United States Court of Appeals
For the First Circuit

No. 17-1814

QUILLIE MERLE SPRAY,

Petitioner, Appellant,

v.

KELLY A. RYAN, Superintendent of MCI - Shirley,

Respondent, Appellee.

Before

Howard, Chief Judge,
Lynch and Barron, Circuit Judges.

JUDGMENT

Entered: February 19, 2019

Petitioner-Appellant Quillie Merle Spray appeals from the order of the district court denying his petition for habeas corpus, filed pursuant to 28 U.S.C. §2254. We review the district court's denial of habeas relief de novo. Moore v. Dickhaut, 842 F.3d 97, 99 (1st Cir. 2016). We have carefully reviewed all of the parties' submissions, and the record. Essentially for the reasons set forth in the magistrate judge's Report and Recommendation dated June 1, 2017 (and adopted by the district court judge on August 8, 2017), we affirm the order denying the petition.

The judgment of the district court is affirmed. See 1st Cir. R. 27.0(c).

Spray's Motion for Appointment of Counsel is denied.

So ordered.

By the Court:

Maria R. Hamilton, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Quille Merle Spray
Petitioner

V.

Kelly Ryan
Respondent

CIVIL ACTION

NO. 1:14-cv-13877-PBS

ORDER OF DISMISSAL

SARIS, C.J.

In accordance with Court's Order dated August 8, 2017 adopting Report and Recommendation and Denying Petitioner's Writ of Habeas Corpus (28:2254) (Docket No. 1) , it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

8/9/2017
Date

/s/ C. Geraldino-Karasek
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

QUILLIE MERLE SPRAY, Petitioner, v. KELLY RYAN, Superintendent Respondent.	)	Civil Action No. 1:14-cv-13877-PBS

REPORT AND RECOMMENDATION ON
PETITION FOR WRIT OF HABEAS CORPUS

June 1, 2017

BOAL, M.J.

On October 16, 2014, Quillie Merle Spray II ("Spray"), who was convicted of first degree murder and is currently serving a life sentence in a Massachusetts correctional facility, petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Docket No. 1 (the "Petition"). Respondent Kelly Ryan ("Respondent") opposes the Petition. Docket No. 22.

This case arose from the stabbing death of Sherylann Miller on December 9, 2000. Spray, who worked as a tiler at the restaurant Miller managed, killed her after a physical altercation in the back room of the restaurant. Spray raises one claim in the Petition, alleging that his trial counsel did not provide him with constitutionally required effective assistance of counsel. Specifically, Spray contends that his counsel failed to investigate and present a mental health defense at trial. Docket No. 18 at p. 1; Docket No. 1 at p. 5.

For the reasons set forth below, I recommend that the District Judge DENY the Petition.

I. PROCEDURAL HISTORY

Spray was charged and tried on four separate counts: (1) murder; (2) assault and battery by means of a dangerous weapon; (3) possession of a firearm in a motor vehicle; and (4) possession of ammunition without a firearm identification card. Supplemental Answer ("S.A."), Ex. 1, p. 10. On January 21, 2003, after a two-week trial at which Spray testified, a jury found Spray guilty of first-degree murder by reason of extreme atrocity or cruelty, and assault and battery by means of a dangerous weapon. S.A., Ex. 24. After the jury rendered the verdict, the trial judge dismissed the assault and battery count as merged with the first-degree murder count. Id. at p. 15. The jury returned not guilty verdicts on the firearm and ammunition counts. Id. at pp. 4-5.

On July 16, 2010, Spray filed a second motion for a new trial,[1] and raised the same claim that forms the basis of this Petition—ineffective assistance of counsel. S.A., Ex. 1, p. 8; S.A., Ex. 6. On September 18, 2012, the trial court denied Spray's second motion for a new trial, and on October 25, 2012, Spray filed a notice of appeal of the order denying his second motion for a new trial. S.A. Ex. 1, p. 10; S.A. Ex. 10. On January 7, 2013, the SJC consolidated Spray's direct appeal, as well as appeals from his motions for a new trial, and on March 13, 2014, affirmed Spray's conviction and the orders denying his two motions for a new trial. Spray, 467 Mass. 456, 477 (2014); S.A. Ex. 17.

On October 16, 2014, Spray filed the instant Petition. Docket. No. 1. On January 6, 2015, Respondent filed an answer. Docket No. 12. On March 16, 2015, Spray filed his

[1] On February 28, 2007, pursuant to Mass. R. Crim. P. 30(b), Spray filed his first motion for a new trial on the ground that two eyewitnesses had recanted pre-trial affidavits and trial testimony. S.A., Ex., 1, p. 7; S.A. Ex. 3. On June 22, 2007, the trial court denied Spray's first motion for a new trial, and on February 13, 2003, Spray filed a notice of appeal of the order denying his motion. S.A., Ex. 5. The claims raised in Spray's first motion are not raised in the Petition. See S.A., Ex. 3; Docket No. 18.

Memorandum of Law in Support of Petition for Writ of Habeas Corpus. Docket No. 18. On July 27, 2015, Respondent filed her Opposition. Docket No. 22.

