SJC-12159

COMMONWEALTH vs. DARIUS GIBSON.

Suffolk. November 5, 2021. - January 27, 2022.

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

Homicide. Evidence, Firearm, Prior misconduct, Inflammatory evidence, Corroborative evidence. Practice, Criminal, Capital case, Continuance, New trial, Assistance of counsel, Witness.

Indictments found and returned in the Superior Court Department on November 14, 2012.

The cases were tried before Linda E. Giles, J., and a motion for a new trial, filed on January 30, 2020, was heard by her.

Dana Alan Curhan for the defendant.
Ian MacLean, Assistant District Attorney, for the Commonwealth.

WENDLANDT, J. The defendant, Darius Gibson, was convicted of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty for the death of Terrence Kelley, who was shot multiple times as he was being

chased by his assailant down a public street in Boston on a sunny afternoon just before Memorial Day in 2010.[1] Following his conviction, the defendant filed a motion for a new trial on the ground that he located a "newly available" witness who would provide impeachment evidence against one of the Commonwealth's key witnesses. The motion judge, who was also the trial judge, denied the motion.

In this consolidated appeal, the defendant contends that (1) the judge erred in permitting evidence regarding the defendant's familiarity with the locus of the shooting and with firearms; (2) the judge erred in allowing evidence suggesting two witnesses were fearful of meeting with police officers following the shooting; (3) the judge erred in denying the defendant's request for a continuance to permit trial counsel more time to locate a witness who had indicated that one of the Commonwealth's key witnesses had fabricated her testimony; (4) the judge erred in denying the defendant's motion for a new trial; (5) trial counsel provided ineffective assistance; and (6) we should revisit our "corpus delicti" rule to adopt the Federal standard, as more fully discussed infra. In addition, the defendant asserts that a reduction in the verdict would be more consonant with the weight of the evidence presented and

[1] The defendant also was convicted of carrying a firearm without a license and intimidating a witness.

asks us to exercise our authority under G. L. c. 278, § 33E, to reduce the degree of guilt. We affirm the defendant's convictions and the order denying his motion for a new trial, and we discern no reason to grant relief under G. L. c. 278, § 33E.

1. Background. a. Facts. We recite the evidence in the light most favorable to the Commonwealth, reserving some details for later discussion. Commonwealth v. West, 487 Mass. 794, 795 (2021).

On May 28, 2010, prior to the shooting, the defendant visited James Austin at a second-floor apartment that Austin shared with his mother on Creston Street, located in a building between Normandy Street and Blue Hill Avenue, in Boston. The defendant wore a black hat, a black shirt, black pants, and glasses; his hair was in flat braids. Austin's mother testified that the defendant had come that day seeking, as he had in the past, to purchase "eight balls"[2] of cocaine from Austin. On this day, however, no drugs were exchanged; instead, Austin informed the defendant that, the prior day, "K-J" (the victim's nickname)

[2] An "eight ball" is approximately 3.5 grams, or one-eighth of an ounce, of cocaine. Commonwealth v. Montoya, 464 Mass. 566, 570 (2013).

and others had robbed Austin and Earl Smith[3] of, inter alia, their supply of drugs. The theft had taken place just outside the Austins' apartment building.

The defendant left the Austins' apartment. Austin's mother did not see the defendant again that day. She testified that after the defendant left, Austin telephoned the victim and asked the victim if he could "get his ID back, that's all he wanted back was his ID." The victim agreed.

Meanwhile, the victim had parked his car on the far end of Creston Street, near Normandy Street; as he passed the Austins' building, Austin's mother saw the victim "walking up and down" Creston Street. The victim was "just bragging" and "screaming," "This is my block, this is my block now, this is my block." Austin's mother then retired to her room to sleep.

The victim continued walking and then stopped, for a brief time, at the home of his childhood friend, who lived with his mother on the third floor of a building on the corner of Normandy Street and Creston Street, to play video games. Thereafter, the friend escorted the victim out; it was a bright, sunny afternoon, a bit before 2 P.M.

[3] Following the robbery, Smith had "stayed over" at the Austins' apartment; Smith was also present during the defendant's visit.

