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SJC-11553

COMMONWEALTH vs. SCOTT STEADMAN.

Norfolk. November 5, 2021. - March 25, 2022.

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

Homicide. Assault and Battery by Means of a Dangerous Weapon. Joint Enterprise. Evidence, Joint venturer, Hearsay, Disclosure of evidence, Exculpatory, Third-party culprit, Consciousness of guilt, Scientific test. Practice, Criminal, Hearsay, Mistrial, Disclosure of evidence, Instructions to jury, Capital case, Burden of going forward.

Indictments found and returned in the Superior Court Department on September 23, 2009.

The cases were tried before Elizabeth M. Fahey, J., and postconviction motions for forensic testing and expert witness funds, filed on January 6, 2020, were considered by her.

Brian A. Kelley for the defendant.
Stephanie Martin Glennon, Assistant District Attorney, for the Commonwealth.

KAFKER, J. A jury convicted the defendant, Scott Steadman, of murder in the first degree based on both deliberate premeditation and extreme atrocity or cruelty for the death of

Ronald Pratt, who was found in his tent at a campsite with forty-six stab wounds. The defendant was also convicted of two counts of assault and battery by means of a dangerous weapon for altercations with two individuals who shared the campsite with Pratt. The defendant now appeals from his convictions and from the denial of two postconviction motions, one requesting forensic testing pursuant to G. L. c. 278A and the other for an advance of expert fees.

As to his direct appeal, the defendant first argues that the trial judge erred by admitting joint venture hearsay evidence where there was no joint venture, or, in the alternative, where the statement was not in furtherance of the joint venture. Second, the defendant argues that he was entitled to a mistrial when, midtrial, he first learned that one of the Commonwealth's identified experts had performed an additional test on a bloody footprint in evidence. Third, he claims that the trial judge erred by excluding certain third-party culprit evidence. Finally, the defendant argues that the jury charge should not have included a consciousness of guilt instruction.

We discern no reversible error in our review of the defendant's direct appeal. Having thoroughly examined the record, we also conclude that there is no reason to grant relief under G. L. c. 278, § 33E.

Although we affirm the defendant's convictions, we consider his motions related to postconviction forensic testing separately, as they are part of a process that is "separate from the trial and any subsequent proceedings challenging an underlying conviction." Commonwealth v. Clark, 472 Mass. 120, 121-122 (2015). Our review reveals that the defendant's motion for expert fees was premature and thus properly denied. We also conclude, however, that his motion requesting forensic analysis meets the modest threshold requirements of G. L. c. 278A, § 3. We therefore reverse its dismissal and remand to the trial court for further proceedings consistent with this opinion.

Background. We summarize the facts as the jury could have found them, reserving certain details for our discussion of specific issues.

At the time of his death, Ronald Pratt resided in a tent at a campsite in Weymouth. He shared the campsite with a married couple, Kristen Fuller and Robert Fuller, who occupied their own nearby tent.[1] On the morning of July 18, 2009, Pratt got into an argument with Derek Royal, a frequent visitor to the campsite, about Royal allegedly cutting down Pratt's marijuana plants. Royal left, angry. That afternoon the defendant, Timothy Estabrooks, and William Lambert drove to the campsite in the

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[1] As they share a surname, we refer to the Fullers individually by their first names.

defendant's vehicle to visit Pratt. The group drank alcohol, smoked marijuana, and played darts and cards. Later in the afternoon the defendant and Estabrooks drove Lambert home and then returned to the campsite. At some point Kristen felt unwell and retired to her tent to sleep.

Kristen awoke to shouting: an altercation between the defendant, Pratt, and Estabrooks was in progress. She heard the defendant say to Pratt, "Don't disrespect me like that," and heard Pratt fall to the ground. Robert got between the defendant and Pratt; in response, the defendant punched him, knocking him down. The defendant and Estabrooks, both wearing sneakers, then began to kick Robert in the face. When Kristen tried to intervene, the defendant pushed her down and hit her in the face with a lawn chair before resuming his assault on Robert. The defendant warned the Fullers to stay on the ground, or he was "going to get his gun." Shortly thereafter he and Estabrooks left the campsite. Kristen tended to Robert's bloodied face, and then they and Pratt, who appeared uninjured from the melee, retired to their respective tents for the night. The Fullers changed their clothes, putting their bloody laundry into a plastic bag.

Meanwhile, the defendant and Estabrooks returned to Lambert's nearby apartment, arriving shortly before 11 P.M. As they continued to drink and watch television, the defendant told

Lambert that he had been in a fight with Pratt, and that they "beat [Robert's] ass" when the Fullers tried to intervene. The defendant asked Lambert if he still had a particular Buck 119 hunting knife, and after Lambert retrieved the knife, the defendant took it, a sheath, and a belt from Lambert, saying that he wanted to return to the campsite by himself. He then departed the apartment alone.

Back at the campsite, Robert was awakened by a man yelling just outside his tent. The tent was shaken, and Robert saw a knife blade slice into the tent door as a male voice said, "You're next, motherfucker. I got a gun." Robert did not get out of the tent at that time.

At approximately 2 A.M., Weymouth Police Sergeant Kevin Malloy was on patrol and observed the defendant walking, shirtless, down a street near the campsite. As he approached the defendant, who was at that point in front of a closed fast food restaurant, Malloy noticed that the defendant had a significant amount of dried blood on his hands. When Malloy asked what happened, the defendant replied that he had fallen off a bicycle and was walking to his friend's apartment, giving Lambert's address. Malloy could see no injuries on the defendant, nor did he see any bicycle. After the defendant assured Malloy that he could make it to Lambert's, he continued on his way.

