SJC-11484

COMMONWEALTH vs. DERRICK D. WALLER.

Plymouth. February 10, 2020. - October 22, 2020.

Present: Gants, C.J., Lenk, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Homicide. Firearms. Evidence, Opinion. Practice, Criminal, Instructions to jury, Assistance of counsel, Capital case.

Indictments found and returned in the Superior Court Department on December 17, 2009.

The cases were tried before Frank M. Gaziano, J.

Dana Alan Curhan for the defendant.
Bridget Norton Middleton, Assistant District Attorney, for the Commonwealth.

LOWY, J. A jury found the defendant guilty of murder in the first degree and of unlawful possession of a firearm. The defendant asserts reversible error because one of the Commonwealth's key witnesses provided improper lay testimony on

[1] Chief Justice Gants participated in the deliberation on this case prior to his death.

the ultimate issue of the defendant's guilt. The defendant also argues that a substantial likelihood of a miscarriage of justice occurred because the judge erred by not providing a self-defense instruction sua sponte; because trial counsel was ineffective for requesting that the judge refrain from issuing that instruction in furtherance of an all-or-nothing strategy; and because the weight of the evidence did not support either verdict. We affirm and see no reason to exercise our authority under G. L. c. 278, § 33E.

1. Background. At around 2 A.M. on August 15, 2009, the victim, Delacey Hinton, died from a gunshot wound to the chest. The victim's neighbor, who had been with the victim on their shared porch, watched the victim descend stairs towards the street after a silver, four-door car approached. The neighbor then saw the driver stick a silver handgun out the window and heard two shots.

Hours before the murder, the defendant and his roommate went to a night club where the defendant's girlfriend worked and where the victim also happened to be. The defendant pointed out the victim to the roommate, explaining that the victim had previously slapped the mother of the defendant's child. As the club's closing time approached, an argument ensued between the defendant and the roommate, on one side, and the victim and his friends on the other. During the dispute, the victim asked one

friend if he had his "thing" on him, which the roommate interpreted to mean a gun.

As the victim was leaving the club, the defendant and the roommate harassed him in the parking lot. In response, the victim made a shooting gesture with his hands. As the victim drove out of the club's parking lot, the defendant and the roommate pursued, but they quickly gave up and returned to the parking lot to wait for the girlfriend's shift to end. The defendant, the roommate, and the girlfriend returned to the girlfriend's apartment at around 1:30 A.M.

Shortly before 2 A.M., the defendant told the girlfriend that he was going to the "dude's crib." He then took the girlfriend's car, a silver, four-door Infinity. The roommate attempted to accompany the defendant, but the defendant refused. The roommate and the girlfriend telephoned the defendant repeatedly between 1:57 A.M. and 2:05 A.M., when the defendant finally answered. When the defendant returned, at around 2:15 A.M., he went to the girlfriend's bathroom. In view of the roommate and the girlfriend, the defendant washed his hands, took out a chrome revolver with a wooden handle, and dumped two shells into the sink. The girlfriend testified that she previously had seen the same gun in the defendant's possession.

A short time later, the defendant exclaimed that he shot the victim two times and gestured as if aiming a gun: "[I] let

him have it" and "[I] hit him one time in the chest, he fell over and [I] gave him another one to go." The defendant also stated that he believed that the victim had been about to pull out a gun. The next morning, the defendant washed the girlfriend's car.

The police began investigating the defendant only hours after the murder. After finding out about the investigation, the defendant asked the girlfriend to be his alibi. He also told the roommate not to discuss the shooting, purchased the same clothes as the roommate so that they could "be twins," and accused the roommate of telling someone what had happened. Responding to these developments, the roommate fled to Ohio. Soon thereafter, the defendant fled to Indiana, where he lived under a false identity and where he was arrested for murder about one year later.

2. Discussion. a. Evidentiary issue. In explaining why he left Massachusetts so quickly, the roommate testified that he did not "want to be around [shootings]" and that he "didn't want to be a part of any of that, shootings and murders and stuff like that." The defendant argues that those statements constituted improper lay testimony concerning the ultimate issue: whether the defendant murdered the victim.