Immediately after the victim left, the friend's mother, who had been home during the victim's visit, heard multiple gunshots that sounded like "firecrackers." The friend, who had returned to the apartment, and his mother ran to the apartment's window that faced Creston Street and saw the victim leaning against a van. The friend sprinted outside with his brother; when they reached the victim, he was spitting blood. They lifted his shirt and saw bullet holes in his body. The friend helped the victim to the ground "because he was so, he was weak and he was going down." The friend used his own T-shirt to put pressure on the victim's wounds, as the victim stated in Spanish, "I can't breath[e]." The victim had "blood all over him," and "blood was coming out of his mouth."

Austin's mother was awakened by the sound of gunshots. Looking out her apartment window, she saw two men running on Creston Street toward Blue Hill Avenue. She then heard her buzzer, and Austin said through the intercom system: "Ma, open the door, open the door." She went downstairs to let him and Smith into the apartment building;[4] she testified that Austin was "scared" and that he said, "K-J got shot." She looked out her window again and saw the victim "by the pole bleeding."

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[4] Video footage from surveillance cameras at the Austins' apartment building showed Austin and Smith standing on the stairs outside the building as the victim ran past; thereafter, Austin's mother is shown letting them into the building.

Charles Slayden, a Creston Street resident, testified that just before 2 P.M. on the day of the shooting, as he arrived at his home, he saw a man on the corner of Creston and Normandy Streets; he later identified the man as "Wizz," who was known to spend time with Austin.[5] "Wizz" was the defendant's nickname. As Slayden arrived home, he heard a male voice saying, "You can't run now mother fucker"; Slayden saw two men running (one behind the other) and heard multiple gunshots. Slayden saw the second man, who had been in the back, keep going toward Blue Hill Avenue. The victim, who had been the man in the front of the chase, stopped and turned around to walk back up Creston Street in the direction from which he had come. The victim's legs buckled.

Jenice Peters, another Creston Street resident, was sitting on her porch and heard what she thought sounded like "firecrackers" coming from the direction of Normandy Street. She heard a male voice say, "Go back to where you came from." She then saw the victim, who stopped and coughed blood, before trying to make his way toward Normandy Street. The victim "was holding his stomach" and "keeled over"; Peters "saw blood coming out of his mouth." Peters saw a second man (whom she described

[5] At trial, Slayden denied reporting that he recognized "Wizz." Slayden testified that his son was incarcerated and that he was "concerned about his [son's] welfare."

as African-American, with dark skin and braids lying against his head, wearing all dark clothes) walk down Creston Street to Blue Hill Avenue. Peters had seen the man once before, about a week before the shooting. Peters retrieved her cell phone to call 911 but determined not to do so when the second man gave her an "ill grill," or a "weird look like you better not do it."

Two other witnesses also offered their eyewitness accounts of the shooting. The first was a Creston Street resident who heard a man cry for help. She looked out her window, heard gunshots, and saw an injured man run toward Blue Hill Avenue. She also saw a second "young" man also run toward Blue Hill Avenue; she described him as having braids and "dark skin" and wearing black. The second witness, who lived a few streets away and was driving his scooter at the time of the shooting, reported that he was near the corner of Creston Street and Normandy Street when he saw two men engaged in a chase on Creston Street toward Blue Hill Avenue and heard several gunshots. He then saw the second man in the back break away toward Blue Hill Avenue. The victim, who was the man in front, circled back down Creston Street toward the witness (away from Blue Hill Avenue). The victim stopped, leaned against a motor vehicle, and dropped to the ground. The witness called 911 and described the shooter as a Hispanic male wearing a white T-shirt; at trial, this witness testified that he thought he was

describing the victim to the dispatcher at that time and that he could not describe the shooter, whom he had only seen from behind.

Responding Boston police officers arrived at the scene just before 2 P.M. One officer tried to talk to the victim, but the victim was "gargling and bleeding from his mouth" and could not speak. An ambulance arrived and transported the victim to the hospital, where he was pronounced dead shortly after arriving. An autopsy was performed the day after the shooting. The medical examiner recovered four bullets from the victim's body, but the victim had been shot five times -- two times in the front of his body and three times in the back.[6] Blood was found in the victim's lungs, which had made it difficult for him to breathe. The medical examiner determined that the wounds to the lung and liver were the most serious injuries and caused the victim's death.

Immediately after the victim was transported to the hospital, police officers secured the crime scene and began to canvas the area for both physical evidence and witnesses. Officers recovered six .25 caliber shell casings from Creston

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[6] One bullet entered the front of the victim's abdomen and lodged in his pelvis, one entered his chest near his right armpit and exited through his abdomen, one entered his back and penetrated his right lung through his ribs, one entered his back and lodged in his liver, and one entered his buttock and was recovered from the outer part of his thigh.