II. FACTUAL BACKGROUND[2]

The SJC found the following facts:

> *a. Facts.*
>
> Based on the evidence at trial, the jury could have found the following. In December, 2000, a fast-food restaurant was under construction in Clinton. The defendant, his brother Gary Spray, his sister-in-law Monica Spray, and his cousin Thomas Barron, who lived in Oklahoma and all worked together on tiling jobs there, were hired to install tile in that restaurant. The defendant, Gary, Monica, and occasionally Thomas had worked in similar jobs across the country; Gary and Monica often worked as a team on such jobs, while the defendant worked by himself.
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> Gary, Monica, and Thomas initially were solely responsible for the December 2000, job in Clinton. However, they were delayed in starting the 1,500-mile drive to Massachusetts, and the defendant decided to travel to Clinton as well. He drove to Massachusetts alone, arriving in Clinton in the early morning hours of Thursday, December 7, 2000. Gary, Monica, and Thomas arrived in a separate vehicle late that afternoon; their arrival was delayed by an unscheduled stop in St. Louis, where they had "a little drug party" involving mostly methamphetamines. While at the job site on Friday, the defendant and Gary spoke with the general contractor, who observed that they were already behind schedule.
>
> The victim, Sherylann Miller, was also present at the construction site where the defendant and his relatives were working. Miller was the general manager of the future restaurant, and was in the process of accepting job applications and conducting interviews for employment there. Since the heating system had yet to be installed, the area was being kept warm by propane heaters. At one point, the defendant heard the victim say that she was cold, and suggested that they move closer to the heater; she also apologized to the defendant when she stepped on freshly laid tile. The two had no prior relationship and did not interact any further that day.
>
> At approximately 4 P.M. on Saturday, December 9, the defendant, Gary, Monica, and Thomas were working at the job site when the defendant walked out the door. The other three continued to install tile until they heard the victim "hollering," "No, don't!" and "Stop, stop!" Monica turned

[2] Absent clear and convincing evidence to the contrary, the recitation of the facts by the SJC is presumed to be correct. See 28 U.S.C. § 2254(e)(1); Gunter v. Maloney, 291 F.3d 74, 76 (1st Cir. 2002); Evans v. Thompson, 518 F.3d 1, 3 (1st Cir. 2008).

around to see the defendant "wrestling" with the victim and "punching on her" while "dragging her backwards." Thomas saw the defendant holding the victim "around the waist or kind of in a bear hug."

Monica began "jumping up and down and hitting herself in the chest," and said to Gary, "It's Merle, it's Merle." Gary turned around to see the defendant "punching [the victim] in the back." Gary ran to the defendant, pushed him against the wall, and asked, "What the fuck are you doing? What are you doing to this lady?" The defendant responded, "We'll tell them somebody else done it." By that time, the victim had fallen to the floor and a large amount of blood had begun to flow from her body. Gary directed Monica and Thomas to telephone for help. Monica ran to a nearby gasoline station and the attendant there telephoned 911. The defendant walked to the front of the restaurant, saying, "Let's get this tile laid so we can get out of here and go to the house."

Clinton police responded within two minutes of receiving the 911 call. They encountered the family in various states of shock outside the restaurant. Monica was "hysterical"; Thomas was pacing nervously and crying; and Gary was standing over the defendant, yelling repeatedly, "What the fuck did you do that for?" The defendant was sitting on the curb outside the restaurant, acting "very calm" and not seeming at all upset. Monica pointed to the defendant and said, "He stabbed her, he did it." Thomas and Gary also indicated to police that the defendant had stabbed the victim. In response to questions regarding the whereabouts of the weapon, Gary stated that the defendant had had a knife, and that it had a green handle and a blade approximately five inches in length.

Police found the victim lying on the floor in the back of the restaurant with a large pool of blood around her head. The victim was transported to a local hospital, and then transferred via helicopter to a hospital in Worcester, where she was pronounced dead in the early morning hours of the following day.

Shortly after police arrived and his relatives identified him as the one who had stabbed the victim, the defendant was arrested, handcuffed, and placed in a police cruiser. Gary continued to yell at the defendant while he sat in the cruiser, "What are you doing, you didn't even know her." Monica was permitted to change clothes and throw out the clothing she had been wearing, as she had soiled herself.

The defendant, Gary, Monica, and Thomas were transported in separate police cruisers to the Clinton police station. There, Gary, Monica, and Thomas each gave a written statement while sitting in separate rooms; police observed that none appeared to be under the influence of drugs or alcohol. Gary again provided a description of the weapon used in the attack, and said that he had seen the defendant kneel down beside a bucket at the scene. Officers located the bucket, filled with dirty water and plaster or mud, and retrieved a green-handled knife with a serrated edge from it; a red-

handled knife was also recovered from the scene. The green-handled knife was brought back to the police station where Gary identified it as belonging to the defendant.

While the defendant was booked and fingerprinted, officers observed a cut on his left hand. A Clinton police officer and a State trooper interviewed the defendant after reading him the Miranda rights and presenting him with a card listing those rights, which he initialed. The defendant agreed to speak with police, and to allow police to transcribe his statement. During the interview, the defendant denied having had anything to do with the stabbing; police described him as "calm, cool, collected, very cooperative," and said that he did not appear to be under the influence of drugs or alcohol. Later that evening, the defendant's vehicle was towed; an inventory search produced an unlicensed firearm, ammunition, and spent shell casings.

At approximately 2 A.M. Sunday morning, police learned that the victim had died as a result of her injuries, and booked the defendant on the additional charge of murder. Later that afternoon, after advising him of the Miranda rights, and procuring a waiver of his right to a prompt arraignment pursuant to Commonwealth v. Rosario, 422 Mass. 48 (1996), police again interviewed the defendant. He denied knowing anything about the source of the victim's injuries, but, in response to repeated questioning, eventually stated, "If I did do it, I didn't mean to kill her."

An autopsy revealed that the victim died as a result of six stab wounds to the neck, and that her injuries were consistent with having been stabbed from behind. Two of the wounds severed her spinal cord. Forensic testing established that a sample from a blood stain on the defendant's shirt cuff matched the victim's blood. A hair matching the victim's was found on the green knife, as well as a piece of fabric that was consistent with the fabric of the jacket that the victim was wearing at the time of the attack.