At some point in the early morning hours, Lambert was awakened by the defendant returning to his apartment. When Lambert asked why he was there so late, the defendant replied that "the cops [were] after [him]," and that he had "hucked" Lambert's knife away "somewhere around [the fast food restaurant]." Lambert continued to press the defendant about what was going on, and the defendant ultimately stated, "Just say you won't see Ron around here anymore."

The defendant removed his clothes and sneakers, put them in a plastic bag, and asked Lambert to put them "in the incinerator." Lambert took the bag and put it in his own car's trunk because, although his apartment building did have an incinerator, he knew it was not functioning. The defendant fell asleep on Lambert's futon.

Several hours later, the defendant and Estabrooks left Lambert's apartment and traveled to the home of Karen Chase in Brockton, arriving at approximately 8 A.M. Chase was Estabrooks's former mother-in-law, and he was living with her at the time. Chase saw the defendant use her hose to wash off his body and shoes on her back porch, which Estabrooks explained was because they had just come from the beach. She agreed to let Estabrooks use her washing machine and dryer. Chase testified that, during their interaction, Estabrooks showed her a shirt with a ten-inch circle of blood on it and said, "I think Scott's

in trouble." The defendant and Estabrooks left Chase's home together around 11 A.M.

At the campsite, Kristen awoke that morning to the sound of Robert shouting. As she emerged from her tent, she noticed a tear in its screen that hadn't been there when she had gone to sleep. She found her husband outside and walked over to Pratt's tent, which had had its door ripped open. Inside, Pratt lay on his side in a pool of blood, dead.

Kristen changed her clothes, packing them into the couple's laundry bag, and she and Robert left the campsite.[2] The two split up. At 8:36 A.M., Kristen called 911 from a nearby pay telephone, and when first responders arrived minutes later, she led them to the campsite. Robert, meanwhile, walked in a different direction, wishing to avoid police contact due to outstanding warrants for failure to register as a sex offender. He was located and arrested on those warrants several hours later, and was ultimately sent to a hospital for treatment for his head injuries.

That afternoon the police questioned Lambert at his apartment. He became distraught upon learning that they were investigating Pratt's death. During their conversation, Lambert

[2] Kristen testified that she threw the laundry bag containing their dirty clothes into the woods as she left the campsite. It was never recovered.

received a telephone call from the defendant, who stated he was downstairs. Lambert led the police to the rear of his building, where they found the defendant and arrested him, as well as Estabrooks, who was sleeping in the front seat of the defendant's nearby vehicle. Two pairs of sneakers were recovered from the vehicle, both of which had what appeared to be bloodstains on them. No weapons were found in searches of the defendant's vehicle, the campsite and surrounding woods, the area of the nearby fast food restaurant, Lambert's apartment, and the area around Lambert's building.

An autopsy later showed that Pratt suffered forty-six sharp-force injuries, including a fatal deep wound to his right jugular vein. Forty-five were consistent with having been inflicted by a hilted Buck 119 hunting knife.

Approximately 105 samples were submitted to the State police laboratory, forty-one of which were collected for deoxyribonucleic acid (DNA) testing. Among them were samples from a pair of size ten and one-half white New Balance sneakers, one of the two pairs of sneakers found in the defendant's vehicle.[3] Red-brown stains soaked into fabric on the right

[3] The other pair were Starter brand and were size nine and one-half. Chase testified that Estabrooks's shoe size was nine and one-half. Forensic analysis of a bloodstain on the Starter sneakers showed a DNA profile matching that of Estabrooks.

sneaker's tongue tested positive for the presence of "dilute" human blood, meaning its appearance was consistent with having come in contact with water. DNA analysis from that sneaker revealed a major DNA profile that matched Pratt's, with the defendant being a possible contributor to a second, minor DNA profile.[4] No DNA analysis was performed on any of the samples taken from the campsite, or on the clothes Robert was wearing when he was hospitalized, which he had turned over to the police.

Procedural history. In September 2009, the defendant was indicted on one count of murder in the first degree, for the death of Pratt, and two counts of assault and battery by means of a dangerous weapon, for attacks on the Fullers. He was tried before a jury in the Superior Court in Norfolk County in February 2013. At trial, in addition to challenging the sufficiency of the affirmative evidence that he was the killer, the defendant sought to induce reasonable doubt by suggesting that Robert had murdered Pratt, and by questioning the adequacy of the police investigation of the case.[5] The jury returned

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[4] The DNA analyst testified that the odds of a match such as Pratt's occurring in a randomly selected unrelated individual were between one in 118.8 quadrillion and one in 62.93 quintillion. She also testified that the Fullers and Royal were excluded as possible matches to the minor DNA profile.

[5] Because we first articulated this type of defense in Commonwealth v. Bowden, 379 Mass. 472 (1980), it has come to be

guilty verdicts on all three offenses, with the murder conviction resting on both deliberate premeditation and extreme atrocity or cruelty. He was sentenced to life in prison without parole.

The defendant filed his direct appeal on February 25, 2013. Following several similar unsuccessful motions,[6] on January 6, 2020, the defendant filed his latest motion for postconviction forensic testing pursuant to G. L. c. 278A, which was accompanied by a motion for funds for an expert to perform one of the requested analyses.[7] The motion judge, who was also the

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commonly referred to as a "Bowden defense." See id. at 486 ("The fact that certain tests were not conducted or certain police procedures not followed could raise a reasonable doubt as to the defendant's guilt in the minds of the jurors"). See, e.g., Commonwealth v. Trotto, 487 Mass. 708, 722 n.6 (2021) (describing Bowden defense).