Street, all of which appeared to have been discharged from the same firearm (as evidenced by impression marks on the casings). Officers also recovered two bullets from the street, which appeared to have been fired from the same firearm as the bullets found in the victim's body.[7] Officers reviewed video surveillance footage captured on cameras from the Creston Street building in which the Austins lived. The footage showed Austin and another man, later identified as Smith, on the stoop of that building at the time of the shooting; it also showed the victim running from the right of the screen to the left (from Normandy Street toward Blue Hill Avenue), and then walking back from the left to the right a short time later. Despite the ongoing investigation, no arrests were made in 2010.

In 2011, Hilary Holden met with police detectives as part of a deal for leniency on a Federal charge against her for conspiracy to deal firearms without a license. Holden offered additional information regarding the shooting.[8] She testified

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[7] The six recovered bullets (four from the victim's body and two from the street) and the six recovered casings had consistent markings. Because the actual firearm used to shoot the victim was not recovered, however, the police detective who analyzed the ballistics could not say definitively whether the bullets and casings came from the same firearm.

[8] At trial, Holden acknowledged that she did not disclose this information when she first was arrested in 2010; instead, she disclosed the information after a Federal charge for conspiracy to deal firearms without a license was brought against her in 2011. In return for her testimony, the

that she met the defendant in June 2010 (after the shooting). At the time, Holden explained, she had "exchanged sexual acts" for drugs and money and committed robberies with the defendant alone[9] and also with the defendant and Austin together. Holden testified that eventually Austin became her "boyfriend"; she committed another robbery with Austin alone and falsely reported to the investigating police officers that the defendant committed the robbery with her (even though the defendant, who was incarcerated at the time of the robbery, could not have done so) to protect Austin.[10] At the time of the defendant's trial, Holden was incarcerated; she testified pursuant to a cooperation agreement with the Commonwealth.

Commonwealth agreed not to charge her for any additional criminal activity with the defendant or Austin during June and July of 2010 beyond the two armed robberies to which she had already pleaded guilty. Additionally, under the deal, the sentences for the Federal conspiracy to deal firearms without a license charge and the State armed robbery convictions (to which she pleaded guilty) would run concurrently.

[9] During one such robbery in July 2010, Holden's hand was cut. When she sought treatment at a hospital, she gave a false name.

[10] When asked if she "would do anything for [Austin]," Holden answered that she would. She also wrote in a letter to Austin's mother, "I'll do whatever I got to do to get my baby out," referring to Austin.

According to Holden, she was driving in a vehicle[11] with the defendant in the weeks following the shooting when they passed a sign posted near the crime scene (on Blue Hill Avenue, across from Creston Street) that sought information concerning the shooting. The defendant became "enraged" when he saw the sign and stated that the sign was "there because of him." The defendant explained to Holden that he "shot and killed somebody" on Creston Street "over a robbery that had gone wrong." The defendant told Holden that the person who committed the robbery had "disrespected them in their hood and robbed them"; the defendant identified the victim to Holden as "K-J."

Holden further testified that after the defendant saw an article online regarding the shooting, which reported that the victim had been shot seven times, the defendant told Holden that the article was mistaken and that he had shot the victim six times.[12] The defendant returned to the subject of the shooting on another occasion when Holden was driving and both the defendant and Austin were passengers in the vehicle. The defendant was "boasting" about the shooting. Addressing Austin, the defendant "was basically saying like, I told you I'd get a

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[11] Holden had stolen the vehicle from her parents when she left Vermont.

[12] As discussed supra, the victim was shot five times, although six bullets and casings ultimately were recovered.

gun, I told you I would do it and I did it."[13] Austin responded that initially Austin did not think the victim "got killed" because "when [the defendant] shot him, like the blood didn't seep through his white tee right away and [he] kept walking after he was hit. And then eventually, he fell." The defendant became "like excited[,] like hype about it."

Following these conversations with the defendant, Holden was incarcerated in connection with the robbery she committed with Austin. While incarcerated, she received two letters from the defendant.[14] The first stated, "[Y]ou know that loyalty is my main thing before anything else, and you cannot say that I wasn't loyal to you and [Austin] in my hood."[15] Holden understood the statement as a command that she be loyal to him. The letter said, "Now, do I want your head on my trophy wall, ha, ha,"[16] and "if we don't start back over again and break my

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[13] During the armed robberies that Holden and the defendant committed together, the defendant used a knife.