* * *

e. *Second motion for new trial.*

In July, 2010, represented by new appellate counsel, the defendant filed a second motion for a new trial. He argued that trial counsel was ineffective for failing to investigate a defense based on lack of criminal responsibility, where posttrial [sic] investigation yielded substantial evidence that the defendant's mental health was impaired at the time of the stabbing. According to the defendant, affidavits of various family members and documentary evidence revealed his significant history of alcohol and methamphetamine abuse; previous psychotic episodes, including hallucinations, potentially associated with methamphetamine abuse; and the presence of various "stressors" in his life at the time of the killing. Given the unusual and apparently motiveless circumstances of the crime, and the strength of the evidence against him, the defendant asserted that trial counsel "should have recognized his prospects for acquittal were minimal—even nonexistent" and instead pursued the "obvious alternative" of a

defense premised on his mental state. The defendant argued that, had evidence related to his mental state been presented to the jury, it could have influenced the verdict.

A judge who was not the trial judge denied the motion after a hearing at which a clinical psychologist, trial counsel, and the defendant testified. The psychologist, Dr. Helene Presskreischer, opined that it was most likely that, at the time of the stabbing, the defendant was suffering from a spontaneous recurrence of a methamphetamine-induced psychosis and acted in what he perceived to be self-defense; this psychosis would have affected his ability to appreciate the wrongfulness of, and to control, his behavior such that he could have been found not guilty by reason of insanity. Presskreischer's opinion was based on the defendant's nearly twenty-year history of chronic methamphetamine abuse beginning at the age of fourteen; prior incidents of hallucinations; and certain "stressors" in his life at the time of the killing, including his father's recent death and the defendant's having taken over the family tiling business, his ongoing divorce, and the stressful and noisy working environment prior to the murder.

Presskreischer testified to her review of a number of medical records and reports concerning the defendant's previous psychotic episodes. In 1997, three years before the stabbing, he was observed waving and yelling at motorists driving by his home. Police transported him to a community health center, where he reported that someone was trying to kill him and that he had seen four satellites collide over his house; he was diagnosed with amphetamine-induced psychotic disorder, with hallucination. Sometime after his father's death in 1999, the defendant's mother observed the defendant "talking crazy" and, concerned, asked his cousin Terry to come to the house. When Terry arrived, the defendant was moving about his house as if to evade detection, and was frightened that someone was trying to kill him. Terry took him to the hospital. Several months before the stabbing, Gary found the defendant in "stocking feet" outside his home, standing in snow and ice, holding a gun. He discovered that the defendant had shot bullet holes in his bathroom ceiling and garage door, in order to fend off intruders who he believed were trying to kill him. No evidence of intruders was discovered.

Presskreischer opined that, based on her observations of the defendant during their meetings, he continued to suffer from residual psychosis. She also testified to the long-term effects of methamphetamine abuse. She said that chronic abuse of the drug can lead to structural changes in the brain that may cause up to three-quarters of abusers to experience psychotic episodes. She testified further that, even when active drug use has ceased, users can experience "flashbacks," or spontaneous recurrences of psychotic episodes, that may be triggered by even mild "psychosocial stressors." While the specific diagnosis of spontaneous recurrence of methamphetamine-induced psychosis was not listed in the edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) that was current at the time of trial, that

> edition did include a chapter on amphetamine-induced disorders; Presskreischer also submitted a bibliography of articles on the topic published in peer-reviewed journals before the date of the stabbing.
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> The judge found that "the post-trial affidavits and expert testimony of Dr. Presskreischer suggest that methamphetamine psychosis may have been a viable defense," but nonetheless concluded that "the facts known to, or accessible to [trial counsel], did not raise a reasonable doubt as to the defendant's mental state" and that "[t]he investigation conducted by [trial counsel] was constitutionally effective based on the information available to her." The judge noted that trial counsel met with the defendant approximately twelve times prior to trial, and during such meetings, the defendant consistently maintained his innocence. Although he told trial counsel of his history of drug abuse, the defendant also stated that he was not under the influence of methamphetamine or other drugs at the time of the crime, and that he had not used any drugs on the day of the stabbing. The judge found that trial counsel conducted a reasonable investigation of the defendant's family; the defendant's mother provided the name of an Oklahoma facility where the defendant received drug and mental health treatment as a teenager, but trial counsel was unsuccessful in obtaining medical records from that facility. The judge found that trial counsel was not otherwise on notice of any mental health problems affecting the defendant, and did not observe or learn of any instances of hallucinations, delusions, or other indicators of mental illness.

Spray, 467 Mass. at 458-66.

III. DISCUSSION

A. Habeas Corpus Standard of Review

Spray may not obtain federal habeas relief under 28 U.S.C. § 2254(d) unless he can show that the SJC's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The "contrary to" prong is satisfied when the state court "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," Williams v. Taylor, 529 U.S. 362, 405 (2000), or if "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a [different] result." Id. at 406. The "unreasonable application" prong is satisfied if the state court "identifies

the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. 413. In reviewing a case under § 2254(d)(1), "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." Id. at 410.

The AEDPA also allows relief from a state court judgment if that judgment is based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). "Under this standard, 'the state court's factual findings are entitled to a presumption of correctness that can be rebutted only by clear and convincing evidence to the contrary.'" RaShad v. Walsh, 300 F.3d 27, 35 (1st Cir. 2002) (citations omitted). "Unless the petitioner can carry this heavy burden, a federal habeas court must credit the state court's findings of fact." Id. (citations omitted).

B. Sixth Amendment Right to Effective Assistance of Counsel

Spray argues that he did not receive constitutionally effective assistance from his trial counsel because she failed to investigate and present a mental health defense at trial.

