SJC-10581

COMMONWEALTH vs. DAVID NICANOR DIAZ PEREZ.

Suffolk. October 4, 2019. - February 3, 2020.

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

Homicide. Firearms. Constitutional Law, Assistance of counsel. Practice, Criminal, New trial, Assistance of counsel.

Indictments found and returned in the Superior Court Department on July 1, 2003.

The cases were tried before Janet L. Sanders, J., and a motion for a new trial, filed on March 30, 2017, was heard by her.

Cailin M. Campbell, Assistant District Attorney (John P. Pappas, Assistant District Attorney, also present) for the Commonwealth.

Robert F. Shaw, Jr., for the defendant.

LENK, J. In 2003, the defendant was charged with murder in the first degree and possession of a firearm without a license in connection with a fatal shooting. His first trial ended in a mistrial when the jury were unable to reach a verdict. His

second trial, at which the defendant had different counsel, ended in convictions. At both trials, the Commonwealth relied on the testimony of two eyewitnesses to identify the defendant as the shooter. During the first trial only, however, an alibi witness testified that he had been inside a building with the defendant when the shooting took place on a street outside the building. After his convictions, the defendant moved for a new trial, arguing that his second attorney's failure to call or even investigate this witness amounted to constitutionally ineffective assistance of counsel. The second trial judge agreed and granted the motion. The Commonwealth appealed from the allowance of a new trial. Because we discern no abuse of discretion or clear error of law in the judge's decision, we affirm and remand for a new trial.

1. Background. a. Facts. On March 22, 2003, the victim, Quirico Romero, was fatally shot at a baby shower. The baby shower was attended by roughly one hundred guests (including the defendant), many of whom did not know one another. The event was held inside a hall, and featured both a disc jockey and an open bar. As midnight approached and the event concluded, the guests began to gather outside. An argument then broke out between the shooter, his companion, and another guest in the street outside the hall. This argument escalated into physical violence. Eventually, the shooter produced a gun, firing it

once into the air and then twice more. The victim, who also had been outside but who had not been involved in the initial confrontation, attempted to flee after the first shot was fired. He was shot in the back and later died of his injuries.

b. Proceedings at trial. On July 1, 2003, the defendant was indicted on charges of murder in the first degree and unlawful possession of a firearm. His first trial began in May of 2006. A mistrial was declared because, after more than a week of deliberation, the jury were still unable to reach a verdict. After the first trial, the defendant was appointed new counsel. On June 12, 2007, the jury at the defendant's second trial, which involved the same prosecutor but a different judge, found him guilty of both charges. Accordingly, he was sentenced to life in prison without the possibility of parole for the murder conviction. He also received a concurrent sentence of from four to five years for the firearm charge.

The principal factual issue at each trial was whether there was sufficient evidence to identify the defendant as the shooter. The Commonwealth produced no physical or forensic evidence directly tying the defendant to the crime;[1] it relied

[1] The Commonwealth did introduce shell casings and other ballistics evidence tying the bullet that killed the victim to a gun recovered two months after the shooting in an unrelated matter. No evidence connected the defendant with either the person who was found with this weapon or the weapon itself.

almost exclusively on eyewitness testimony. While investigating the shooting, the police prepared a photographic array containing the defendant's photograph.[2] This array was shown to six individuals who claimed to have witnessed the shooting or the preceding altercation. Only two of them identified the defendant as the shooter.[3] Neither witness had seen the defendant before the baby shower, and only one of them claimed to have seen the defendant actually fire the gun. Both witnesses identified the defendant as the shooter at trial and were cross-examined. The Commonwealth also introduced corroborating eyewitness testimony regarding the shooter's appearance, including his ethnicity,[4] height, and attire.

One of the witnesses testified at the defendant's first trial but not at the second: Analdi Sanchez. Sanchez asserted that he had been inside the hall with the defendant when the shooting occurred. He also denied having seen the defendant with a gun. On cross-examination, the Commonwealth identified gaps in Sanchez's memory. The prosecutor also questioned

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[2] The arrays did not contain the photograph of any other guest at the event.

[3] The defendant also asserts that "wanted" posters featuring his face had been distributed prior to these identifications.

[4] Most of the guests were Puerto Rican or Dominican. The defendant is Puerto Rican, and multiple eyewitnesses testified that the shooter was Puerto Rican as well.