[6] On April 26, 2017, the defendant filed an ex parte motion for DNA expert funds that was denied without prejudice, to be refiled in more detail. On May 31, 2018, the defendant filed a "renewed" motion for funds for an expert and a c. 278A request for forensic scientific analysis. After a hearing, the motion judge, who was also the trial judge, denied the motion on the procedural ground that the defendant had not sought a stay of his direct appeal. We denied his request for a stay, but allowed that we would accept filing of his next c. 278A motion in this court, transmit it to the trial court to be decided, and then consolidate any appeal therefrom with his direct appeal.

[7] The defendant's reason for filing a separate motion for expert funds, and then only for one of his sought-after analyses, is unclear. His motion invokes G. L. c. 278A, § 10, which explains how the costs of analysis ordered pursuant to c. 278A are to be paid. No such analysis has been ordered in his case, nor is there any guarantee that any will be. Although we reverse the dismissal, at the preliminary § 3 stage, of his

trial judge, denied the motions without a hearing or written decision, and those denials were entered on the docket on February 19, 2020. The defendant appealed from those denials on May 29, 2020.

Discussion. 1. Direct appeal. The defendant raises four issues on direct appeal, arguing (1) that the trial judge erred by admitting joint venture hearsay evidence where there was no joint venture, or, in the alternative, where the statement was not in furtherance of the joint venture; (2) that a late-disclosed forensic test on a bloody footprint from Pratt's tent caused sufficient prejudice to warrant a new trial; (3) that third-party culprit evidence of Royal's past convictions should have been admissible both for its truth and to bolster the defendant's Bowden defense; and (4) that the judge had no basis in the evidence to instruct the jury on consciousness of guilt. The defendant also asks us to exercise our extraordinary authority under G. L. c. 278, § 33E, to order a new trial or to reduce the degree of guilt. We consider each argument in turn.

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motion for postconviction forensic testing, it does not follow that he will prevail at the subsequent § 7 hearing. Moreover, the choice of who performs the requested analysis is not unilateral; G. L. c. 278A, § 8, requires that the prosecuting attorney and defendant agree on an accredited "forensic services provider," or, if unable to agree, to submit a list of possible providers for the court to choose from. For these reasons, we conclude that the defendant's motion for funds was premature and affirm its denial.

a. Joint venture hearsay. The defendant challenges the admission, through Chase, of Estabrooks's hearsay statement, "I think Scott's in trouble." The judge allowed the testimony on the theory that the statement was made in furtherance of an ongoing joint venture between Estabrooks and the defendant. The defendant now argues that this was an abuse of discretion, claiming that there was insufficient independent evidence of a joint venture and, in the alternative, that the statement was not made in furtherance of any joint venture. The defendant is incorrect on both counts.

"We recognize an [exemption from] the hearsay rule whereby 'statements by joint venturers are admissible against each other if the statements are made both during the pendency of the cooperative effort and in furtherance of its goal.'" Commonwealth v. Bright, 463 Mass. 421, 426 (2012), quoting Commonwealth v. Braley, 449 Mass. 316, 319 (2007). Before admitting such coventurer hearsay, a trial judge must first determine, based on a preponderance of admissible evidence other than the offered statement, that a criminal joint venture existed between the declarant and the defendant, and that the offered statement was made during and in furtherance of the joint venture. Bright, supra.

The defendant first insists that the trial judge neglected to make the preliminary finding of an ongoing joint venture.

Although it is true that that the judge did not make such a finding explicitly, either orally or in writing, our view is that this is because the defendant essentially conceded the existence of the joint venture.[8] In any event, we are satisfied that there was no abuse of discretion here, as there was ample evidence to support the existence of the joint venture. Estabrooks made the statement in question with a bloody shirt in hand after asking to use Chase's laundry. Chase had witnessed the defendant using her hose to rinse off his body and shoes. Viewed in the light most favorable to the Commonwealth, Commonwealth v. Winquist, 474 Mass. 517, 521 (2016), a fair inference is that the two were working in concert to conceal or destroy evidence of the murder: "the joint venture was clearly ongoing." Commonwealth v. Chalue, 486 Mass. 847, 875 (2021) ("[the declarant] was washing one of the cars likely used in the crimes -- presumably in an attempt to conceal evidence -- moments before making the statements").

The defendant also objects that the statement in question did not further the joint venture. Instead, he argues, it had the opposite effect: according to the defendant, the statement

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[8] At argument for the pretrial motions in limine on this point, defense counsel made only a single passing reference questioning the existence of the joint venture. The substantive argument focused exclusively on whether the statement was made in furtherance of the venture.

was the disclosure of a crime, rather than an attempt to hide one. He analogizes it to the statement of a coventurer in Commonwealth v. White, 370 Mass. 703, 706 (1976). There, the victim of a mugging chased and cornered one of his assailants, who told him, "I didn't do it. She did it." Id. We held the statement to be inadmissible, both because the joint enterprise of escape had failed and because "if any escape enterprise could possibly be said to have continued, it was not a 'common' one," as the declarant's statement served to exculpate himself at the expense of his coventurer. Id. at 710-711.