1. Ineffective Assistance of Counsel Standard

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST., amend. VI. The right to the assistance of counsel implicitly includes the right to *effective* counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984).

Clearly established federal law governing ineffective assistance of counsel claims is based primarily on the principles set forth in Strickland. Under the Strickland analysis, Spray must show that: (1) counsel's performance was deficient, i.e. counsel made errors so serious that counsel was not functioning as "counsel" as guaranteed by the Sixth Amendment; and, (2) the

deficient performance prejudiced the defense, i.e. counsel's errors were so serious as to deprive the defendant of a fair trial. Strickland, 466 U.S. at 687.

Not every lawyerly slip constitutes ineffective assistance of counsel for Sixth Amendment purposes. Id. at 693. "Judicial scrutiny of counsel's performance must be highly deferential" and "every effort [should] be made to eliminate the distorting effects of hindsight." Id. at 689. This Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1995)).

To satisfy the first prong of the Strickland test, Spray must show that trial counsel's performance was deficient to the point of being "objectively unreasonable." See United States v. McGill, 11 F.3d 223, 226 (1st Cir. 1993); Companonio v. O'Brien, 672 F.3d 101, 109 (1st Cir. 2012). Reasonable conduct falls "within the range of competence demanded of attorneys in criminal cases." United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978) (quoting McMann v. Richardson, 397 U.S. 759, 770-71 (1970)). In other words, performance is constitutionally deficient "only if no competent attorney would have acted as [counsel] did." Companonio, 672 F.3d at 110.

To establish prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." Harrington v. Richter, 562 U.S. 86, 111

(2011). Rather, "the likelihood of different result must be substantial, not just conceivable." Id. at 792.

Because all of the appeals were consolidated, the SJC reviewed Spray's claim of ineffective assistance of counsel under the "substantial likelihood of a miscarriage of justice standard." Spray, 467 Mass. at 471. Accordingly, the SJC, citing Commonwealth v. Wright, 411 Mass. 678, 681 (1992), stated that it would consider "whether there was an error in the course of the trial . . . and, if there was, whether that error was likely to have influenced the jury's conclusion." Spray, 467 Mass. at 472. This standard is more favorable to Spray than both the Strickland standard and the Massachusetts constitutional standard. See Kirwan v. Spencer, 631 F.3d 582, 590, n. 3 (1st Cir. 2011); Knight v. Spencer, 447 F.3d 6, 10 (1st Cir. 2006). "Because the standard that the SJC employed is at least as protective of the defendant's rights as its federal counterpart, [this Court] may defer under section 2254(d)(1) to its determination." Kirwan, 631 F.3d at 590, n. 3 (internal citation and quotation marks omitted). Further, the First Circuit has held that where the SJC applies the more favorable "substantial likelihood of a miscarriage of justice" standard, its decision will not be deemed "contrary to" the Strickland criteria. Knight, 447 F.3d at 24.

Accordingly, the pivotal issue for this Court is whether the SJC's decision was unreasonable under the Strickland standard. Harrington, 562 U.S. at 101. "This is different from asking whether defense counsel's performance fell below Strickland's standard." Id. "Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d)." Id. at 105. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id.

Because the Strickland standard is a general one, the range of reasonable applications of Strickland is substantial. Harrington, 562 U.S. at 105. Further, "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under the Strickland standard itself." Id. at 785. The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. Id. at 788 (internal quotations and citations omitted.).

2. Discussion

In his second motion for a new trial, Spray argued that his trial counsel was ineffective for failing to investigate a mental health condition that may have led to the presentation of a mental health defense at trial. S.A., Ex. 6. According to evidence elicited from a post-trial investigation, Spray was likely suffering from some form of mental health disorder at the time of the stabbing. Id. Spray argued that if this evidence had been presented to the jury, it would have had a substantial possibility of influencing the outcome of his trial. Id.

At the SJC, Spray argued that the motion judge disregarded significant evidence relating to his trial counsel's failure to investigate into his mental health. S.A. Ex. 17, Ex. 13, pp. 11-12. Spray argued that this failure constituted inadequate assistance of counsel in light of not only the strengths of the mental health defense, but the weaknesses of an actual innocence defense. Id. at p. 12. Under this theory, Spray contended that his trial counsel not only had notice of a potential mental health condition, but that his counsel improperly substituted her own judgment for that of a mental health professional in deciding not to investigate. Id. at p. 15. Such improper substitution, Spray argued, caused his counsel to forego any consideration of investigating or presenting a mental health defense. Id. at pp. 16-18.

The SJC recognized that the failure to raise a substantial defense, including an insanity defense, may be considered ineffective assistance of counsel, but only where the jury verdict would have been different if the error had not been made. Spray, 467 Mass. at 472 (citing Commonwealth v. Sena, 429 Mass. 590, 595 (1999)). Ultimately, the SJC found that Spray's counsel's performance was neither deficient nor prejudicial. This Court finds that the SJC's decision was neither contrary to, nor an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

a. Counsel's Performance

Spray argues that due to the overwhelming nature of the evidence against him, lack of motive, past drug use, and past mental health treatment, his counsel's decision to present a defense of actual innocence constituted ineffective assistance of counsel. Docket No. 18 at p. 25.

The role of a federal habeas court in evaluating whether counsel's performance was deficient is to view the performance subjectively from the point of view of trial counsel, and with a deferential slant with regard to professional judgment. Ouber v. Guarino, 293 F.3d 19, 25 (1st Cir. 2002). "[A] reviewing court must not lean too heavily on hindsight" and should review a tactical decision on the basis of what counsel actually knew or should have known at the time they made the decision. Id. (quoting Bell v. Cone, 535 U.S. 685, 701 (2002)). A court "must respect counsel's strategic choices, recognizing that 'the law does not require counsel to raise every available nonfrivolous defense.'" U.S. v. Arias, 94 F. Supp. 3d 93, 102 (D. Mass. 2015) (Section 2255 case)(quoting Knowles v. Mirzayance, 556 U.S. 111, 127 (2009)).

