember hearing anything yelled when people began to scatter. After he was asked to read

his statement to the officer, he testified that it did not reflect accurately what he told the officer. Failey testified that he had told the officer that, when he was leaving the club after the stabbing, he had heard a woman say, "He be buggin'." When the officer asked Failey if he was referring to the defendant, Failey said that he was not. The officer then asked whether Failey could have heard the defendant's nickname "E" instead of "he," and Failey responded that that he did not know. Failey agreed that the record of his statement to the officer said, "Eric be buggin'," but denied that he said that to the officer. Failey never directly testified that he heard someone say, "Eric be buggin'."

The defendant argues that the statement "Eric be buggin'" was admitted improperly because it was hearsay and did not satisfy the requirements of the excited utterance exception. He also argues that its admission violated his rights under the due process and confrontation clauses of the Fifth and Sixth Amendments to the United States Constitution and under art. 12 of the Massachusetts Declaration of Rights because the statement was testimonial hearsay. At trial, the defendant sought to preclude the Commonwealth from introducing the statement, objected numerous times to the prosecutor's questions, and moved for a mistrial during the questioning. The issue thus was preserved, and we "review to determine whether the introduction

of the [statement] was error and, if so, whether it was prejudicial." Commonwealth v. Colon, 482 Mass. 162, 186 (2019) (out-of-court statements properly admitted).

Because Failey initially did not remember hearing anything yelled and then claimed that the written statement did not reflect accurately what he told the officer, the substance of the statement to the officer, including the statement "Eric be buggin'," was admissible as a prior inconsistent statement for impeachment purposes. See Commonwealth v. Daye, 393 Mass. 55, 66 (1984). Thus, the statement "Eric be buggin'" was not admitted for its truth and was not hearsay. See Commonwealth v. Niemic, 483 Mass. 571, 581 (2019) ("Testimony reporting a prior out-of-court statement that tends to contradict the declarant's testimony is admissible for the purposes of impeachment" [alterations, quotations, and citation omitted]). The judge therefore did not err in admitting the statement "Eric be buggin'" as part of Failey's prior inconsistent statement. For these reasons, we need not address the defendant's arguments regarding whether the statement qualified as an excited utterance or whether it was testimonial.

5. Closing argument. The defendant argues that the prosecutor, in his closing argument, relied on the statement "Eric be buggin'" not for impeachment purposes, see part 4, supra, but as substantive evidence that the defendant's demeanor

or behavior underwent a change at the time of the stabbing. The defendant objected to the challenged portion of the prosecutor's closing argument at trial, so we review for prejudicial error. See Commonwealth v. Andre, 484 Mass. 403, 417 (2020).

"We consider remarks made during closing in the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury" [quotations and citation omitted]. Andre, 484 Mass. at 417-418. Although the prosecutor referred to the inconsistency in Shea's statement to the police, the thrust of the relevant portion of the argument, set forth in the margin,[7] was that the statement "Eric be buggin'" indicated that the defendant had done something that caused people in the club to scatter. The prosecutor therefore improperly employed the statement for its truth. See Commonwealth v. Bregoli, 431

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[7] The prosecutor remarked:

> "[H]ow [the defendant] was acting in the bar was described to you by his friend Brian Failey[,] and Brian Failey said, 'I saw Mr. Denson by the dance floor. Yeah, he's a generally quieter guy, came up to me said hello.' . . .
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> "That all changed when Brian Failey heard something yelled, and he heard right at the time people started to scatter, 'Eric, be buggin'.' And, of course, he told you, 'Well, I might have said, "He be buggin'"; I might have said, "E be buggin'." I might have said Eric, He, E, or some variation that the police must have manipulated.' But in his statement to the police that he looked at before he signed, given soon after the event, he said '[W]hat caused the people to scatter after Eric was shaking my hand and being a good guy was, "Eric, be buggin',"' and then all of a sudden it's crazy." (Emphasis added.)