Sanchez about his claim that he had not spoken with the defendant about the shooting, and his reluctance to come forward with his testimony until contacted by a defense investigator.

c. Subsequent procedural history. Following his convictions, the defendant filed a timely notice of appeal in this court. His appeal has remained stayed due to various delays. In March 2017, the defendant filed a motion for a new trial in this court, and that motion was remanded to the Superior Court. Represented by yet another attorney, the defendant argued that the failure of his second trial counsel (successor counsel) to call Sanchez or to investigate Sanchez's prior testimony constituted ineffective assistance of counsel, and therefore violated his rights under the Sixth Amendment to the United States Constitution. Sitting as the motion judge, the judge who had presided at the defendant's second trial conducted evidentiary hearings on June 28 and August 6, 2018.

The judge found that successor counsel had spoken with the defendant's previous counsel to obtain the defendant's case file after being appointed to represent him in July 2006. Upon reviewing the file, successor counsel knew that the defendant's first trial had ended in a mistrial and that it had turned on the reliability of eyewitness testimony. The file, however, did not contain a trial transcript. So, in October of 2006,

successor counsel filed a motion to obtain transcripts from the first trial.

Before the second trial began, successor counsel met with the defendant's mother. His mother mentioned that Sanchez had testified and might be available to do so again, but she did not explain the substance of Sanchez's testimony.[5] Successor counsel thus had "no idea" that Sanchez's testimony placed the defendant away from the scene of the shooting when it happened. She did not hire a private investigator to locate or talk to Sanchez, or make any effort to contact him or to ascertain the content of his testimony, a decision the judge called "inexplicabl[e]." While counsel ultimately did put Sanchez on her witness list, she testified at the evidentiary hearing that her practice was to provide the names of all possible witnesses so that potential jurors could hear them.

Two weeks before the second trial began, the trial transcripts still had not arrived. Only then did successor counsel move for a continuance. Her motions did not mention Sanchez or explain that she needed the transcripts to understand his testimony; the motions were denied.[6] The transcripts arrived

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[5] Analdi Sanchez did not testify before the grand jury.

[6] Successor counsel had no explanation for why she did not mention Sanchez or renew her motion for a continuance as the trial approached. When pressed on this issue at the evidentiary hearing, she admitted that "Sanchez just slipped through, and he

at the eleventh hour: the certification for the transcript volume containing Sanchez's testimony is dated May 31, 2007, which is the very day that the second trial began. At trial, successor counsel had the transcripts, but she did not call Sanchez or attempt to show that he was unavailable in order to introduce his prior testimony. At the evidentiary hearing, counsel acknowledged that she could have taken either course of action, and she could not explain why she had not.

Based on these findings, the judge concluded that successor counsel had provided ineffective assistance of counsel. Applying the traditional standard this court set forth in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), the judge reasoned that counsel's failure to investigate Sanchez fell short of the standard of competence expected from an ordinary lawyer, and that this failure deprived the defendant of a substantial ground of defense. The judge described the Commonwealth's case as "far from overwhelming," noting that only two out of six eyewitnesses presented with the photographic array had identified the defendant as the perpetrator. She also observed that the incident took place at night following a party where alcohol had been consumed. Accordingly, she wrote that evidence "placing the defendant elsewhere when the shooting

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shouldn't have. He should not have. . . . Frankly, I didn't think much about him . . . ."

occurred would necessarily be important." The judge was not persuaded that issues with Sanchez's testimony, including inconsistencies between his account of events and those given by other witnesses, would have negated the impact of the testimony; such issues were for the jury to decide. In September of 2018, the judge therefore allowed the defendant's motion for a new trial. The Commonwealth then appealed.

2. Discussion. The Commonwealth contests both that successor counsel was ineffective and that any error on her part prejudiced the defendant. Even if we found its arguments persuasive, which we do not, the Commonwealth has not shown that the judge abused her discretion in allowing the defendant's motion for a new trial.

a. Standard of review. "The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). The decision to allow a new trial is reviewed for abuse of discretion and "will not be reversed unless it is manifestly unjust." Commonwealth v. Gorham, 472 Mass. 112, 117 (2015), quoting Commonwealth v. Nieves, 429 Mass. 763, 770 (1999). Accord Commonwealth v. Wright, 469 Mass. 447, 461 (2014) (decision on motion for new trial is reviewed for "significant error of law or other abuse of discretion" [citation omitted]). "We afford particular

deference to a decision on a motion for a new trial based on claims of ineffective assistance where the motion judge was, as here, the trial judge." Commonwealth v. Martin, 467 Mass. 291, 316 (2014).