[14] Deoxyribonucleic acid (DNA) recovered from the first letter's envelope's seal matched the defendant's DNA profile. The letter referenced the defendant's and Holden's first meeting at a bar; that Holden "took a blade for [him]" in a robbery, see note 9, supra; and a black eye that the defendant apparently gave Holden. These references indicated to Holden that the letter was from the defendant.

[15] Based on our review of the letter, we note that although the trial transcript quoted the letter as stating "in my hood," the letter itself stated "and my hood."

[16] The letter itself stated "hah," not "ha, ha."

heart again, see what will happen." Holden understood these comments as a "blatant threat." In another section, the defendant wrote, "[Y]ou know my style what I do when I am pissed off," which Holden understood to refer to "the extreme measures he goes to when he's mad," and that "[h]e doesn't have a problem killing anybody." The letter was marked with two cigarette burn holes, which she understood to represent bullet holes.

The second letter was a "kite," a correspondence passed from the defendant to Holden's cell mate, who saw him in court. It said, "[L]oyalty please, don't rat on me," which Holden understood to refer to the shooting. This letter also said, "I remember your parents' name and address, N and M, think of your daughter," which Holden understood as "definitely a threat."

At trial, the defense was that Holden was not credible and that, without her testimony, there was no other evidence tying the defendant to the shooting of the victim.

b. Prior proceedings. The defendant was indicted on charges of murder in the first degree, in violation of G. L. c. 265, § 1; carrying a firearm without a license, in violation of G. L. c. 269, § 10 (a); and intimidating a witness, in violation of G. L. c. 268, § 13B. As more fully discussed infra, trial counsel sought a continuance approximately one week before the trial was scheduled to commence to locate a defense

witness. The judge denied the motion, and the trial commenced as scheduled in January 2015.

The jury returned verdicts finding the defendant guilty on all the indictments.[17] The defendant received the mandatory life sentence on the indictment charging murder in the first degree, a concurrent sentence of from four to five years on the firearm indictment, and a sentence of from five to seven years on the witness intimidation indictment beginning after his life sentence. The defendant's timely appeal was stayed to permit him to file a motion for a new trial. We remanded the motion to the judge, who denied it after holding a nonevidentiary hearing. The defendant's timely appeal from the denial of his motion for a new trial was consolidated with his direct appeal.

2. Discussion. The defendant contends that the judge made evidentiary errors in allowing admission of certain testimony, that the judge erred in denying his request for a continuance and his motion for a new trial, that his trial counsel provided ineffective assistance, and that we should revisit our corpus delicti rule to adopt the Federal standard. In addition, the defendant asks us to exercise our authority under G. L. c. 278,

[17] As stated, the jury found the defendant guilty of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty.

§ 33E, to reduce the degree of guilt. We address each contention in turn.

a. Evidentiary objections. We review a judge's evidentiary rulings for an abuse of discretion. See Commonwealth v. Andre, 484 Mass. 403, 414 (2020); Commonwealth v. Bishop, 461 Mass. 586, 596 (2012). On appeal, the defendant maintains that the judge improperly allowed admission of evidence concerning the defendant's possession of and access to firearms and ammunition unrelated to the firearm used to kill the victim and permitted testimony and argument suggesting witnesses feared the defendant. Both types of evidence, the defendant asserts, suggested he engaged in uncharged misconduct, were unfairly prejudicial, and require a new trial.

i. Admission of firearm and ammunition access. Over the defendant's objection, the judge permitted the admission of excerpts of video footage, which was captured four days before the shooting by a body camera worn by a confidential informant who was working with Special Agent Robert White of the Bureau of Alcohol, Tobacco, Firearms and Explosives in connection with a separate Federal investigation.[18] The footage showed the defendant together with Austin on Creston Street. White, who

[18] When this evidence was admitted, the judge instructed the jury that the fact that the agent was conducting a separate investigation "is being used for a very limited purpose and that is . . . to explain to you why that video came about."

had listened to live audio feed captured at the time the footage was created, testified to the defendant's statements that he had access to certain firearms and ammunition. Specifically, four days before the shooting, the defendant claimed to be in possession of .22 caliber ammunition. In a second conversation, which White heard in June (after the shooting), the defendant claimed to possess twelve-gauge shotgun ammunition, .40 caliber ammunition, and a .22 caliber handgun and ammunition, and to have access to additional weapons. The defendant contends that because none of the evidence concerned the weapon or type of ammunition used in the shooting (.25 caliber), it was irrelevant, serving only to suggest his propensity to commit gun-related violence.