Mass. 265, 277-278 (2000) (prosecutor's substantive use of evidence admitted for limited purpose improper). Nevertheless, in the context of the entire argument, all of the evidence presented at trial, and the judge's instructions to the jury that closing arguments are not evidence and that prior inconsistent statements of a witness may be considered only in evaluating the credibility of the witness, see Andre, supra, we conclude that the prosecutor's improper remarks "did not influence the jury or had but very slight effect" (citation omitted), Flebotte, 417 Mass. at 353.

6. Ineffective assistance of counsel. As he did in his motion for a new trial, the defendant argues that trial counsel was ineffective in deciding to call the forensics expert and in failing to present an alternative explanation for how blood came to be present in the back seat of the vehicle.

"Because the defendant was convicted of murder in the first degree, we do not evaluate his ineffective assistance claim under the traditional standard set forth in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974)." Commonwealth v. Ayala, 481 Mass. 46, 62 (2018), citing Commonwealth v. Seino, 479 Mass. 463, 472 (2018), and Commonwealth v. Kolenovic, 478 Mass. 189, 192-193 (2017). "Instead, we apply the more favorable standard of G. L. c. 278, § 33E, and review his claim to determine whether there was a substantial likelihood of a miscarriage of

justice." Ayala, supra, citing Seino, supra. "Under this review, we first ask whether defense counsel committed an error in the course of the trial." Ayala, supra, citing Seino, supra. "If there was an error, we ask whether it was likely to have influenced the jury's conclusion. Ayala, supra, citing Seino, supra at 472-473.

"Where the claimed ineffectiveness is the result of a strategic or tactical decision of trial counsel, the decision must have been 'manifestly unreasonable' to be considered an error." Ayala, 481 Mass. at 62, quoting Kolenovic, 478 Mass. at 193. In order to determine whether a decision is manifestly unreasonable, we must evaluate the "decision at the time it was made" (citation omitted). Ayala, supra. "When, as here, the motion judge did not preside at trial, . . . we regard ourselves in as good a position as the motion judge to assess the trial record." Commonwealth v. Perkins, 450 Mass. 834, 845 (2008), quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986). We address each of the defendant's arguments in turn.

a. Calling the forensics expert. At the evidentiary hearing on the defendant's motion for a new trial, trial counsel testified that the decision to call the forensics expert was based on his impressive credentials in the field of deoxyribonucleic acid (DNA) testing, including his former employment with the crime lab, and on the recommendation of

other defense attorneys who had tried cases involving DNA evidence. Trial counsel testified that he was aware of the forensics expert's "baggage," but believed that it was not relevant to his scientific knowledge or competence to testify regarding bloodstain analysis, and that it would not outweigh the benefit of his testimony.

At trial, the forensics expert provided meaningful criticism of the methods used to investigate and document the evidence of blood in the club and in the rear seat of the SUV. Specifically, he testified that the shape of the bloodstain in the back seat of the SUV was not consistent with a transfer stain because it lacked directionality or feathering that would have indicated transfer through rubbing. This testimony fit with the over-all defense strategy of suggesting that the Commonwealth could not prove how the blood was deposited in the SUV, that it could not have come from the defendant, and that investigators may have contaminated scene.

Despite the defendant's efforts on appeal to characterize the prosecutor's cross-examination of the forensics expert as devastating to his case, the trial transcript reveals that its scope and effect were fairly minor. At the beginning of cross-examination, the prosecutor asked the forensics expert about negative performance reviews that he had received during his time with the crime lab. The forensics expert admitted that he

had received negative reviews that addressed his ability to process crime scenes without causing contamination. On redirect examination, trial counsel made an effort to rehabilitate the forensics expert's credibility by bringing out the details of the three incidents that were the subjects of the negative reviews and highlighting that the incidents were dissimilar to the investigation in the defendant's case.