Estabrooks's circumstances were markedly different. He and the defendant were not confronted by police or otherwise confined, and were in the midst of washing away blood evidence. This brings the case closer to Chalue, 486 Mass. 847. There, we rejected a defendant's similar argument that statements made to third parties "objectively served to thwart the joint venture by unnecessarily disclosing incriminating information," holding that the declarant's statements were better understood as "trying to enlist [the third parties'] loyalty by giving them enough information that they would feel complicit in the crimes, and therefore not speak up." Id. at 875. Similarly, here a fact finder could have reasonably found that Estabrooks's statement to Chase, made with bloody shirt in hand and with the defendant washing himself of blood outside, was an attempt to

enlist her aid in concealing the crime. The judge did not abuse her discretion in admitting it.[9] See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) (abuse of discretion only where judge makes "clear error of judgment in weighing the [relevant] factors" and "decision falls outside the range of reasonable alternatives" [quotation and citation omitted]).

b. Brady violation. The defendant also contends that the trial judge erred in not declaring a mistrial when, several days into the trial, both the prosecutor and defense counsel first learned that the Commonwealth's footwear expert had performed an additional test on the bloody footprint found in Pratt's tent. We conclude that the disclosure of the additional test at trial caused no prejudice to the defendant.

We review the denial of a request for a mistrial for an abuse of discretion. Commonwealth v. Lao, 460 Mass. 12, 19 (2011). "Under Brady v. Maryland, 373 U.S. 83, 87 (1963),

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[9] After joint venturer hearsay is admitted by a judge, the jury must still "make an independent determination of the existence of a common undertaking" by a preponderance of the evidence. Commonwealth v. Bright, 463 Mass. 421, 430, 434 (2012). The defendant's brief suggests that the judge did not accurately charge the jury on the requisite level of proof. The judge instructed the jury twice on this subject. It is true that, when the evidence was offered, she did not explain that the finding was to be by a preponderance of the evidence. But any prejudice to the defendant was ameliorated by her overstating the standard in her closing charge, where she instructed the jury that they had to find evidence of the joint venture beyond a reasonable doubt.

'[t]he Commonwealth must disclose to the defense any material, exculpatory evidence over which the prosecution has control.'" Commonwealth v. Andrade, 488 Mass. 522, 531 n.9 (2021), quoting Commonwealth v. Seino, 479 Mass. 463, 476 (2018). "[W]here, as here, there has been disclosure but no evidence of bad faith, the question becomes whether the defendant had sufficient time to adjust to the disclosure in shaping and preparing his defense. Stated another way, the defendant must show prejudice." Lao, supra at 20.

The expert's initial testing had been inconclusive. The Commonwealth had disclosed his initial reports, which stated that the print lacked sufficient detail for him to form any opinion about whether it matched any footwear relevant to the investigation. With the new test, little changed: the resulting photograph was slightly more detailed, but the expert nevertheless concluded that he still was unable to form an opinion about a match. Defense counsel, arguing that he would have sent the new photograph to his own expert had it been timely disclosed, moved for a mistrial. The judge denied the motion but offered the defendant the opportunity to submit the photograph to his own expert. Defense counsel declined, stating that he was prepared to go forward with the trial. Ultimately neither party called the expert as a witness.

Assuming, without deciding, that the expert's second test was sufficiently material and exculpatory evidence that placed it within the ambit of Brady, we find that the defendant has not demonstrated sufficient prejudice from its delayed disclosure to merit a new trial. First, we fail to see how the newly disclosed test and photograph could have caused prejudice where they had no impact on the substance of the expert's proffered testimony, which was, both before and after the new test, that he was unable to form an opinion about a match to the footprint. See Commonwealth v. Gilbert, 377 Mass. 887, 895 (1979) (no prejudice from late disclosure where additional time would not have "materially improved" examination of witness). Moreover, it is unlikely that the defendant would have sought testimony about additional analysis of the footprint by the Commonwealth, however inconclusive, as it would have undermined his forcefully argued Bowden defense.[10]

To the extent that the defendant argues that an analysis of the photograph by his own expert could have bolstered his defense, the judge offered defense counsel the opportunity to do just that, but counsel instead elected to proceed with the trial as scheduled. We have held that if defense counsel is provided

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[10] Indeed, in his closing argument, defense counsel proclaimed that the jury "should be shocked, really, that the Commonwealth deliberately refused to examine the shoes that Robert Fuller was wearing at the time that he was arrested."

an opportunity to assess late-disclosed evidence and declares they are ready to go forward, there is reason to find no prejudice. See, e.g., Commonwealth v. Hamilton, 426 Mass. 67, 71 (1997) ("It is an indication that prejudice was negated when the defendant's trial counsel stated that she was ready for trial after the two-day continuance and did not seek any further delay when the fingerprint evidence was offered by the prosecution on the fifth day of the trial"); Commonwealth v. Cundriff, 382 Mass. 137, 150 (1980), cert. denied, 451 U.S. 973 (1981) (no prejudice from late disclosure where judge continued case for one day and defendant did not request more time for investigation). Such is the case here.

c. Third-party culprit evidence. The defendant sought, by means of a pretrial motion in limine, to introduce facts regarding prior convictions of Royal related to attacks near homeless encampments in 1990 and 1997. The defendant now argues that the judge improperly excluded that evidence, which both limited his ability to point to Royal as a third-party culprit and impeded presentation of his Bowden defense, specifically his argument that Royal's criminal record should have driven the police to investigate him further. We determine that there was no error.