Evidence of a defendant's uncharged criminal acts or other misbehaviors is inadmissible "for the purposes of showing [the defendant's] bad character or propensity to commit the crime[s] charged." Commonwealth v. Helfant, 398 Mass. 214, 224 (1986). See Commonwealth v. Woollam, 478 Mass. 493, 500 (2017), cert. denied, 138 S. Ct. 1579 (2018); Commonwealth v. Gomes, 475 Mass. 775, 783 (2016). Such evidence, however, may be admissible if it is relevant for other purposes. See, e.g., Commonwealth v. Holley, 478 Mass. 508, 532 (2017) (evidence of prior gun theft admissible to show defendant had "means of committing the crime" charged [citation omitted]); Commonwealth v. Ridge, 455 Mass.

307, 322-323 (2009) (evidence of defendant's access to guns admissible to show familiarity with firearms); Commonwealth v. Mullane, 445 Mass. 702, 709-710 (2006) (evidence of prior investigation into similar criminal activity admissible to show pattern or method of operation).

Even where such evidence is relevant for other purposes, such as to show the defendant's familiarity with and access to firearms, see Andre, 484 Mass. at 414, it is inadmissible if "its probative value is outweighed by the risk of unfair prejudice to the defendant," Commonwealth v. Crayton, 470 Mass. 228, 249 n.27 (2014) (clarifying that "'other bad acts' evidence is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk").[19]

In determining whether to admit other bad acts evidence, the judge must consider the precise manner in which the evidence is relevant and material to the facts of the particular case, as well as the risk that the jury will ignore a limiting instruction and make the prohibited character propensity inference. Andre, 484 Mass. at 415 (noting this risk is at "its zenith in an identification case because the jury may incorrectly infer that if the defendant possessed a firearm

[19] The defendant's trial took place after our decision in Crayton.

previously [or subsequently], he is probably the person who committed the crime charged"). The judge should be particularly cautious where, as here, the prior bad acts evidence concerns firearm-related evidence used to show the defendant's access to weapons but does not concern the weapon used in the commission of the crime being tried. Commonwealth v. Imbert, 479 Mass. 575, 585 (2018). Once the judge weighs these competing considerations, "it is then within the judge's discretion to determine whether the probative value of the firearms-related evidence is outweighed by the risk of prejudicial effect on the defendant." Andre, supra.

The judge did not abuse her discretion in admitting the evidence, which was relevant not only to establish that the defendant was familiar with and had access to firearms, but also, as the judge instructed the jury, to show that the defendant was familiar with Creston Street, where the shooting occurred, and with Austin (from whom the victim allegedly stole drugs the night before). The defendant previously had denied any familiarity with the area and disclaimed any association with Austin in a custodial interrogation with police investigators concerning the shooting.[20] Further, the judge

[20] The defendant was in custody on different charges at the time; he was read his rights under Miranda v. Arizona, 384 U.S. 436 (1966), signed a form indicating he understood those rights, and agreed to speak to the officers.

provided a contemporaneous limiting instruction with the testimony to tell the jury to use the evidence, if at all, for the limited purpose of inferring the defendant's familiarity with the location and with certain individuals.[21] The judge also provided a limiting instruction in the final jury instructions.[22,23]

ii. Admission of evidence regarding witnesses' fear. The defendant also contends that the judge erred by permitting Slayden and Peters to testify about their hesitance to come forward as witnesses. Following an exchange on direct examination, during which Slayden testified that he could not recall whether he had reported to an investigating officer that

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[21] The contemporaneous instruction stated: "Members of the jury you've heard evidence from this witness about an investigation that he was conducting. That evidence is being used for a very limited purpose and that is only, if you accept it, that to explain to you why that video came about. And it's relevant only insofar as you may take it if you accept it that as to [the defendant's] alleged familiarity with certain locations that have been mentioned during the trial and with certain individual that have been mentioned during the trial. So, other than that you are not to concern yourself or consider it in any other way that I have just told you."

[22] The instruction stated in part: "[Y]ou may consider [this evidence] solely on the limited issues of the defendant's pattern of operation, intent, motive, course of conduct and knowledge, as well as the nature of his relationship with Hilary Holden, James Austin and Earl Smith. You may not consider this evidence for any other purpose."