According to the SJC, it was reasonable to determine that the facts and circumstances which were known, or reasonably should have been known by counsel at the time she decided to pursue a defense of actual innocence did not amount to notice of a need to investigate a mental

health defense. The SJC also found that at all times prior to trial, Spray maintained his innocence, and never suggested to his counsel that he may have committed the stabbing at any of his twelve meetings with his counsel. Spray, 467 Mass. at 474. Spray did discuss his history of past methamphetamine use with counsel, but stated that he was neither under the influence of methamphetamine or other drugs on the day of the stabbing, nor had he used any drugs that day. Id.

Importantly, however, Spray did notify his counsel that as a teenager, he had received treatment for alcohol abuse at a facility in Oklahoma. Spray, 467 Mass. at 474. Viewing Spray's past treatment as a potential source of relevant information regarding his mental health, his counsel interviewed Spray's mother, who contradicted the statement that the treatment had been for alcohol abuse. Id. at 475. According to Spray's mother, the treatment had been for drug abuse and other mental health treatment. Counsel subsequently attempted to obtain copies of Spray's twenty year-old medical records from the Oklahoma facility, but was unsuccessful. Id. Counsel also interviewed Spray's family members regarding his past treatment, but as the SJC found, the investigation uncovered no concrete information that would have put counsel on notice of the need to order a psychiatric evaluation. Spray, 467 Mass. at 474-6.

The SJC further found that counsel's awareness of the existence of these old records was the only indication that Spray's counsel knew about any of Spray's past issues with mental health disorders. Id. In the absence of any contemporary and concrete information, the SJC's finding that there was not sufficient information available to characterize counsel's decision as unprofessional was not an unreasonable determination of fact.

The SJC further found Spray's counsel could not reasonably have known that chronic methamphetamine abuse gives rise to potential drug induced psychoses, and therefore could lead

to a successful lack of criminal responsibility defense if properly investigated and presented. Id. at 476-77. The SJC noted that in the early 2000s there was only "limited prevalence of methamphetamine use in the Commonwealth" and consequently attorneys had limited exposure to methamphetamine-induced psychosis. Id. at 476. Spray did not exhibit any hallucinatory behavior during the trial preparation or the trial itself. Id. at 474. In addition, Spray's post-trial evaluating psychiatrist verified that counsel's unfamiliarity was justifiable. Id. at 475-77.

The cases cited by Spray to support his position are distinguishable. For example, in Genius v. Pepe, 50 F.3d 60 (1st Cir. 1995), a court-appointed psychiatrist testified that the petitioner was mentally deficient but not criminally responsible and the petitioner was sent to be evaluated to determine whether he was incompetent to stand trial. Those circumstances are not present in this case.

Similarly, the other cases cited by Spray are inapposite. In each of those cases, courts found that counsel was constitutionally ineffective because there was concrete evidence regarding mental health issues and, therefore, counsel was on notice of the petitioners' psychiatric disorders.[3] Here, Spray points to the facts of the crime itself, Spray's drug use, and

[3] See Jacobs v. Horn, 395 F.3d 92 (3d Cir. 2005) (finding that where trial counsel *actually presented a diminished capacity defense*, but failed to adequately support it through investigation, the petitioner had not received effective assistance of counsel); Newman v. Harrington, 726 F.3d 921 (7th Cir. 2013) (finding that because the petitioner's mother provided counsel with copies of psychiatric evaluation records reflecting a long history of severe mental and cognitive disabilities in the first meeting between counsel and the petitioner, the failure to investigate into the petitioner's mental fitness was ineffective assistance of counsel.); Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002) (finding that where counsel failed to consult with a psychiatrist that had examined the petitioner while represented by different counsel, and failed to investigate a prior court-ordered involuntary commitment for psychiatric evaluation of which counsel had knowledge, the petitioner had not received effective assistance of counsel); Seidel v. Merkel, 146 F.3d 750, 755 (9th Cir. 1998) (finding that where counsel failed to investigate knowing that the petitioner had been treated by a prison psychiatrist while awaiting trial, petitioner's medical records indicated previous treatment at a Department of Veterans Affairs hospital for a mental disorder, and that the petitioner's Own Recognizance Report prepared in

Spray's mother's mention of prior mental health treatment for which counsel tried but was unable to obtain any record. However, the SJC acknowledged the existence of this information and still concluded that Spray's counsel was "not under a constitutional duty to undertake a supplemental investigation." Spray, 467 at 476. This conclusion is consistent with federal law.

Spray also points to the SJC's acknowledgement that "another attorney might well have investigated the psychological effects of [methamphetamine] . . . abuse." Docket No. 18, p. 21(quoting Spray, 467 Mass. at 476). Spray argues that potentially persuasive information would have been revealed had such an investigation been conducted. Id. This line of argument, however, is precisely the kind of second-guessing that federal law proscribes as constituting grounds for habeas relief. See Strickland, 466 U.S. at 689. Indeed, the SJC agreed that while the decision not to conduct further investigation may in retrospect have been incorrect, it correctly decided that the actionable issue is not whether it was a sound decision, but whether counsel was under a constitutional duty to investigate further. Spray, 467 Mass. at 476. "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Requiring counsel in all instances to disregard their own assessment of the value of conducting extensive psychological investigation only serves to "promote costly defensive lawyering focused not on the specifics of the case counsel is actually defending, but on the avoidance of post-trial allegations of ineffectiveness." Rosado v. Allen, 482 F. Supp. 2d 94, 107

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advance of a bail hearing documented previous psychiatric treatment, the petitioner had not received effective assistance of counsel.); Frazier v. Huffman, 343 F.3d 780, 794 (6th Cir. 2003) (finding that where counsel failed to investigate but was aware of an injury to the part of petitioner's brain responsible for decision-making, impulse control, and reasoning, yet failed to order a psychiatric evaluation, the petitioner had not received effective assistance of counsel.