Arguing that a third party was the true culprit is, of course, "a time-honored method of defending against a criminal

charge." Commonwealth v. Rosa, 422 Mass. 18, 22 (1996). "We have given wide latitude to the admission of relevant evidence that a person other than the defendant may have committed the crime," although "this latitude is not unbounded." Commonwealth v. Silva-Santiago, 453 Mass. 782, 800-801 (2009). Where the proffered evidence is hearsay not otherwise subject to an exception, it is admissible only if it "is otherwise relevant, will not tend to prejudice or confuse the jury, and there are other substantial connecting links to the crime" (quotation and citation omitted). Id. at 801. Additionally, the evidence "must have a rational tendency to prove the issue the defense raises, and the evidence cannot be too remote or speculative." Id., quoting Rosa, supra. Without these safeguards, "the admission of feeble third-party culprit evidence poses a risk of unfair prejudice to the Commonwealth, because it inevitably diverts jurors' attention away from the defendant on trial and onto the third party, and essentially requires the Commonwealth to prove beyond a reasonable doubt that the third-party culprit did not commit the crime." Silva-Santiago, supra. For the purposes of our review, "the exclusion of third-party culprit evidence is of constitutional dimension and therefore examined independently." Id. at 804 n.26.

Here, of course, the defendant was not precluded from introducing all third-party culprit evidence, just evidence of

Royal's prior convictions, and their factual underpinnings. Indeed, the judge permitted the jurors to hear evidence that, the morning before Pratt's murder, Pratt had accused Royal of cutting Pratt's marijuana plants without permission, which led to a loud argument and Royal angrily leaving the campsite. The judge also allowed examination of a police investigator regarding the investigation of Royal as a possible suspect.

The first item the defendant unsuccessfully sought to introduce was the transcript of a hearing where Royal pleaded guilty as a joint venturer to manslaughter. The transcript contained a prosecutor's statement of the facts of the case that described Royal's participation, alongside others, in humiliating, tying up, and beating a homeless man in a Quincy park in 1990. The victim, who had been staying at the same campsite as Royal, died from his injuries. Royal was a cooperating witness and was sentenced to from three years to three years and one day of incarceration on his guilty plea. The defendant also sought to introduce, through copies of the convictions and a police report, that Royal had been convicted of three additional offenses stemming from a single 1997 encounter: armed robbery, assault and battery, and assault and battery by means of a dangerous weapon. The police report contained the recounting by the victim, a homeless man, of how

Royal and another tied him up in a wooded area in Quincy, beat him with a tree branch, and robbed him.

We conclude that the defendant has not established that Royal's crimes bore "substantial connecting links" to the murder of Pratt. Silva-Santiago, 453 Mass. at 801. Most significantly, the attacks occurred twelve and eighteen years before Pratt's death. See Andrade, 488 Mass. at 532 (defendant must show third-party act is "closely connected in point of time and method of operation" to crime of which defendant is accused [citation omitted]). We are not aware of, and the defendant has not identified, any cases where we have allowed the admission of third-party culprit evidence of acts occurring so long before the charged crime.[11] Compare Commonwealth v. Harris, 395 Mass. 296, 301 (1985) (evidence of attack by third party not similar enough to admit where, among other differences, crimes were two months apart), with Commonwealth v. Keizer, 377 Mass. 264, 267 (1979) (finding "substantial connecting links" between crimes committed three days apart that were "of the same type, committed by similar methods in the same vicinity of Boston, by

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[11] We acknowledge that there is some merit to the defendant's argument that the temporal gap is not so large as it looks, as Royal was incarcerated after each conviction. But that consideration is not enough to overcome the many dissimilarities.

three males of similar description . . . [using] similar weapons").

Furthermore, when comparing the current case to Royal's past crimes, "examination reveals more variances than similarities with regard to these offenses." Commonwealth v. Morgan, 460 Mass. 277, 292 (2011). Pratt was killed while he slept; the victims of Royal's attacks were confronted while awake, tied up, and subjected to humiliation. See Commonwealth v. Hunter, 426 Mass. 715, 717 (1998) (where victim was strangled to death, evidence that third party had placed hands on neck of another during argument was not similar enough to be admissible). Pratt was stabbed by a single individual; both of Royal's attacks were accomplished with accomplices. Pratt's killer used a knife; Royal's victims were beaten with tree branches. See Morgan, supra (difference between .22 caliber firearm and .45 caliber firearm "significant" to admissibility). To be sure, there are some similarities -- all three attacks involve violence in wooded areas near homeless encampments -- but on the balance, we discern no error in the judge's decision to exclude the evidence.

Our inquiry does not end there, however, as the defendant also argues that the evidence of Royal's past crimes should also have been admitted as part of his Bowden defense. Again we begin with the recognition that the defendant was not precluded

from presenting a wide-ranging Bowden defense generally, including a third-party culprit Bowden defense. The only limitation at issue relates to Royal's prior convictions, and the accompanying factual details.

In evaluating that limitation, we recognize that "the exclusion of evidence of a Bowden defense is not constitutional in nature and therefore is examined under an abuse of discretion standard." Silva-Santiago, 453 Mass. at 804 n.26. Furthermore, "third-party culprit information is admissible under a Bowden defense only if the police had learned of it during the investigation and failed reasonably to act on the information." Id. at 803. Before the introduction of such evidence, the judge should "conduct a voir dire hearing to determine whether the third-party culprit information had been furnished to the police," id., and whether "its probative value is substantially outweighed by the danger of unfair prejudice," Commonwealth v. Moore, 480 Mass. 799, 809 n.9 (2018). Because no such voir dire occurred here, "we must determine based on the record before us whether the judge abused her discretion by excluding the proffered testimony." Silva-Santiago, supra at 804.