[23] For these reasons, we also reject the defendant's contention that admitting this testimony violated due process. See Payne v. Tennessee, 501 U.S. 808, 825 (1991).

he saw a person he knew as "Wizz," the defendant's nickname, on Creston Street the day of the shooting, the prosecutor asked Slayden whether he was "concerned about his [incarcerated son's] welfare." Slayden testified, "Yes, I'm concerned about his welfare." Subsequently, the investigating officer testified that Slayden had "requested confidentiality" in agreeing to provide information regarding the shooting; the officer suggested they meet in the rear of a grocery store. The officer testified that, at that time, Slayden had reported that he had seen Wizz on the day of the shooting on Creston Street. During closing argument, the prosecutor stated:

> "You can't really blame [Slayden] for trying to disavow [his identification of the defendant] here. All of you stood on [Slayden's] porch [on] Creston Street. You took note of the view up and down the street. He's got to live there. You were there for a minute. His son's in jail. He's concerned about him. Protective of his son."

The defendant did not object to the testimony or argument.

Peters testified that after she saw the victim collapse, she retrieved her cell phone to call 911 but determined not to do so when the defendant gave her an "ill grill," or a "weird look like you better not do it." She further testified that her roommate requested that the investigating detective meet her on a street other than Creston Street. In closing argument, the prosecutor stated that Peters was "also scared" and "[m]et the detectives later a block away so she wouldn't be seen going off

with them to Headquarters." Again, the defendant did not object to the testimony[24] or argument.

On appeal, the defendant argues that admitting the evidence concerning the witnesses' fear was particularly inflammatory given that he was charged with witness intimidation. Certainly, in determining whether to admit evidence concerning a witness's fear to come forward, a judge must consider the probative value of the evidence as well as its potential prejudicial effect. Mass. G. Evid. § 403 (2021). Here, the judge did not abuse her discretion.

"Generally, questions regarding a witness's fear of testifying, whether caused by the defendant or not, are allowable in the judge's discretion." Commonwealth v. Auguste, 418 Mass. 643, 647 (1994). "[E]ven where . . . the alleged other bad act evidence is similar to that with which the defendant is charged, the determination regarding admissibility is left to a case-by-case determination." Commonwealth v. Hall, 66 Mass. App. Ct. 390, 395 (2006). The evidence with regard to Slayden was relevant to explain his hesitance to testify about what he saw the day of the shooting. Auguste, supra. See Commonwealth v. Errington, 390 Mass. 875, 880 (1984) ("A witness who has been impeached by a prior inconsistent statement may

[24] When the prosecutor asked Peters why the roommate had made this suggestion, trial counsel's objection was sustained.

explain why he has made inconsistent statements"). Similarly, the testimony regarding the defendant's "ill grill" was relevant to Peters's reasons for not calling 911 on the day of the shooting and questions regarding Peters's roommate's request were relevant to Peters's hesitance to come forward.[25] See Commonwealth v. DePina, 476 Mass. 614, 631 (2017) (allowing witness to explain earlier hesitance to testify "to respond to an obvious avenue of attack on the witness's credibility"). Compare Commonwealth v. McIntyre, 430 Mass. 529, 539-540 & nn.6-7 (1999) (concluding it was erroneous to admit witnesses' testimony "about their own feelings regarding the defendant's presence," including that "there would be trouble" and that "there was bad vibes," because there was no relevance to that case or charges against defendant).[26]

b. Denial of continuance. Six days before the trial was scheduled to begin, the defendant moved to continue the trial to permit him additional time to try to locate Elaine Bell, a former inmate in the same facility as Holden who had come forward with information that Holden's testimony was fabricated

[25] The officer who interviewed Peters testified that she was "very nervous" to talk to the officer during the interview.

[26] For these reasons, the evidence did not violate due process. See Payne, 501 U.S. at 825; Darden v. Wainwright, 477 U.S. 168, 181-182 (1986).

to obtain favor with the prosecution.[27] The defendant intended to call Bell to impeach Holden. A few weeks before trial, in late 2014, however, defense counsel learned that Bell had been released from custody. He asked a private investigator to try to locate her. Because she was a registered sex offender, both thought her location would be readily ascertainable. While the investigator learned Bell might be living in either North or South Carolina, the telephone numbers connected to her were not in service, and he was unable to find her prior to trial. The judge denied the motion.

