COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-778

COMMONWEALTH

vs.

JUSTICE E. AINOOSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was found guilty of murder in the second degree, unlawful carrying of a firearm, and possessing a firearm without a firearm identification card. His convictions were affirmed by this court on direct appeal in 2010. The defendant subsequently filed an amended pro se motion for postconviction relief, including a request for a new trial, which was denied on February 21, 2018. On that same date, the motion judge denied a renewed motion for appointment of counsel, pursuant to G. L. c. 278A, § 5, to prepare and file a motion for forensic and scientific analysis. The defendant has appealed from the denial of both motions. We address, in turn, his claims with respect to the jury instructions, the sufficiency of the evidence, and his motion for appointment of counsel.

1. Jury instructions. The defendant raises several arguments about the jury instructions in this case. We will assume without deciding that he is not estopped from bringing these claims by his direct appeal. As these claims were waived because they were not raised previously, we review them to determine if any error created a substantial risk of a miscarriage of justice. See Commonwealth v. Freeman, 352 Mass. 556, 563-564 (1967).

First, the defendant argues that the judge's statement, "[i]f the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion upon reasonable provocation, the Commonwealth has not proved malice" was inadequate, and that the jury should have been instructed that, not only would that mean the Commonwealth had not proven malice, but also that the defendant consequently could not be convicted of murder.

Reading the instructions as a whole, we think they adequately convey this concept. The judge started off by saying that to prove murder in the second degree, the Commonwealth had to prove beyond a reasonable doubt that the defendant unlawfully killed with malice, and that "[i]f . . . after your consideration of all the evidence you find the Commonwealth has not proved beyond a reasonable doubt either one of the two elements of murder in the second-degree, you must not convict the defendant of murder in the second-degree." He said further

that in order to prove that the defendant acted with malice, the Commonwealth had to prove beyond a reasonable doubt the absence of certain mitigating circumstances, namely, heat of passion induced by reasonable provocation or sudden combat, and use of excessive force in self-defense.

The defendant argues next that there was error in the instruction on heat of passion induced by sudden combat because the judge did not state that to find that the defendant acted in the heat of passion induced by sudden combat, "[t]here must be evidence that would warrant a reasonable doubt that something happened [i.e., provocation] which would have been likely to produce in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint, and that what happened actually did produce such a state of mind in the defendant." Commonwealth v. Amaral, 389 Mass. 184, 188 (1983), quoting Commonwealth v. Walden, 380 Mass. 724, 728 (1980).

Read as a whole, the instruction does adequately convey this concept as well. When instructing the jury on heat of passion based on reasonable provocation, the judge defined heat of passion as "the states of mind of passion, anger, fear, flight, and nervous excitement." As to heat of passion induced by sudden combat, the judge instructed that sudden combat involves a sudden assault by the deceased, which may include

physical contact. The judge stated that "[w]hat other contact was sufficient will depend on whether a reasonable person under similar circumstances would have been provoked to act out of emotion rather than reasoned reflection." The judge also instructed that the killing must have "occurred before a reasonable person would have regained control of his emotions, and the defendant must have acted in the heat of passion, without cooling off at the time of the killing." The language of Walden cited by the defendant represents the test for whether the defendant is entitled to an instruction on the heat of passion theories of mitigating circumstances, see Walden, 380 Mass. at 728, not the exact language that the judge was required to use in the instruction itself. The instruction as given was sufficient to instruct the jury as to the Commonwealth's burden of proof.

The defendant next argues that the judge erred in instructing the jury as follows:

> "If after your consideration of all the evidence, you find that the Commonwealth has proved beyond a reasonable doubt the elements of murder, except that the Commonwealth has not proved beyond a reasonable doubt the absence of heat o[f] passion upon reasonable provocation, or heat o[f] passion induced by sudden combat, then you must not find the defendant guilty of murder. And you would be justified in finding the defendant guilty of voluntary manslaughter."

The defendant argues that the jurors should have been instructed not that they would be justified in finding the defendant guilty

of voluntary manslaughter, but rather that they were required to find the defendant guilty of voluntary manslaughter or to acquit him.