We conclude that here the probative value of the evidence of Royal's prior convictions, and their factual details, was substantially outweighed by the risk of unfair prejudice. The remoteness in time and the factual dissimilarities of Royal's

past crimes mean they were of marginal relevance to the police investigation. See Commonwealth v. Ridge, 455 Mass. 307, 317 (2009). Conversely, allowing admission of not just the fact of the convictions but the narratives of the underlying events would have distracted the jury and prejudiced the Commonwealth. This is particularly true where there was negligible evidence of Royal's involvement in Pratt's murder, and the defense's focus was on Robert as the third-party culprit, not Royal, which was supported by Robert's undisputed presence at the campsite at the time of the murder, his flight, and an attack against him by a hatchet-wielding Pratt a few weeks earlier. See Commonwealth v. Wood, 469 Mass. 266, 278 (2014).

In any event, the defense had ample opportunity to challenge the adequacy of the police investigation, both of Royal and as a whole. See Commonwealth v. Martinez, 487 Mass. 265, 271 n.7 (2021), citing Commonwealth v. Scott, 470 Mass. 320, 332 (2014) (that judge allowed some but not all Bowden evidence defendant sought to admit significant to finding no abuse of discretion). For example, defense counsel was able to elicit from a police investigator that criminal history checks were run on persons of interest to an investigation only "sometimes," that he never ran one on Royal himself, and that he was unaware of whether anyone ever did so. The same witness testified that Royal was not interviewed until over a week after

Pratt's death, and then only for ten minutes, while standing in front of a diner. The Bowden defense was adequately before the jury, and in sum, we discern no abuse of discretion regarding the exclusion of the prior conviction evidence.

d. Consciousness of guilt. The final claim of the defendant's direct appeal is that the trial judge erred by instructing the jury on consciousness of guilt. Because no objection was preserved, we review for error that creates a substantial likelihood of a miscarriage of justice. See Commonwealth v. Burgos, 462 Mass. 53, 67, cert. denied, 568 U.S. 1072 (2012).

"An instruction on consciousness of guilt is appropriate where the jury may draw an inference of guilt 'from evidence of flight, concealment, or similar acts, such as false statements to the police, destruction or concealment of evidence, or bribing or threatening a witness.'" Commonwealth v. Bastaldo, 472 Mass. 16, 33 (2015), quoting Commonwealth v. Morris, 465 Mass. 733, 737-738 (2013). The defendant argues that no such evidence was in the record here. This contention is without merit. First, the jury could have readily inferred that the defendant lied to Sergeant Malloy about the source of the dried blood on his hands. The defendant claimed that he was bloodied by falling off a bicycle, but Malloy saw no bicycle nearby, nor did he observe any injuries on the shirtless defendant. Second,

the jury could also have readily inferred that the defendant endeavored to hide or destroy evidence, by "hucking" Lambert's knife away, by ordering Lambert to incinerate his clothes, or by washing off blood at Chase's home in Brockton. The judge's instruction was supported by the evidence, and she did not err in giving it.[12] See Morris, supra at 738.

e. General Laws c. 278, § 33E, review. Finally, having reviewed the record, we conclude that there is no reason to order a new trial or otherwise exercise our authority under G. L. c. 278, § 33E, for this extremely atrocious, premeditated murder. We therefore affirm the defendant's convictions.

2. General Laws c. 278A motion. We now turn to the defendant's postconviction c. 278A motion for forensic testing. A defendant who has been convicted of a crime but asserts his or her "factual innocence" may move for postconviction forensic testing pursuant to G. L. c. 278A. See G. L. c. 278A, § 2. Broadly speaking, this is a two-step process. First, a judge will examine the defendant's motion to ensure that it contains sufficient information to meet the requirements of G. L. c. 278A, § 3. This "threshold determination . . . [is] based

[12] We also note that the judge "took careful steps to preserve the neutrality of the instruction" by explaining that there were numerous reasons that innocent people may behave as the defendant did, and that someone experiencing feelings of guilt is not necessarily guilty, as even the innocent may feel guilty. See Commonwealth v. Almeida, 479 Mass. 562, 574 (2018).

primarily on the moving party's filings, and is essentially nonadversarial." Commonwealth v. Wade, 467 Mass. 496, 503 (2014), S.C., 475 Mass. 54 (2016). Then, for the second step, "[i]f the judge finds that the preliminary requirements at the motion stage have been satisfied, a hearing will be scheduled . . . [where] the defendant must establish by a preponderance of the evidence each of the factors enumerated in G. L. c. 278A, § 7 (b)." Randolph v. Commonwealth, 488 Mass. 1, 3 (2021).

Here, the defendant appeals from the motion judge's dismissal of his c. 278A motion at the first step. He argues that the judge erred in determining that his filing failed to satisfy the requirements of § 3. We agree with the defendant.