There was no error. The roommate did not testify to a lay opinion. See Commonwealth v. Canty, 466 Mass. 535, 541 (2013).

He explained why he left Massachusetts, and his testimony rebutted the defendant's insinuation that the roommate shot the victim. Moreover, the testimony did not directly implicate the defendant as the murderer. Rather, the roommate explained, in general terms, that he did not want to be around "shootings" or "murders" or "stuff like that."[2] See Commonwealth v. Lennon, 399 Mass. 443, 444-445 (1987) (no prejudice from improperly admitted witness statement, "I know who did it," while identifying defendant).

Even if the jury may have considered the testimony as evidence that the roommate believed that the defendant had committed the murder, the probative value of the evidence was not substantially outweighed by the danger of undue prejudice. See Commonwealth v. Goddard, 476 Mass. 443, 447 (2017); Mass. G. Evid. § 403 (2020). As mentioned, the roommate's explanation of why he abruptly left Massachusetts was particularly important

[2] "An opinion is not objectionable just because it embraces an ultimate issue." Mass. G. Evid. § 704 (2020). However, testimony providing an opinion as to guilt or innocence is not permissible because it invades the province of the jury and implicitly vouches for the credibility of witnesses. See, e.g., Commonwealth v. Colin C., 419 Mass. 54, 60 (1994) ("jury are capable" of assessing ultimate issue); Commonwealth v. Richardson, 423 Mass. 180, 185-186 (1996) (opinion on credibility of witness inadmissible as improper vouching). See also, Commonwealth v. Canty, 466 Mass. 535, 541-542 (2013) (limitations on expert opinion on ultimate issue also apply to lay testimony).

considering the defense's insinuation that the roommate might have fled because he had committed the crime.

b. Self-defense instruction. At trial, the judge contemplated whether to provide an instruction on self-defense because he anticipated that the defendant might request one. At sidebar, the judge discussed the issue with defense counsel, noting that there was sufficient evidence to support the self-defense instruction. The judge emphasized that "it's up to counsel" whether to pursue the defense.

At the close of evidence, after consulting with the defendant, defense counsel decided against seeking a self-defense instruction because he thought it would "undercut[] the defense" that the defendant did not commit the murder and was not present at the scene of the crime. The judge accordingly omitted the instruction.

The defendant now argues that the judge committed reversible error by not providing the instruction and that his trial counsel provided ineffective assistance for strategically deciding against requesting such an instruction. Neither claim has merit.

When requested by either the Commonwealth or the defendant, a judge must instruct on self-defense if the evidence in the light most favorable to the defendant warrants an instruction. See Commonwealth v. Souza, 428 Mass. 478, 486 (1998). However,

a judge has no obligation to instruct when neither party requests, because doing so may "interfere[] with the defendants' right to present their chosen defenses," especially where defendants expressly decide against the instruction in pursuit of an all-or-nothing defense. Commonwealth v. Norris, 462 Mass. 131, 144 (2012). See Souza, supra. Cf. Commonwealth v. Salazar, 481 Mass. 105, 114 (2018) ("It is a well-known and time honored approach to avoid emphasizing a defense that would undermine a primary defense theory" [quotations and citation omitted]); Commonwealth v. Roberts, 407 Mass. 731, 737 (1990) ("The theory of law on which by assent a case is tried cannot be disregarded when the case comes before an appellate court for review" [citation omitted]).[3] The evidence at trial for a self-defense instruction was weak, at best, considering the defendant affirmatively sought out the "dude's crib" before he shot the victim, and the defendant, as determined by the judge's thorough colloquies, chose not to pursue the defense. Therefore, the instruction would have "undermine[d the defendant's] central"