The jury are supposed to be instructed that they "shall" convict the defendant of manslaughter if mitigation is found; they should not be instructed merely that they "may" so convict him. See Commonwealth v. Torres, 420 Mass. 479, 492 (1995). The "you would be justified" language does imply discretion to convict, and so it was error. However, the instruction made clear that if the Commonwealth had not proven beyond a reasonable doubt the absence of heat of passion, then the jury "must not" find the defendant guilty of murder. We assume the jury followed these instructions in finding the defendant guilty of murder, not manslaughter. Thus, the defendant has not shown a substantial risk of a miscarriage of justice from this error in this case.

The defendant's next argument presents a closer question. It turns in part on a distinction between the ways the judge instructed the jury with regard to the various types of mitigation that were raised by the evidence. As just described, with respect to the first two types of mitigation, the judge instructed:

> "If after your consideration of all the evidence, you find that the Commonwealth has proved beyond a reasonable doubt the elements of murder, except that the Commonwealth has

not proved beyond a reasonable doubt the absence of heat o[f] passion upon reasonable provocation, or heat o[f] passion induced by sudden combat, then you must not find the defendant guilty of murder. And you would be justified in finding the defendant guilty of voluntary manslaughter." (Emphasis added.)

But with respect to the third type of mitigation, use of excessive force in self-defense, the judge did not include the highlighted command. He said:

"To reiterate, where there is evidence that the defendant may have acted in self-defense, then the Commonwealth must prove beyond a reasonable doubt that the defendant did not act in self-defense. If the Commonwealth failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, then you must find the defendant not guilty.

"The Commonwealth has the burden of proving beyond a reasonable doubt the absence of self-defense. If the Commonwealth fails to prove beyond a reasonable doubt the absence of self-defense, your verdict must be not guilty with respect to the crimes of murder or voluntary manslaughter. If, however, the Commonwealth does prove excessive force in an effort to defend oneself, you would be justified in finding the defendant guilty of voluntary manslaughter. I'm now going to talk some more about voluntary manslaughter.

"Voluntary manslaughter includes the intentional and unlawful killing of another human being as a result of the use of excessive force in self-defense. In this case, you must consider whether the Commonwealth has proved beyond a reasonable doubt that the defendant used excessive force in defending himself. If the Commonwealth proves beyond a reasonable doubt that the defendant used excessive force in defense of himself which caused the death of the deceased, then you should return a verdict of guilty of voluntary manslaughter. If the Commonwealth fails to prove that the defendant used excessive force in rightfully defending himself, then you must not return a verdict of guilty of voluntary manslaughter through the use of excessive force in self-defense."

The defendant argues that, because the jury were not told that they must acquit the defendant of murder if excessive force is not proven, the jury might have concluded that they were free to convict the defendant of murder, which they did, if the Commonwealth proved beyond a reasonable doubt the use of excessive force in self-defense. Of course, an instruction conveying that would be wrong. See Commonwealth v. Santos, 454 Mass. 770, 774 (2009) (error to "effectively inform[] the jury that, if a defendant otherwise entitled to defend himself uses excessive force, he loses the defense of self-defense altogether"). Likewise, the jury are supposed to be instructed that they "shall" convict the defendant of manslaughter in such a circumstance, and are not to be instructed merely that they "may" so convict him, see Torres, 420 Mass. at 492, which is in essence what the judge, initially at least, instructed by saying merely that the jury "would be justified" in convicting the defendant of voluntary manslaughter. This, the defendant argues, exacerbated the issue. Unlike the instructions on the first two types of mitigation, the jury were not told that they may not convict the defendant of murder if what has been proven is the use of excessive force in self-defense. The implication was that there was no such prohibition. Saying that the jury merely "would be justified" in convicting the defendant of

voluntary manslaughter muddied the issue further, because it implies that it is not the only course open to the jury.

These instructions are not a model of clarity. But the sentence, "If, however, the Commonwealth does prove excessive force in an effort to defend oneself, you would be justified in finding the defendant guilty of voluntary manslaughter[,]" came immediately after the sentence, "If the Commonwealth fails to prove beyond a reasonable doubt the absence of self-defense, your verdict must be not guilty with respect to the crimes of murder or voluntary manslaughter." The judge did not say that a conviction of murder would also be justified. In addition, the judge subsequently said, "If the Commonwealth proves beyond a reasonable doubt that the defendant used excessive force in defense of himself which caused the death of the deceased, then you should return a verdict of guilty of voluntary manslaughter" (emphasis added). This statement of what the jury should do is weaker than an imperative, which is what was required, but stronger than "may."