Taking this deferential approach, this court is called upon to determine whether successor counsel erred in failing to investigate Sanchez's testimony and whether that failure likely influenced the jury's verdicts. In general, a motion judge may consider numerous factors to decide whether "justice may not have been done" and a new trial is warranted. See Commonwealth v. Brescia, 471 Mass. 381, 390–391 (2015), quoting Commonwealth v. Lombardi, 378 Mass. 612, 616 (1979) (mentioning four factors). See also Commonwealth v. Maynard, 436 Mass. 558, 570 (2002). If the motion for a new trial is based on a constitutional claim of ineffective assistance of counsel, judges are guided by a prejudicial error standard. See, e.g., Commonwealth v. Epps, 474 Mass. 743, 756–757 (2016), citing Saferian, 366 Mass. at 96; Brescia, supra at 388–390 & n.10, 391 & n.11. To assess whether such an error occurred, a judge ordinarily is called upon to apply the standard set forth in Saferian, supra. Here, the judge applied this standard and found it met.

In cases of murder in the first degree, however, we do not apply the Saferian standard in our own review of ineffective

assistance of counsel claims; rather, "we apply the more favorable standard of G. L. c. 278, § 33E, and review [the] claim to determine whether there was a substantial likelihood of a miscarriage of justice." Commonwealth v. Ayala, 481 Mass. 46, 62 (2018), citing Commonwealth v. Seino, 479 Mass. 463, 472 (2018). See Commonwealth v. Wright, 411 Mass. 678, 681–682 (1992), S.C., 469 Mass. 447 (2014). "That is, we determine [(1)] whether defense counsel erred in the course of the trial and, [(2)] if so, whether that error was likely to have influenced the jury's conclusion" (quotation and citation omitted). Seino, supra. We address each of these elements in turn.

b. Whether counsel erred. The initial issue is whether successor counsel erred in failing to call Sanchez or to investigate his testimony. Both the Massachusetts and Federal Constitutions require defense counsel "to conduct an independent investigation of the facts." Commonwealth v. Baker, 440 Mass. 519, 529 (2003), citing Saferian, 366 Mass. at 96, and Strickland v. Washington, 466 U.S. 668, 690 (1984). While defense counsel need not investigate every possible lead, any decision not to investigate or to limit an investigation must be supported by reasonable professional judgment. See Commonwealth v. Long, 476 Mass. 526, 532 (2017); Commonwealth v. Alvarez, 433 Mass. 93, 102 (2000). Absent a reasonable investigation,

defense counsel lacks sufficient information to evaluate his or her strategic options and to make decisions in the best interests of the client. See Long, supra.

The requirement of a reasonable investigation includes a duty to pursue witnesses with potentially exculpatory testimony. See, e.g., Commonwealth v. Farley, 432 Mass. 153, 156 (2000), S.C., 443 Mass. 740 (2005). Discharging this duty requires, "if necessary[,] drawing on experts or investigators for help." Commonwealth v. Alcide, 472 Mass. 150, 160 (2015). Here, the judge found that, although successor counsel was aware of Sanchez and that he had testified at the first trial, she made no attempt to locate or to speak with him, either personally or through a private investigator, nor did she discuss his testimony with the defendant's previous counsel. As a result, successor counsel lacked the ability to determine whether calling Sanchez as a witness might have bolstered the defendant's case, or weakened that of the prosecution. As the judge reasoned, "With no knowledge about [Sanchez's] prior testimony, [successor counsel] was not making a strategic decision; that would have required some knowledge of what Sanchez had to say."

It is irrelevant that successor counsel may have had access to and read a transcript of Sanchez's testimony on the day that the second trial began; due to her inadequate investigation

before trial, she lacked both the preparation and the time to make effective use of this testimony, or to make an informed deliberation as to its reliability. See Commonwealth v. Lang, 473 Mass. 1, 19 (2015) (Lenk, J., concurring) ("Our case law does not support [an] assessment of counsel's strategic decisions in isolation from [a] constitutionally inadequate investigation").

In any event, successor counsel was unable to explain her decision not to call Sanchez or to attempt to introduce his testimony after she had obtained the transcripts. Commonwealth v. Hill, 432 Mass. 704 (2000), is instructive. There, counsel failed to call a witness whose testimony contradicted the Commonwealth's theory of how events unfolded. See id. at 718. This witness had testified at the trial of an alleged accomplice, who was acquitted; the witness did not testify at the trial of the defendant, who was convicted of murder in the first degree. See id. at 704, 717. Because the motion judge found "no credible explanation for not calling [the witness]," we affirmed the judge's conclusion that counsel had been ineffective. Id. at 718. Similarly, Sanchez provided testimony contradicting the Commonwealth's theory of the case at the defendant's first trial, and a mistrial was declared. So, at least some credible explanation from successor counsel was required as to why Sanchez was not called at the second trial.

