COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1082

COMMONWEALTH

vs.

DARREN CASWELL.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This is the defendant's second appeal to this court. His conviction of murder in the second degree was affirmed on direct appeal. See Commonwealth v. Caswell, 85 Mass. App. Ct. 463 (2014). Now, the defendant contests the denial of his subsequent motion for a new trial, pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). He argues that the claimed errors, addressed below, denied him his right to due process and a fair trial. We discern no cause to disturb the order denying his motion, and affirm.

1. Inaccurate statements in postconviction rulings. We acknowledge that this court's opinion in the defendant's direct appeal, as well as the Superior Court judge's order on the defendant's motion for a new trial, contained an inaccurate statement regarding the photograph of a burnt vehicle seen on

Russell Freitas's computer. See Caswell, 85 Mass. App. Ct. at 465. The evidence at trial was that the photograph depicted the victim's van, which was burned about six months before the victim's death, not of the victim's pickup truck, which was burned with the victim's body inside.

However, those inaccurate statements made in the postconviction proceedings, though unfortunate, do not create a substantial risk of a miscarriage of justice in the adjudication of the defendant's guilt at trial.[1] It is impossible for statements made in the postconviction proceedings to have affected the jury's deliberations in reaching their verdict of guilt at trial.[2] Moreover, the mistaken reference to the truck instead of the van does not bear on the question of the defendant's guilt, only Freitas's.

We also acknowledge that the prosecutor mistakenly said "van" instead of "truck" six times in closing argument. However, the prosecutor correctly used the term "truck" nineteen

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[1] The defendant raises the mistaken factual statement as an issue for the first time in this appeal. When a claim of error is not raised at the first available opportunity, we review only for a substantial risk of a miscarriage of justice. See Commonwealth v. Randolph, 438 Mass. 290, 294-295 (2002). A substantial risk of a miscarriage of justice exists only "if we have a serious doubt whether the result of the trial might have been different had the error not been made." Commonwealth v. LeFave, 430 Mass. 169, 174 (1999).

[2] For the same reason, we decline to address the defendant's assertion at oral argument that the opinion in his direct appeal inaccurately described phone records from August 14, 15, and 16, 2003. See Caswell, 85 Mass. App. Ct. at 471.

times and did not mention the photograph of a burnt vehicle on Freitas's computer during closing argument. Moreover, the jurors were instructed that closing arguments are not evidence. Thus, it is nothing more than speculation that the jurors mistook the van in the photograph for the truck in which the victim's body was found, or that such a mistake affected their verdict. The misstatements by the prosecutor do not create a substantial risk of a miscarriage of justice.[3]

2. Pedro's phone records. There was no error when the prosecutor stated in the closing argument that Joseph Pedro's phone records "were looked into," because the argument was based in the evidence. At trial, an officer testified that the police looked at a phone record linked to Pedro and could not find any evidence that Pedro had called Frietas around the date of the victim's death. A prosecutor is "entitled to marshal the evidence and suggest inferences that the jury may draw from it." Commonwealth v. Drayton, 386 Mass. 39, 52 (1982). The prosecutor's statement was proper.

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[3] The opinion in the defendant's direct appeal also stated that "[c]rediting the version of evidence that favors the Commonwealth, the defendant admitted to the police that he was at the scene when the victim was killed." Caswell, 85 Mass. App. Ct. at 472. Contrary to the defendant's contention, this statement was not unfounded. The defendant's statement to the police, "That's not how it happened. I didn't know ahead of time that this kid was going to be killed," could have been interpreted to mean he was present at the scene of the murder, when viewed in a light that is favorable to the Commonwealth.

3. Impeachment of MacNeil. The Commonwealth did not improperly impeach its own witness in violation of G. L. c. 233, § 23.[4] The prosecutor did not introduce evidence of Michael MacNeil's bad character or inconsistent statements without allowing MacNeil to explain them. The prosecutor merely suggested in closing argument that MacNeil was lying; the suggestion was a permissible inference based on MacNeil's failure to provide details during his testimony. Because "[t]he absence of an unmeritorious or futile objection cannot constitute ineffectiveness," defense counsel was not ineffective for failing to object to the prosecutor's statement. Commonwealth v. McLaughlin, 79 Mass. App. Ct. 670, 678 (2011).