As there was no objection at trial, we may reverse only if there was an error that created a substantial risk of a miscarriage of justice. We are inclined to think that, taken as a whole, and notwithstanding the problems alleged by the defendant, the instructions were not in error. But, even if the portions of the instructions that mitigated those problems were

not sufficient to cure any error in the instructions, we do not think that any such error created a substantial risk of a miscarriage of justice.

The defendant next argues that the instructions as a whole improperly placed the burden of proving voluntary manslaughter on the defendant. We do not think this is the case, but, in any event, the instructions to which the defendant points do not shift the burden to the defendant to disprove murder. Even if we assume for argument's sake that the instructions could have created some confusion with respect to whether, in the circumstances those instructions described, where the jury were required to find the defendant not guilty of murder, they should or should not have found him nonetheless guilty of the lesser included voluntary manslaughter offense, this still did not shift the burden to the defendant to disprove the crime for which he was convicted.

The defendant next argues that the judge did not instruct that provocation and malice are mutually exclusive, and that therefore the judge did not adequately explain that a finding of provocation negates a finding of malice. Although the judge did not specify that the two are "mutually exclusive," the charge as a whole does convey that any reasonable doubt as to whether adequate provocation did actually cause the defendant to act in the heat of passion negates the possibility of a finding of

malice, and, thus, of a conviction of murder. Contrast Commonwealth v. Acevedo, 427 Mass. 714, 716 (1998) (finding reversible error where judge "told the jury that malice is negated by provocation only if provocation is proved beyond a reasonable doubt").

The defendant goes on to argue that a question asked by the jury -- "If the jury cannot agree on murder one or murder two, what is the mandate for consideration of voluntary manslaughter? Is the fact that some jurors believe the charge should be murder one or murder two adequate reason not to find for voluntary manslaughter?" -- reveals that the challenged instructions confused the jury about what they should do with respect to voluntary manslaughter. He argues that such instructions may have been understood by the jury to have "foreclosed a voluntary manslaughter verdict for the defendant." Of course, we cannot look behind the jury verdict, but we disagree that this question, which seems to relate to the proper approach when the jurors are divided with respect to the verdict, implies that the jurors understood the "would be justified" language of the instruction to require a finding of guilty on the charge of murder.

Finally, the defendant points to the fact that he was acquitted of all charges based on his shooting of the second victim, about whom the jury were instructed that if mitigation

were shown, they were required to convict of a lesser included offense, rather than being instructed that "they would be justified" in finding guilt as to that offense. The defendant argues that it was the difference in the instructions to which he points that caused these disparate verdicts. Again, the jury were instructed clearly that if mitigation was not disproven beyond a reasonable doubt, they should not convict the defendant of murder. But they did.

To the extent the defendant reframes the jury instruction claims as one of ineffective of counsel, he fares no better. The second prong of the Saferian standard requires demonstration that a claimed error, here a failure to object to these instructions, would have provided the defendant an otherwise available, substantial ground of defense. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). As explained in Commonwealth v. Randolph, 438 Mass. 290, 296 (2002), this requires demonstration of a substantial risk of a miscarriage of justice, precisely what we have concluded is absent here.

2. Sufficiency of the evidence. Beyond the jury instructions, the defendant argues that the evidence was insufficient to support his conviction of murder in the second degree. However, as the motion judge noted, had the jury simply believed the testimony of witness Terrio, they had sufficient

evidence before them to support a finding beyond a reasonable doubt of guilt.

3. Motion for appointment of counsel. We turn to the denial of the motion for appointment of counsel. "Enacted in 2012, . . . G. L. c. 278A (chapter 278A) allows those who have been convicted but assert factual innocence to have access to forensic and scientific testing of evidence . . . that has the potential to prove their innocence." Commonwealth v. Williams, 481 Mass. 799, 799 (2019). A defendant must provide certain specified information in an affidavit in order to be entitled to a hearing on whether to allow such testing. See G. L. c. 278A, § 3.[1]

[1] General Laws c. 278A, § 3, states:

> "(a) A person seeking relief under this chapter shall file a motion in the court in which the conviction was entered, using the same caption and docket number as identified the underlying case.
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> "(b) The motion shall include the following information, and when relevant, shall include specific references to the record in the underlying case or to affidavits that are filed in support of the motion that are signed by a person with personal knowledge of the factual basis of the motion:
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> "(1) the name and a description of the requested forensic or scientific analysis;
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> "(2) information demonstrating that the requested analysis is admissible as evidence in courts of the commonwealth;
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> "(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;

"(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.