No such explanation was given, and successor counsel testified explicitly that she had none.

Under these circumstances, we cannot say that the judge was unreasonable in finding successor counsel's performance ineffective, much less that the judge abused her discretion.

c. Prejudice from error. Having determined that successor counsel erred, we turn to the impact of this error on the jury. "We review to determine whether 'better work might have accomplished something material for the defense,' Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977), or whether any error created a substantial likelihood of a miscarriage of justice, [Wright, 411 Mass. at 682]." Commonwealth v. Martinez, 431 Mass. 168, 184 (2000). To demonstrate such a likelihood, it is sufficient for the defendant to show that "any such error 'was likely to have influenced the jury's conclusion.'" Commonwealth v. Lally, 473 Mass. 693, 698 (2016), quoting Wright, supra. Accord Alcide, 472 Mass. at 158. "One type of situation in which such a showing may be made is where counsel neglected evidence that another person committed the crime, and that evidence, if developed, might have raised a reasonable doubt about whether the defendant or someone else had killed the victim" (quotations and citations omitted). Id.

"Where a defendant moves for a new trial based on ineffective assistance of counsel in failing adequately to

investigate a potential . . . defense, the judge may not deny the motion based on the judge's own assessment of a potential expert's credibility or based on the general observation that juries routinely reject [such a] defense[]." Lang, 473 Mass. at 21 n.1. See Commonwealth v. Roberio, 428 Mass. 278, 281 n.5 (1998), S.C., 440 Mass. 225 (2003). We have stressed that "[a] judge weighing whether a new trial is warranted in light of these and similar factors . . . must focus on the probable effect of the circumstances on the jury's decision-making, and not on his or her own 'personal assessment of the trial record,' see Commonwealth v. Tucceri, 412 Mass. 401, 411 (1992), in order to 'preserve[] . . . the defendant's right to the judgment of his peers.' Id." Brescia, 471 Mass. at 391.

Here, whether "better work" might have been done is not entirely theoretical: the defendant's first trial, at which Sanchez testified that the defendant had been inside with him when the shooting occurred, resulted in a mistrial. At each trial, the primary evidence against the defendant consisted of two eyewitness identifications. As the second trial judge stated, "any evidence that would undercut these two identifications by placing the defendant elsewhere when the shooting occurred would necessarily be important."

The importance of Sanchez's testimony also must be put in context. The judge appraised the Commonwealth's case as "far

from overwhelming." The case did not rely on forensic or other physical evidence. It did not turn on incriminating statements by the defendant. Instead, this case centered on eyewitness testimony. "[M]istaken eyewitness identification is the primary cause of erroneous convictions, outstripping all other causes combined, and . . . suggestive identification procedures are the primary cause of mistaken identifications." Commonwealth v. Martin, 447 Mass. 274, 293 (2006) (Cordy, J., dissenting) (noting also that "[o]f the first 163 exonerations secured through the use of [deoxyribonucleic acid] evidence, for example, we know that seventy-seven percent of the convictions were the product of mistaken eyewitness identifications"). See id. at 293 nn.2-3 (identifying numerous studies calling reliability of eyewitness testimony into question). See also Commonwealth v. Gray, 463 Mass. 731, 746 (2012), quoting Martin, supra at 293 & n.4. Indeed, the research on mistaken eyewitness identification is now so broadly accepted scientifically that we have required that instruction on the five principles of eyewitness identification, as identified in studies on mistaken eyewitness identification, be included in the model jury instructions. See Commonwealth v. Gomes, 470 Mass. 352, 364-378 (2015), S.C., 478 Mass. 1025 (2018), quoting Martin, supra at 293, and cases cited. See generally Model Jury Instructions on Eyewitness Identification, 473 Mass. 1051 (2015).

Here, the Commonwealth relied primarily on the nighttime recollections of eyewitnesses in the chaotic aftermath of a party where alcohol had been served. The eyewitnesses were shown a photographic array that displayed the face of only one guest from the baby shower: the defendant.[7] The two eyewitness who identified the defendant as the shooter did not know him, and four other eyewitnesses who were shown the photographic array did not identify the defendant as the shooter. See Gomes, 470 Mass. at 364-378. Given these imperfections in the Commonwealth's case, affirmative testimony that the defendant could not have been the shooter might have had a significant impact on the jury's deliberations.