The record thus does not support the defendant's argument that trial counsel's decision to call the forensics expert was manifestly unreasonable when made. See Ayala, 481 Mass. at 62. That co-counsel, as the defendant emphasizes, disagreed with the decision does not alter our conclusion. Co-counsel admitted at trial that the decision was "[p]urely strategic." An unsuccessful defense strategy does not amount to ineffective assistance of counsel, even if different strategies were available or conceivable. See Commonwealth v. White, 409 Mass. 266, 272 (1991) ("where tactical or strategic decisions of the defendant's counsel are at issue, we . . . avoid characterizing as unreasonable a defense that was merely unsuccessful"). The defendant's ineffective assistance claim therefore fails on this basis.

b. Secondary transfer of blood. The defendant also argues that trial counsel was ineffective because he failed to pursue an alternative theory of defense, namely, that the defendant was

the troublemaker thrown out of the club shortly before the stabbing and that the blood on his clothing, which then was transferred to the vehicle, was the result of his coming into contact with other people in the parking lot of the club as they left the club after the stabbing. Trial counsel instead argued that the defendant was not the assailant but was inside the club and close enough to the stabbing to be spattered with blood as the victim coughed after being stabbed, just as other bystanders were. The defendant claims that this strategy left him without an effective defense.

The defendant overstates the strength of the evidence supporting his proffered theory of secondary transfer. The evidence showed that the troublemaker and the assailant were thrown out of different doors of the club; a witness who knew the defendant saw him get tackled out of the mailbox door; once he was outside, the defendant headed toward the gas station; Shea followed the assailant out of the mailbox door almost immediately and chased him in the direction of the gas station; and the victim and other people with blood on them left the club soon after, through the mailbox door. Only one witness, Alvarado, insisted that the defendant was thrown out of the main entry door and that he "hung around for a while" afterward. Critically, she did not testify that he came into contact with anyone at any time in the parking lot of the club, and there was

no other evidence to that effect. In addition, Alvarado's credibility was drawn into question by her admission that the defendant was her friend and that she was not happy to be testifying.

Contrary to the defendant's argument, trial counsel's strategy did not leave him without an effective defense. Trial counsel testified that he did not pursue a secondary transfer theory because he did not think that the evidence supported it. He testified that the strategy that he did pursue was advantageous in establishing how blood came to be on the defendant's clothing, whereas a theory presenting him as the earlier-expelled troublemaker would have put him too far from the stabbing to plausibly have gotten blood on himself. Based on our review of the record and the weight of the evidence, we conclude that trial counsel's over-all strategy and his decision not to pursue a defense theory based on secondary transfer were not manifestly unreasonable. See Ayala, 481 Mass. at 62. For this reason as well, the defendant's claim of ineffective assistance of counsel fails.

7. Review under G. L. c. 278, § 33E. The defendant asks us to exercise our authority under § 33E to reduce his conviction or order a new trial. The defendant argues three specific grounds for relief under § 33E. We discuss each in turn.

First, the defendant argues that the weight of the evidence did not support the conclusion that he was the assailant. As we already have noted, the evidence identifying the defendant as the assailant was compelling. See part 3, supra. The defendant's argument therefore fails.

Second, the defendant claims that the weight of the evidence did not support the verdict on either theory of murder in the first degree presented, deliberate premeditation or extreme atrocity or cruelty. As the defendant acknowledges, "[n]o particular length of time of reflection is required to find deliberate premeditation; a decision to kill may be formed in a few seconds." Commonwealth v. Whitaker, 460 Mass. 409, 419 (2011). The evidence showed that the defendant was not involved in the initial altercation, which had ended by the time he approached the victim, and that he used one hand to hold the victim by the shoulder and the other to stab him in the neck. The weight of the evidence thus supported the defendant's conviction on the theory of deliberate premeditation. In light of this conclusion, we need not reach the question whether the weight of the evidence supported the defendant's conviction on the theory of extreme atrocity or cruelty.[8]

[8] The jury found the defendant guilty of murder in the first degree on each theory separately and unanimously.

Finally, the defendant asks us to consider his youth and immaturity in mitigation of his sentence. As the defendant states in his brief that he was twenty years old at the time of the stabbing and there is nothing in the record that indicates that a reduction in the verdict on this basis is warranted, we decline to do so.

After a thorough review of the record, we conclude that there is no other reason to exercise our authority under § 33E to grant a new trial or to reduce or set aside the verdict of murder in the first degree.

Judgments affirmed.

Order denying motion for a new trial affirmed.