On appeal, the defendant contends that the judge abused her discretion. See Commonwealth v. Super, 431 Mass. 492, 496 (2000). When considering whether to grant a continuance, the judge should consider "the movant's need for additional time against the possible inconvenience, increased costs, and prejudice which may be incurred by the opposing party" along with "the interest of the judicial system in avoiding delays which would not measurably contribute to the resolution of a particular controversy." Commonwealth v. Gilchrest, 364 Mass.

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[27] Specifically, Bell had written a letter to the Suffolk County sheriff's investigative division that stated:

> "I Elaine Marie Bell over heard [sic] Miss Hilary Holden . . . [say] that she had blame [sic] some kid for a murder and was telling it so the D.A. made a deal with her to put her back in M.C.I. Framingham so Miss Holden could be back with her girlfriend (gross). Thank you for reading this."

272, 276-277 (1973). See Mass. R. Crim. P. 10 (a) (2), 378 Mass. 861 (1979) (listing considerations in determining whether to allow continuance of trial).

The judge did not abuse her discretion. Bell's anticipated testimony would have served to impeach Holden, on the basis that Holden was fabricating her testimony against the defendant to obtain favor. This suggestion, however, could be (and was) explored amply during the trial through evidence and cross-examination regarding Holden's criminal record[28] and her relationship with Austin and the defendant, including Holden's own admission that she would do anything to get Austin out of jail, as well as the deal she made with the prosecution for leniency; indeed, evidence was elicited that Holden had fabricated information implicating the defendant in a robbery to assist Austin.[29] See Commonwealth v. Cruz, 456 Mass. 741, 748 (2010) (finding no abuse of discretion in denying continuance where delay would not "measurably contribute to the resolution of the case" [citation omitted]); Gilchrest, 364 Mass. at 277

[28] Additionally, cross-examination elicited testimony about the extensive number of disciplinary reports (between seventy-five and one hundred, or maybe more) that Holden incurred while incarcerated at various facilities.

[29] Specifically, Holden lied to police about her accomplice in a robbery, falsely implicating the defendant (who was incarcerated at the time of the robbery) to protect Austin, her then boyfriend.

(finding it not arbitrary to deny continuance where continuance "would result in a delay but not in the introduction of any significantly new evidence"). More significantly, as the judge found, there was no indication at the time of the motion that Bell could be found even if a continuance were allowed. Compare Commonwealth v. Clark, 454 Mass. 1001, 1002 & n.3 (2009) (finding abuse of discretion in denying continuance where unavailable witness was, in fact, available and would participate at set future time).[30]

c. Denial of motion for a new trial. The defendant also maintains that the judge erred in denying his motion for a new trial based on "newly discovered" or "newly available" evidence from Bell, whom the defendant was able to locate years after his conviction. The standard of review for denial of a motion for a new trial is abuse of discretion or other error of law. Commonwealth v. Brown, 470 Mass. 595, 602 (2015). "In a motion for a new trial based on new evidence, the defendant must show that the evidence is either 'newly discovered' or 'newly available' and that it 'casts real doubt' on the justice of the defendant's conviction" (footnote omitted). Commonwealth v.

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[30] For these same reasons, we reject the defendant's contention that the denial of the motion violated his constitutional right to present a defense. See Commonwealth v. Miles, 420 Mass. 67, 85-86 (1995); Commonwealth v. Cavanaugh, 371 Mass. 46, 51 (1976).

Sullivan, 469 Mass. 340, 350 (2014). See Commonwealth v. Cintron, 435 Mass. 509, 516 (2001), overruled on another ground by Commonwealth v. Hart, 455 Mass. 230, 241 (2009) ("The standard applied to a motion for a new trial based on newly available evidence is the same as applied to one based on newly discovered evidence").

A defendant must demonstrate that the evidence is (1) newly discovered (or newly available) and (2) credible and material and that (3) the evidence casts real doubt on the justice of the conviction. Commonwealth v. Teixeira, 486 Mass. 617, 640 (2021). Assuming arguendo that Bell's testimony does, in fact, comprise "newly available" evidence[31] because, despite trial counsel's efforts, she could not be located at the time of the trial, the defendant has not shown that the evidence "casts real doubt on the justice of the conviction." Commonwealth v. Cameron, 473 Mass. 100, 104-105 (2015), quoting Commonwealth v. Grace, 397 Mass. 303, 305 (1986). "The inquiry is not 'whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the

[31] Bell's testimony is not "newly discovered," which requires the evidence to have been "unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial." Commonwealth v. Raymond, 450 Mass. 729, 733 n.6 (2008). See Teixeira, 486 Mass. at 640. The defendant knew about Bell and the evidence she might provide months before trial. See, e.g., Commonwealth v. Grace, 397 Mass. 303, 306 (1986).

jury's deliberations.'" Cameron, supra at 105, quoting Grace, supra at 306.