The Commonwealth argues that, in determining whether Sanchez's testimony might have influenced the jury, the judge did not consider adequately Sanchez's credibility. We disagree. The question before us is whether the missing testimony likely could have influenced the jury's verdicts, not whether the jury must have believed it. See, e.g., Gomes, 470 Mass. at 364-378; Roberio, 428 Mass. at 281–282. Thus, in evaluating whether Sanchez's testimony might have factored into the jury's deliberations, it would have been "error for the judge to deny

[7] The defendant also has implied that these eyewitnesses might have been prompted by "wanted" posters featuring his face. See note 3, supra.

the motion for a new trial based on [her] assessment of the [witness's] credibility." Roberio, supra. Rather, as the judge correctly held, once a judge has determined that the testimony of a witness proffered by the defendant is not "so devoid of credibility as to render it unworthy of belief," Commonwealth v. Grace, 397 Mass. 303, 311-312 (1986),[8] "the issue of credibility [is] for a jury, not the judge," to determine. Roberio, supra at 281.

The two cases cited by the Commonwealth do not undermine the principle that credibility assessments are for the jury. Contrary to the Commonwealth's assertions, the Appeals Court's determination that there was prejudicial error in Commonwealth v. Hampton, 88 Mass. App. Ct. 162, 168-171 (2015), did not rest on the defendant's claim of self-defense; its holding was that

[8] We note that this is not a case of a witness who recants his or her testimony many years after the fact, compare Commonwealth v. Tobin, 392 Mass. 604, 618 (1984), where a judge should give "serious consideration" to whether any reasonable juror possibly could credit that testimony in deciding whether it warrants a new trial. See Commonwealth v. Watson, 377 Mass. 814, 838 (1979), S.C., 409 Mass. 110 (1991); Commonwealth v. Ortiz, 393 Mass. 523, 537 (1984). In cases of recantation, where the trial otherwise was determined to have been fair, considerations of finality weigh more heavily. See Commonwealth v. Grace, 397 Mass. 303, 306–308 (1986). By contrast, an "ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." Strickland v. Washington, 466 U.S. 668, 694 (1984).

"[w]here, as here, the only issue at trial was whom to believe, and the witness was the defendant's sole corroborating witness, the question of the witness's credibility should have been left to the jury." Id. at 171. So too in this case.

The Commonwealth also points to Tucceri, 412 Mass. at 414, which suggested that if "undisclosed evidence . . . lacks credibility . . . , the failure to disclose that evidence does not warrant the granting of a new trial." This was dicta: the court in Tucceri affirmed an order for a new trial based on the prosecution's failure to disclose photographs indicating that the defendant's facial features did not match the victim's description of her attacker. See id. at 414–415. Here as well, the evidence in question (if believed) would tend to suggest that another person was responsible for the crime.

As the Commonwealth acknowledges, there are no reported decisions of this court in which the dicta in Tucceri has been interpreted to permit a judge to evaluate a witness's credibility under the second prong of Saferian.[9] To the contrary, we have held that, particularly where "a case is 'a weak one for conviction,'" Commonwealth v. Cowels, 470 Mass.

[9] Commonwealth v. Tucceri, 412 Mass. 401, 411, 413 (1992), did not involve a charge of murder in the first degree; accordingly, this court applied a variant of the Saferian standard, which is less protective than that of Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014).

607, 623 (2015), quoting Commonwealth v. Bennett, 43 Mass. App. Ct. 154, 162 (1997), "the determination that the evidence likely was a real factor in the jury's deliberations demands a new trial. We have justified this approach as 'preserv[ing], as well as it can in the circumstances, the defendant's right to the judgment of his peers,' since it ensures that the court's analysis turns on 'what effect the omission might have had on the jury,' rather than on 'what . . . impact the late disclosed evidence has on the judge's personal assessment of the trial record,'" Cowels, supra, quoting Tucceri, 412 Mass. at 411.

Here, cognizant of all that had happened at trial, the judge determined that Sanchez's testimony "necessarily [would] be important" to the jury's deliberations. This statement functions as an implicit finding that a reasonable jury could have credited the testimony. The judge therefore did not abuse her discretion in deciding that, rather than substituting her own judgment, it should be left to the jury to assess the value of Sanchez's testimony.

As a result, the judge neither erred nor abused her discretion in finding that Sanchez's testimony likely would have influenced the jury's decision.

Order allowing motion for a new trial affirmed.