"[T]he determination of whether a motion meets the requirements of G. L. c. 278A, § 3, such that the moving party is entitled to proceed to a hearing, [is] a limited, threshold inquiry. A judge conducting this inquiry is not called upon to make credibility determinations, or to consider the relative weight of the evidence or the strength of the case presented against the moving party at trial . . . ." Wade, 467 Mass. at 505-506. The movant need only "point to the existence of specific information that satisfies the statutory requirements, . . . and need not make an evidentiary showing by a preponderance of the evidence." Clark, 472 Mass. at 130, quoting Commonwealth v. Donald, 468 Mass. 37, 41 (2014), S.C.,

487 Mass. 1036 (2021). "In other words, at the motion stage, the movant's burden is low." Commonwealth v. Williams, 481 Mass. 799, 804 (2019). In examining whether the movant met that low burden, our review is de novo. Wade, supra at 506.

a. Timeliness. As an initial matter, we address the Commonwealth's contention that the defendant did not pursue his appeal within the statutorily prescribed period, thereby depriving us of jurisdiction to hear it. See Nissan Motor Corp. in U.S.A. v. Commissioner of Revenue, 407 Mass. 153, 157 (1990). When a motion made under c. 278A is denied, § 18 mandates that a party wishing to appeal "shall file a notice of appeal with the court within 30 days after the entry of the judgment." Here, the denial of the defendant's motion was entered on the Superior Court docket on February 19, 2020.[13] In ordinary times, the defendant's thirty-day appeal period would have expired on March 20. March of 2020, however, was far from ordinary, and on March 13 we issued the first of several standing orders in response to the emerging COVID-19 pandemic. The cumulative effect of those orders was to extend the defendant's deadline well past May 29,

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[13] The marginal notation indicates that the judge denied the motion on February 13, but "entry of the judgment" under the statute did not occur until "that date on which notation of the judgment or order was actually entered on the docket." Commonwealth v. Mullen, 72 Mass. App. Ct. 136, 138 (2008). Defense counsel has represented to this court that he did not receive notice of the denial from the trial court until May 20.

the date on which his notice of appeal was filed. The appeal is therefore timely, and we turn to the merits of the defendant's motion.

b. Merits. To proceed to the hearing stage, a defendant's motion and accompanying documents must include five items of information listed in G. L. c. 278A, § 3 (b).[14] The Commonwealth

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[14] Specifically, G. L. c. 278A, § 3 (b), requires that the movant provide:

> "(1) the name and a description of the requested forensic or scientific analysis;
>
> "(2) information demonstrating that the requested analysis is admissible as evidence in courts of the commonwealth;
>
> "(3) a description of the evidence or biological material that the moving party seeks to have analyzed or tested, including its location and chain of custody if known;
>
> "(4) information demonstrating that the analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case; and
>
> "(5) information demonstrating that the evidence or biological material has not been subjected to the requested analysis because:
>
> "(i) the requested analysis had not yet been developed at the time of the conviction;
>
> "(ii) the results of the requested analysis were not admissible in the courts of the commonwealth at the time of the conviction;
>
> "(iii) the moving party and the moving party's attorney were not aware of and did not have reason to be aware of the existence of the evidence or biological material at the time of the underlying case and conviction;

does not dispute that the defendant's motion contains the first three.[15] We therefore turn to the remaining two.

i. Evidence material to identification. Section 3 (b) (4) requires the movant to identify how the requested analysis "has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime." The word "potential" is key. To meet this requirement the moving party need only show that the requested analysis "could be material to the question of . . . identity," and not whether it "would have had any effect on the underlying conviction" (emphases added). Wade, 467 Mass. at 508.

"(iv) the moving party's attorney in the underlying case was aware at the time of the conviction of the existence of the evidence or biological material, the results of the requested analysis were admissible as evidence in courts of the commonwealth, a reasonably effective attorney would have sought the analysis and either the moving party's attorney failed to seek the analysis or the judge denied the request; or

"(v) the evidence or biological material was otherwise unavailable at the time of the conviction."

[15] The defendant's motion properly identifies the requested analyses (DNA testing, footwear impression analysis, and blood spatter analysis), G. L. c. 278A, § 3 (b) (1), explains how the results would be admissible, G. L. c. 278A, § 3 (b) (2), and describes the material to be analyzed (a bloody footprint on the door of Pratt's tent, a blood spatter pattern found on the Fullers' tent, swabs of blood collected from rocks near the campsite, and blood on items of clothing collected from the campsite and Robert), G. L. c. 278A, § 3 (b) (3).

We are satisfied that the defendant's motion identifies how the requested tests could be material to identifying Pratt's killer. No DNA testing was ever done on any of the items collected from the campsite or from Robert. Testing of any of the blood found on those items has the potential to link someone other than the defendant to the murder of Pratt, be it Robert or someone else.[16] That there is an independent explanation for the presence of some individuals' blood at the campsite goes to the of weight of the evidence, which we do not evaluate at this stage. A comparative forensic analysis of the footprint could confirm that it was not made by any of the recovered footwear, implicating a third party or weakening the Commonwealth's contention that the defendant wore the size ten and one-half New Balance shoes while killing Pratt. As for the blood spatter on the Fullers' tent, the results of a forensic analysis could be inconsistent with Robert's testimony, bolstering the defendant's contention that Robert killed Pratt.[17] The results of each test

[16] For example, if the blood from the footprint inside of Pratt's tent was found to contain two DNA profiles, one matching Pratt's, and the other matching no other known profile, then that would potentially suggest a third party was involved in the murder, a fact material to the identification of the defendant as the killer.

[17] In 2017, previous appellate counsel for the defendant received a notification from the office of the district attorney for the Norfolk district that the report of one of the testifying forensic experts in the case had been amended following a regular audit. The amendments included

have at least the potential to be material to the identification of the defendant as Pratt's killer.