(D. Mass. 2007). "A lawyer certainly need not consult a psychological expert in every case in which the defendant has exhibited anti-social tendencies in the past." Id. An attorney, therefore, necessarily must make the decision to investigate further based at least in part on their own assessment of their client. "Pursuing any line of inquiry involves some use of time and distracts in some degree from other possible defenses that might be pursued." Genius, 147 F.3d at 67. Put another way, this Court may only find the SJC's decision unreasonable where counsel had substantially more than a mere inclination that a psychiatric evaluation might be fruitful.

Here, an evaluation of Spray may have yielded results that would have permitted counsel to present a lack of criminal responsibility defense, and another attorney may have ordered the evaluation based on the information before counsel in this matter. However, Spray's counsel's investigation did not produce any indications sufficient for this Court to determine that it was unreasonable for the SJC to decide that the failure to order an evaluation was not a complete departure from established professional norms. See Rompilla v. Beard, 545 U.S. 374, 383 (2005) ("reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste").

Consistent with Strickland, the SJC also properly considered Spray's own actions and their effect on the overall determination of reasonableness of counsel's decision not to investigate further. Strickland, 446 U.S. at 691. As the SJC noted, Spray consistently maintained his innocence prior to trial. Spray, 467 Mass. at 473. Accordingly, he gave his counsel "reason to believe that pursuing [further] investigations would be fruitless." Id. Accordingly, this Court finds that the SJC's decision that the failure of Spray's counsel to further investigate into Spray's mental health was not unreasonable.

b. Prejudice

Not only must Spray show that his trial counsel's performance fell below constitutionally sufficient standards, but he must also show that, but for such conduct, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694.

The SJC reviewed Spray's ineffective assistance of counsel claim by asking "whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge and, if there was, whether that error was likely to have influenced the jury's conclusion." Spray, 467 Mass. at 472 (quoting Commonwealth v. Wright, 411 Mass. 678, 682 (1992)). Further, the SJC asked whether—in the event Spray's counsel committed an error—it was "substantially confident that, if the error had not been made, the jury verdict would have been the same." Id. (quoting Commonwealth v. Ruddock, 428 Mass. 288, 292, n. 3 (1998)). The SJC found that even under this standard, which is more favorable to Spray than the standard articulated in Strickland, the decision to present an actual innocence defense was not prejudicial. Id.

Spray argues that "clearly [he] would have had a better chance of prevailing at trial if counsel had presented a defense of a lack of criminal responsibility." Docket No. 18 at p. 32. Spray speculates that a psychiatric evaluation "would have uncovered details that would have led to an insanity defense, and such a defense would have been more logical and viable given the circumstances of the incident." Id. at p. 35. Although the SJC ultimately rejected his argument that the decision to present an actual innocence defense was prejudicial, Spray alleges that even the SJC acknowledged an insanity defense was more viable than a defense of actual innocence. Id. However, this overstates the SJC's opinion, which concluded that the insanity defense "*might have been* a more powerful defense." Spray, 467 Mass. at 476 (emphasis added). In fact, although the SJC appeared to endorse the insanity defense as a potentially stronger defense, it did

not directly analyze the issue of whether the decision to present an actual innocence defense was prejudicial. Accordingly, this Court finds that while the evidence Spray outlines in his memorandum may create a doubt as to whether the trial would have ended with a different result, the doubt is not so substantial that it rises to the level of prejudicial, and therefore the SJC's decision was not unreasonable. Harrington, 562 U.S. at 111.

Accordingly, Spray fails to demonstrate prejudice.

IV. RECOMMENDATION

For the foregoing reasons, I recommend that the Court DENY the Petitioner Quillie Merle Spray II's Petition for Writ of Habeas Corpus in its entirety.

V. REVIEW BY DISTRICT JUDGE

The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72(b), any party who objects to these proposed findings and recommendations must file specific written objections thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made, and the basis for such objections. See Fed. R. Civ. P. 72 and Habeas Corpus Rule 8(b). The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Fed. R. Civ. P. 72(b) will preclude further appellate review of the District Court's order based on this Report and Recommendation. See Phinney v. Wentworth Douglas Hospital, 199 F.3d 1 (1st Cir. 1999); Sunview Condo. Ass'n v. Flexel Int'l, 116 F.3d 962 (1st Cir. 1997); Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993).

/s/ Jennifer C. Boal
JENNIFER C. BOAL
United States Magistrate Judge

467 Mass. 456
Supreme Judicial Court of Massachusetts, Worcester.

COMMONWEALTH
v.
Quillie Merle SPRAY, Second.

Argued Nov. 8, 2013.
|
Decided March 13, 2014.

Synopsis

Background: Defendant was convicted in the Superior Court Department, Worcester County, Peter W. Agnes, Jr., J., of murder in the first degree. The Superior Court Department, Agnes, J., and John S. McCann, J., denied defendant's motions for a new trial. Defendant appealed.

Holdings: The Supreme Judicial Court, Lenk, J., held that:

[1] confession was voluntary;

[2] defendant was not prejudiced by joinder for trial of firearms charges;

[3] defendant was not prejudiced by any error in admission of hearsay testimony from a State trooper regarding witness's identification of knife as belonging to defendant;

[4] trial court did not abuse its discretion in denying without a hearing defendant's motion for a new trial; and

[5] trial counsel was not ineffective in forgoing a comprehensive examination of the defendant's mental state.