[3] A judge nonetheless still retains discretion "to instruct on a theory of self-defense . . . supported by the evidence even where the defendant [or Commonwealth] has not so requested." Norris, 462 Mass. at 144 n.12. Cf. Commonwealth v. Woodward, 427 Mass. 659, 664-665 (1998) (judicial instructions on lesser included offense, even over defendant's objection, allow jury to reach verdict supported by evidence); Commonwealth v. Jackson, 419 Mass. 716, 725 n.8 (1995) (judge properly gave instruction on lesser included offense, no matter that defendant pursued all-or-nothing defense).

defense that the defendant was not the shooter and that the Commonwealth could not even prove that he was at the scene of the crime. Norris, supra at 143. The judge did not abuse his discretion by deciding to abide by the defendant's request not to provide the self-defense instruction.

As for the defendant's ineffective assistance of counsel claim, defense counsel strategically decided against requesting the self-defense instruction. See Norris, 462 Mass. at 142-143. The defendant has the right to pursue an all-or-nothing defense, and he specifically provided his assent to the judge regarding this strategic choice. See Roberts, 407 Mass. at 737. Cf. Commonwealth v. Pagan, 35 Mass. App. Ct. 788, 792 (1994) (judge has no duty to undercut defendant's all-or-nothing strategy). Therefore, defense counsel's strategic decision was not "manifestly unreasonable". See Commonwealth v. Kolenovic, 471 Mass. 664, 674 (2015). Cf. Commonwealth v. Goitia, 480 Mass. 763, 774-775 (2018) (not requesting limiting instruction was tactical decision that did not create substantial likelihood of miscarriage of justice); Commonwealth v. Wright, 479 Mass. 124, 139 (2018) (no ineffective assistance of counsel where there was clear reason not to pursue lack of criminal responsibility defense).

c. Weight of the evidence. The defendant asks us to exercise our authority pursuant to G. L. c. 278, § 33E, to

reduce his verdict or to grant him a new trial because the weight of the evidence does not support the conviction. See Commonwealth v. Berry, 466 Mass. 763, 770 (2014). According to the defendant, the roommate's and the girlfriend's testimony were unreliable because each had an incentive to lie: the roommate had been a suspect in the shooting, and the inconsistency between the girlfriend's statements to the police during the initial investigation and her testimony at trial demonstrated her motivation to assist the Commonwealth upon receiving a grant of immunity. We disagree.

We do not act as a second jury. Commonwealth v. Franklin, 465 Mass. 895, 916 (2013). Section 33E provides us the authority to grant a new trial as against the weight of the evidence if the verdict, "if allowed to stand, would work a miscarriage of justice" (citation omitted). Id.

Defense counsel vigorously impeached the credibility of the roommate and the girlfriend, and the jury are the ultimate arbiters of credibility. See Franklin, 465 Mass. at 916. The Commonwealth also presented compelling and substantial evidence that the defendant committed the murder, including that he possessed a firearm; that he argued with the victim earlier that evening due to an ongoing dispute; that the car the defendant drove to the victim's "crib" at the time of the shooting matched the description of the car driven by the shooter; that the

roommate and the girlfriend repeatedly called the defendant's cell phone at around the time of the murder, but their calls went unanswered; that when the defendant returned to the girlfriend's apartment shortly after the time of the shooting, he had a chrome-colored gun, which matched the description of the murder weapon, and from which he discharged two shell casings; that the defendant told the girlfriend and the roommate that he had shot "him" twice, matching the number of the victim's gunshot wounds; that the next morning the defendant washed the car he had driven; that the defendant asked his girlfriend to be his alibi and sought to shift blame for the murder to the roommate by subsequently purchasing clothes identical to those the roommate had been wearing that evening; and that the defendant fled Massachusetts and assumed a false identity in Indiana because of consciousness of guilt. The weight of the Commonwealth's evidence amply supported the jury's verdict, and that verdict was consonant with justice.

We have reviewed the entire record and find no basis to set aside the verdict of murder in the first degree or to order a new trial pursuant to our power under G. L. c. 278, § 33E.

Judgments affirmed.