"(c) If the moving party is unable to include for filing with the motion any of the items or information described in subsection (b), or if the moving party lacks items or information necessary to establish any of the factors listed in subsection (b) of section 7, the moving party shall include a description of efforts made to obtain such items and information and may move for discovery of such items or information from the prosecuting attorney or any third party.

"(d) The moving party shall file with the motion an affidavit stating that the moving party is factually

The defendant sought the appointment of legal counsel to assist him in presenting a motion under G. L. c. 278A, § 5, which provides that "[t]he court may assign or appoint counsel to represent a moving party who meets the definition of indigency under [G. L. c. 211D, § 2,] in the preparation and presentation of motions filed under this chapter." The judge denied the defendant's motion in a single-word order.

To be a valid motion under G. L. c. 278A, § 3, the motion must include "information demonstrating that the analysis has

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> innocent of the offense of conviction and that the requested forensic or scientific analysis will support the claim of innocence. A person who pleaded guilty or nolo contendere in the underlying case may file a motion. The court shall not find that identity was not or could not have been a material issue in the underlying case because of the plea. A person who is alleged to have, or admits to having, made a statement that is or could be incriminating may file a motion under this chapter. The court shall not find that identity was not or should not have been a material issue in the underlying case because the moving party made, or is alleged to have made, an incriminating statement. If the moving party entered a plea of guilty or nolo contendere to the offense of conviction or made an incriminating statement, the moving party shall state in the affidavit that the claim of factual innocence is made notwithstanding the plea or incriminating statement.
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> "(e) The court shall expeditiously review all motions filed and shall dismiss, without prejudice, any such motion without a hearing if the court determines, based on the information contained in the motion, that the motion does not meet the requirements set forth in this section. The prosecuting attorney may provide a response to the motion, to assist the court in considering whether the motion meets the requirement under this section. The court shall notify the moving party and the prosecuting attorney as to whether the motion is sufficient to proceed under this chapter or is dismissed."

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." G. L. c. 278A, § 3 (b) (4).

The defendant has included in his appendix some materials which may be read to indicate that a police sergeant who signed a letter admitted in evidence at trial, stating that certain bullets and casings matched the defendant's firearm, was interviewed, shortly after trial, to determine whether he understood "the instruments and the methods and procedures used" in determining from toolmarks whether shell casings or bullets matched a particular firearm. These documents are marked "Attachment 1," and we infer, though it is not certain from the materials before us, that they were presented to the judge below. The Commonwealth addresses them, and does not assert that any argument based on these materials has been waived.

Although these documents are not crystal clear, they may be read to indicate that "[a]n examiner interview and the review of a transcript of court testimony revealed that" this examiner "incorrectly described generally accepted terms and concepts pertaining to the recognition and comparison of microscopic characteristics used in the comparison process." As "remediation," the examiner was transferred out of the firearms identification section and to the division of field services within the State police.

The Commonwealth argues that this evidence is not material to identifying the perpetrator of the crime in this case because the defendant was seen shooting point blank into the car occupied by the victim and others. Indeed, the defendant testified at trial and described how and why he fired into the car. As the defendant points out in his reply brief, however, the Supreme Judicial Court rejected this reading of § 3 (b) (4) during the pendency of his appeal. Rather than limiting the statute to circumstances where the claim is that someone else was the perpetrator of the crime, the court concluded, in a case in which a homicide defendant alleged, as the defendant here does, that he acted in self-defense, "chapter 278A may be utilized by those defendants who assert that they are innocent because no crime occurred." Williams, 481 Mass. at 806.

In light of the recent decision in Williams, we will vacate the judge's order denying the motion for the appointment of counsel in order to allow the motion judge to reconsider the question of the need to appoint counsel, on which we express no opinion. We think it best for the motion judge to explore this question in the first instance as it relates both to the need for appointment of counsel to help the defendant prepare a motion under § 3, and to the defendant's entitlement to retesting under the statute. We express no opinion on the need for and propriety of such retesting.

4. Conclusion. The order denying the amended motion for postconviction relief is affirmed, the order denying the renewed motion seeking appointment of counsel under G. L. c. 278A, § 5, is vacated, and the case is remanded to the Superior Court for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Vuono, Rubin & Sacks, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: May 19, 2020.

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