Affirmed.

West Headnotes (26)

[1] Criminal Law
Particular cases
Criminal Law
Deception

Defendant's confession was voluntary in prosecution for murder in the first degree, although officers varied their line of questioning at one point to ask why he had committed the crime after he had repeatedly denied committing the murder, and defendant invoked his right to counsel immediately after making the inculpatory statement, where change in the form of question fell far short of an intentional misrepresentation that could have undermined the defendant's ability to make a free choice, at no point did officers improperly imply that confessing would benefit the defendant, or exaggerate the strength of the evidence against him, and officers properly

questioned the defendant about the circumstances of the stabbing and any involvement he had in it. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

[2] Criminal Law
Voluntariness

Commonwealth bears the heavy burden of establishing that the confession was voluntary. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[3] Criminal Law
What constitutes voluntary statement, admission, or confession
Criminal Law
Voluntariness

In meeting burden of establishing that the confession was voluntary, the Commonwealth must prove beyond a reasonable doubt that, in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was not overborne, but that the statement was the result of a free and voluntary act. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[4] Criminal Law
Deception

While police officers' use of trickery and other deceptive tactics during an interrogation may cast doubt on both the validity of a suspect's waiver of rights and the voluntariness of any ensuing confession, the interrogator's use of trickery is to be considered as part of the totality of the circumstances. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[5] Criminal Law
Deception

Where the use of a false statement by police officers during interrogation is the only factor pointing in the direction of involuntariness, it will not ordinarily result in suppression. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[6] Criminal Law
Particular cases

Defendant was not prejudiced by joinder for trial of firearms charges, namely possession of a firearm in a motor vehicle, and possession of ammunition without a firearm identification card, and murder in the first degree charge, although the charges were not related offenses, where defendant did not point to a specific right or defense tactic that was

unavailable to him as a result of such joinder, and defendant was acquitted of the firearms charges. Rules Crim.Proc., Rule 9(a), 47 M.G.L.A.

1 Cases that cite this headnote

[7] Criminal Law
Joint or Separate Trial of Separate Charges

Factors a judge may consider in determining whether offenses are related as would support joinder for trial include factual similarities, closeness of time and space, and whether evidence of the other offenses would be admissible in separate trials on each offense. Rules Crim.Proc., Rule 9(a), 47 M.G.L.A.

Cases that cite this headnote

[8] Criminal Law
Joint or Separate Trial of Separate Charges

Offenses are related for purposes of joinder if the evidence in its totality shows a common scheme and pattern of operation that tends to prove each of the complaints. Rules Crim.Proc., Rule 9(a), 47 M.G.L.A.

2 Cases that cite this headnote

[9] Criminal Law
Proceedings;waiver

A defendant claiming that two or more offenses have been joined improperly for trial bears the burden of demonstrating prejudice from misjoinder. Rules Crim.Proc., Rule 9(a), 47 M.G.L.A.

1 Cases that cite this headnote

[10] Criminal Law
Grounds

Prejudice requiring severance does not arise from the mere fact that the defendant's chances for acquittal of one of the charges might have been better had the offenses been tried separately; rather, the defendant must show that a particular tactic or right was foreclosed by the joinder. Rules Crim.Proc., Rule 9(a), 47 M.G.L.A.

3 Cases that cite this headnote

[11] Criminal Law
Joinder or severance of counts or codefendants

Discernment by the factfinder in assessing the evidence by convicting the defendant on one charge and acquitting him on others is a strong indication that a misjoinder of offenses has not resulted in any actual prejudice to the defendant. Rules Crim.Proc., Rule 9(a), 47 M.G.L.A.

2 Cases that cite this headnote

[12] **Criminal Law**
Admissions, declarations, and hearsay;confessions

Defendant was not prejudiced by any error in admission of hearsay testimony from a State trooper regarding witness's identification of knife as belonging to defendant in prosecution for murder in the first degree, although the testimony created an additional linkage between the defendant and the stabbing, where the linkage was cumulative of other evidence against the defendant, including testimony about witness's description of the defendant's knife at the scene of the crime, testimony from an employee of the general contractor who saw a green knife next to the defendant before the stabbing, eyewitness accounts, and forensic evidence.

Cases that cite this headnote

[13] **Criminal Law**
Identity

Testimony by a third party, such as a police officer, regarding a witness's extrajudicial identification is substantively admissible if the identifying witness is unable or unwilling to make an identification in court and is available for cross-examination.

1 Cases that cite this headnote

[14] **Criminal Law**
Identity

It is immaterial to admissibility of testimony by a third party, such as a police officer, regarding a witness's extrajudicial identification, that the identifying witness disavows having made a prior extrajudicial identification, or even denies having any basis for making an identification.

1 Cases that cite this headnote

[15] **Criminal Law**
Identity

Testimony by a third party, such as a police officer, regarding a witness's extrajudicial identification is admissible to establish identifying features of a defendant because of the superior probative worth of an identification made closer in time to the events in question.

1 Cases that cite this headnote

[16] **Criminal Law**
Identity and presence of accused

Where the identifying witness disavows his or her earlier identification, other prior-identification testimony can be put

to the jury, who can determine whose version to believe.

Cases that cite this headnote

[17] **Criminal Law**
Contradictory statements by witness
Criminal Law
Hearing and rehearing in general

Judge, who was also the trial judge, did not abuse his discretion in denying without a hearing defendant's motion for a new trial in prosecution for murder in the first degree, where he reviewed the recantation affidavits and determined that they were not credible, and, even if true, the absence of the witness's testimony at trial would not have changed the verdict, and judge had knowledge of what occurred at trial so that he could properly assess questions of credibility.