Bell's anticipated testimony would have been employed to impeach Holden. While Holden was a key witness for the prosecution, the trial record already included substantial impeachment evidence, as discussed supra.[32] Moreover, Bell herself would have been subject to credibility issues, as she also had been incarcerated and was a registered sex offender. See Cintron, 435 Mass. at 517-518 (upholding denial of new trial based on "newly available evidence" where "evidence [defendant] sought to admit was cumulative and not credible").[33]

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[32] The judge instructed the jury: "You also may consider [the witness's] motive for testifying, whether he or she displays any bias in testifying and whether or not he or she has any interest in the outcome of the case." With respect to Holden in particular, the judge specifically instructed the jury to "examine Ms. Holden's credibility with particular care," and that they "may consider [the cooperation agreement] and any hopes Ms. Holden may have as to future advantages from the prosecution in evaluating her credibility along with all other factors I have already mentioned." See Commonwealth v. Fernandes, 478 Mass. 725, 745 (2018), citing Commonwealth v. Ciampa, 406 Mass. 257, 266 (1989) (requiring such instruction when witness testifies under cooperation agreement). The judge also instructed the jury that they "should also consider the fact that the Commonwealth does not know whether Ms. Holden is telling the truth." See Fernandes, supra.

[33] For these same reasons, the judge did not abuse her discretion in declining to hold an evidentiary hearing on the defendant's motion. See Commonwealth v. Marrero, 459 Mass. 235, 240 (2011), quoting Mass. R. Crim. P. 30 (c) (3), as appearing in 435 Mass. 1501 (2001) (judge may rule on motion for new trial "without an evidentiary hearing, 'if no substantial issue is raised by the motion or affidavits'").

d. Ineffective assistance of counsel. The defendant contends that he is entitled to a new trial because he received ineffective assistance of counsel due to trial counsel's inability to secure Bell's availability at trial. Because the "statutory standard of § 33E is more favorable to a defendant than is the constitutional standard for determining the ineffectiveness of counsel," Commonwealth v. Martin, 467 Mass. 291, 316 (2014), quoting Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014), we analyze this claim "under the rubric of § 33E 'to determine whether there exists a substantial likelihood of a miscarriage of justice,'" Commonwealth v. Facella, 478 Mass. 393, 409 (2017), quoting Commonwealth v. Frank, 433 Mass. 185, 187 (2001).

The record does not support the defendant's argument. Trial counsel diligently searched for Bell, employing a private investigator weeks before trial to try to locate her. Trial counsel reasonably believed Bell, who was a registered sex offender, could be located readily. When these efforts proved fruitless, he filed a motion for continuance one week before trial was set to begin. Moreover, as discussed supra, Bell's absence at trial did not result in a "substantial likelihood of a miscarriage of justice." Facella, 478 Mass. at 409. Trial counsel was able to impeach Holden using the available evidence.

e. Corpus delicti. The corpus delicti rule requires evidence, besides a confession, that the "crime was real and not imaginary." Commonwealth v. Forde, 392 Mass. 453, 458 (1984). In a homicide case, the rule is satisfied by evidence that the alleged victim is dead.[34] Id. See Commonwealth v. Burgos, 470 Mass. 133, 147 (2014). The defendant asks us to revisit the rule to require, in addition, that there be "substantial independent evidence which would tend to establish the trustworthiness of the statement," which is the Federal standard. United States v. Irving, 452 F.3d 110, 118 (2d Cir. 2006), quoting United States v. Bryce, 208 F.3d 346, 354 (2d Cir. 2000). In Burgos, supra, we expressly declined to adopt that standard, and we see no reason to revisit our decision in the circumstances of the present case.

f. Review under G. L. c. 278, § 33E. After a review of the entire record, we discern no error warranting relief under G. L. c. 278, § 33E.

Judgments affirmed.

Order denying motion for a new trial affirmed.

[34] The necessary corroboration under the corpus delicti rule is present here because "[t]he victim in this case was clearly killed as a result of multiple gunshot wounds. There is therefore no issue whether the crime of murder occurred." Commonwealth v. Burgos, 470 Mass. 133, 147 (2014).