4. Exhibit 17. Business records, such as telephone records, "are generally admissible absent confrontation . . . because -- having been created for the administration of an entity's affairs and not for the purpose of establishing . . . [a] fact at trial -- they are not testimonial." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009). Though exhibit 17

[4] General Laws c. 233, § 23, provides:

> "The party who produces a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony; but before proof of such inconsistent statements is given, the circumstances thereof sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked if he has made such statements, and, if so, shall be allowed to explain them."

(which was created by an employee at the State Fusion Center) does not itself consist of the telephone records, it is merely a summary of properly admitted telephone records without the addition of testimonial statements.[5] Therefore, the defendant was not entitled to confront the creator of exhibit 17. Relatedly, defense counsel was not ineffective for failing to raise the confrontation issue or for failing to object to Sergeant Anna Brookes's testimony on exhibit 17, as doing so would have been futile.[6] See McLaughlin, 79 Mass. App. Ct. at 678.

Neither was defense counsel ineffective for failing to object to the portion of the closing argument when the prosecutor suggested that the defendant and Freitas spoke "six or seven times" on August 13, 2003, before 3:25 P.M. An objection to this suggestion would have been futile because the statement was a proper inference that could have been drawn from the evidence.[7] See Drayton, 386 Mass. at 52; McLaughlin, 79 Mass. App. Ct. at 678.

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[5] The defendant does not contend that the telephone records themselves were not properly admitted.

[6] The defendant's reliance on Mass. G. Evid. § 702 is misplaced. Sergeant Brookes was never held out as an expert witness, and therefore did not need to satisfy the requirements of § 702.

[7] Testimony about exhibit 17 showed that there were seventeen dialed calls between the defendant and Freitas in that time period; the lengths of those called varied, and there was no testimony as to how many were missed calls. A rational jury

Further, the defendant has failed to show that defense counsel was ineffective by not retaining an expert witness to interpret exhibit 17. Even if an expert could have been retained to distinguish between the calls that connected, failed to connect, or went to voicemail, that information would not have provided a substantial ground of defense. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Regardless of how it was interpreted, the information in exhibit 17 was in no way the prosecutor's "key evidence." There was ample other evidence linking the defendant to Freitas and to the circumstances of the victim's death.

5. Talking to MacNeil. On direct appeal, this court already addressed the defendant's argument that the prosecutor erred when he stated that the defendant talked to MacNeil twice on September 3, 2003. See Caswell, 85 Mass. App. Ct. at 476. When an appellate court has already reviewed the defendant's convictions, a repackaging of the same argument "in the garb of ineffective assistance of counsel" is duplicative and can be rejected for that reason alone. Commonwealth v. Balliro, 437 Mass. 163, 170 (2002), quoting Commonwealth v. Silva, 25 Mass. App. Ct. 220, 228 (1987). Regardless, this statement was not an error because there was no evidence that the defendant lacked

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could have concluded that the defendant and Freitas talked six or seven times out of those seventeen dialed calls.

possession of his telephone at the time of the calls. See Caswell, supra.

6. Questions concerning Pedro's credibility. The defendant separately claims that questions by the prosecutor to four witnesses, to which no objection was raised at trial, elicited improper testimony concerning their views about Pedro's credibility. Read in context, the questions were largely designed to explain why the witnesses did not report Pedro's statements to police. Like the motion judge, we discern no substantial risk of a miscarriage of justice.

7. Cumulative impact. Of the defendant's many claimed errors, many were not errors at all for the reasons discussed above. For the reasons we have explained, none of the remaining errors individually create a substantial risk of a miscarriage of justice. Having reviewed them collectively, we are assured that together they do not raise "a serious doubt whether the result of the trial might have been different had the error[s] not been made." Commonwealth v. LeFave, 430 Mass. 169, 174

(1999). The defendant's argument of cumulative impact fails.

Order denying motion for new trial affirmed.

By the Court (Green, C.J., Wolohojian & Sullivan, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: May 11, 2020.

[8] The panelists are listed in order of seniority.