The Commonwealth's arguments to the contrary are unavailing, and largely ask the court to improperly weigh the trial evidence against the probable -- rather than the possible -- results of the testing. The fact that it was undisputed that Robert had bled at the campsite goes to the weight of any match to Robert's DNA; it does not erase all possibility that the analysis could be otherwise material to the killer's identity. Similarly, the semipublic nature of the campsite does not render the requested testing meaningless but is something a fact finder might weigh in evaluating the probative value of any analysis on blood found there.[18] The information in the defendant's motion satisfies § 3 (b) (4).

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reclassification of the blood on the Fullers' tent from "projected blood" to blood "consistent with spatter stains."

[18] In Commonwealth v. Moffat, 478 Mass. 292, 300-301 (2017), S.C., 486 Mass. 193 (2020), cited by the Commonwealth on this issue, we found no abuse of discretion in the lower court's determination, after a G. L. c. 278A, § 7, hearing, that the proposed testing of cigarette butts in the general vicinity of a shooting victim would not be material to identification of the shooter. Moffat is of little value to the Commonwealth here for three reasons. First, as discussed supra, the standard of proof at the § 7 stage is significantly higher than at the § 3 stage. Second, the standards of review involved are different; our review in Moffat was for an abuse of discretion, while here our review is de novo. Finally, the requested tests are distinguishable on the facts. In Moffat, the cigarettes were found on a public roadside nearly 200 feet from the victim, were collected several days after the crime occurred, and had no

ii. Explanation for no prior analysis. Section 3 (b) (5) requires a movant to explain why the requested analysis was not available at the time of his or her conviction using one of five enumerated reasons. The defendant's motion relies on the fourth reason, stating that, pursuant to § 3 (b) (5) (iv), "a reasonably effective attorney would have sought the analysis" but failed to do so. According to the defendant, where there was some evidence that two other individuals, Robert and Royal, possessed motivation to attack Pratt, a reasonably effective attorney would have ensured that at least some of the blood from the campsite exterior would be tested, and that analysis would be done on the footprint in Pratt's tent and the blood spatter on the Fullers' tent. The Commonwealth responds that the defendant's trial counsel made a strategic decision to not pursue such testing, both because such additional investigative efforts could impede presentation of his Bowden defense and because the tests could undermine his defense against the charges for the assault and battery of the Fullers.

The problem with the Commonwealth's argument is that even if its assessment of the defendant's trial strategy were

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evident connection to the shooting beyond proximity. Id. Here, the items sought to be analyzed were found at the somewhat secluded campsite, were collected hours after Pratt's murder, and -- as all involve blood -- have a clear potential connection to a stabbing death.

correct, that would not be dispositive here. As we have said, "a determination that the failure of [the defendant's] trial counsel to seek [the requested analysis] was a reasonable, strategic decision, and not manifestly unreasonable, does not preclude a determination that 'a reasonably effective attorney' would have done so." Wade, 467 Mass. at 511. Rather, we have stressed that "G. L. c. 278A, § 3 (b) (5) (iv), [requires] information demonstrating only that 'a' reasonably effective attorney would have sought the requested analysis, not that every reasonably effective attorney would have done so." Id. Mindful of the low burden imposed at this stage in the proceedings, our view is that the defendant's motion sufficiently explains that a reasonably effective attorney would have sought the testing he requests, testing that could have implicated Royal, Robert, or someone else. That such tests would have come with some risk to the defendant is not dispositive. See id. at 510 ("That there was a risk that pretrial DNA testing might inculpate [the defendant] is a risk that a reasonably effective attorney in these circumstances might have chosen to incur, particularly where there already was some evidence of a third party's involvement").

In sum, our case law has repeatedly stressed the circumscribed nature of the § 3 inquiry and the minimal burden on the defendant to proceed. The defendant need not prove

anything at the § 3 stage, but rather must only furnish some quantum of information that satisfies the statutory requirements. Requiring too much of a movant at the initial, § 3 motion stage would significantly undermine c. 278A's goal of "provid[ing] increased and expeditious access to scientific or forensic testing." Wade, 467 Mass. at 509. The more robust evidentiary analysis of the defendant's proof is to be faced at the § 7 hearing stage.[19]

This is not to say that § 3 is toothless. It continues to serve the important function of weeding out wholly unmeritorious testing requests. Motions that omit one of its requirements, or merely parrot the statutory language in a conclusory manner, can and should be dismissed. See Donald, 468 Mass. at 48 ("a § 3 motion must do more than merely recite the elements"). Here, however, the defendant's motion and accompanying documents contain sufficient information to clear § 3's low bar.

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[19] Other provisions of the statute reinforce the comparatively preliminary nature of the § 3 inquiry. The initial evaluation of the § 3 motion can be done by any judge, while a § 7 hearing must be conducted, if possible, by the same judge who presided over the underlying trial. G. L. c. 278A, §§ 3, 6 (b). The Commonwealth "may" file a response to the § 3 motion, and then only to "to assist the court"; should a motion proceed to a hearing, however, the Commonwealth "shall" file a response, and that response "shall include any specific legal or factual objections." G. L. c. 278A, §§ 3 (e), 4 (b), (c). Moreover, the statute mandates that a motion deemed insufficient under § 3 is to be dismissed without prejudice, further highlighting § 3's threshold status. G. L. c. 278A, § 3 (e).

Conclusion. The defendant's convictions are affirmed. The order denying the defendant's motion for expert fees is affirmed. The order dismissing the defendant's motion for postconviction testing is reversed, and the case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.