6 Cases that cite this headnote

[18] **Criminal Law**
Motion for new trial

Substantial likelihood of a miscarriage of justice standard applied to defendant's appeals of the denial of his first and second motions for a new trial, where they were consolidated.

2 Cases that cite this headnote

[19] **Criminal Law**
Motion for new trial

In reviewing an order granting or denying a motion for a new trial, Supreme Judicial Court accords deference to the views of a motion judge who was also the trial judge.

6 Cases that cite this headnote

[20] **Criminal Law**
Hearing and rehearing in general

Even where a motion for a new trial is based on the recantation of trial witnesses, a defendant may be required to present the evidence upon affidavits alone.

1 Cases that cite this headnote

[21] **Criminal Law**
Discretion of court as to new trial

The decision to grant or deny a motion for a new trial is left to the sound discretion of the motion judge.

4 Cases that cite this headnote

[22] **Criminal Law**
Raising of Particular Defense or Contention
Criminal Law
Capacity to commit crime; insanity or intoxication

Trial counsel was not ineffective in forgoing a comprehensive examination of the defendant's mental state, and relying instead on defense of actual innocence, in prosecution for murder in the first degree, although defendant's mother spoke of the defendant "talking crazy" and being taken to the hospital, over ten months before the stabbing, there was no apparent motive for the crime, and defendant had a flat affect, where there were no facts known or accessible to trial counsel that would have put her on notice of the need to obtain a psychiatric evaluation of her client, even after she conducted additional investigation, trial counsel met with defendant approximately 12 times, during which defendant did not appear to be suffering from psychiatric problems, or hallucinations, defendant did not tell counsel of any prior psychotic episodes or hallucinatory behavior, and there were no reports in the record of the defendant suffering from any hallucinations or psychotic episodes while incarcerated awaiting trial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[23] Criminal Law

Effective assistance

Supreme Judicial Court considers claims of ineffective assistance of counsel to determine whether there was an error in the course of the trial by defense counsel, the prosecutor, or the judge, and, if there was, whether that error was likely to have influenced the jury's conclusion. U.S.C.A. Const.Amend. 6; M.G.L.A. c. 278, § 33E.

4 Cases that cite this headnote

[24] Criminal Law

Raising of Particular Defense or Contention

If Supreme Judicial Court concludes that counsel erred by failing to raise a substantial defense, a new trial is called for on the basis of ineffective assistance of counsel, unless Court is substantially confident that, if the error had not been made, the jury verdict would have been the same. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[25] Criminal Law

Capacity to commit crime; insanity or intoxication

Failure to investigate an insanity defense would fall below the level of competence demanded of attorneys, as required for relief on the basis of ineffective assistance of counsel, if facts

known to, or accessible to, trial counsel raised a reasonable doubt as to the defendant's mental condition. U.S.C.A. Const.Amend. 6; M.G.L.A. c. 278, § 33E.

2 Cases that cite this headnote

[26] Criminal Law
Capacity to commit crime; insanity or intoxication

A failure to investigate an insanity defense is especially unreasonable, as required for relief on the basis of ineffective assistance of counsel, where it is the only viable defense available to a defendant; however, a decision not to pursue an insanity defense for tactical reasons, for instance because in the circumstances the defense would be factually weak, is not tantamount to ineffective assistance of counsel. U.S.C.A. Const.Amend. 6; M.G.L.A. c. 278, § 33E.

4 Cases that cite this headnote

Attorneys and Law Firms

****895** Kenneth I. Seiger for the defendant.

Donna–Marie Haran, Assistant District Attorney, for the Commonwealth.

Present: IRELAND, C.J., SPINA, CORDY, DUFFLY, & LENK, JJ.

Opinion

LENK, J.

***457** The defendant appeals from his conviction of murder in the first degree on a theory of extreme atrocity or cruelty, and from the denial of two motions for new trial. The defendant, his brother, his sister-in-law, and his cousin worked together in a tiling business based in Oklahoma. While working on a job at a restaurant in Clinton, the defendant stabbed and killed the general manager with no apparent provocation or motive. The defense at trial was based on a theory of actual innocence and that the defendant's sister-in-law was the true culprit.

The defendant argues error in the denial of a motion to suppress statements; improper joinder of charges for trial; admission of certain hearsay evidence; and the denial of his first motion for a new trial without an evidentiary hearing. The defendant also argues that his trial counsel was ineffective for failing to pursue a defense of lack of criminal responsibility, based on evidence that the defendant may have been suffering from a spontaneous recurrence of methamphetamine-induced psychosis at the time of the stabbing.

We conclude that there was no error requiring reversal and, after a review of the entire record pursuant to our responsibility under G.L. c. 278, § 33E, that there is no reason to exercise our power to reduce the

defendant's conviction to a lesser degree of guilt or to order a new trial. We affirm.

***458** 1. *Background.* a. *Facts.* Based on the evidence at trial, the jury could have found the following. In December, 2000, a fast-food restaurant was under construction in Clinton. The defendant, his brother Gary Spray, his sister-in-law Monica Spray, and his cousin Thomas Barron,[1] who lived in Oklahoma and all worked together on tiling jobs there, were hired to install tile in that restaurant. The defendant, Gary, Monica, and occasionally Thomas had worked in similar jobs across the country; Gary and Monica often worked as a team on such jobs, while the defendant worked by himself.

Gary, Monica, and Thomas initially were solely responsible for the December, 2000, job in Clinton. However, they were delayed in starting the 1,500–mile drive to Massachusetts, and the defendant decided to travel to Clinton as well. He drove to Massachusetts alone, arriving in Clinton in the early morning hours of Thursday, December 7, 2000. Gary, Monica, and Thomas arrived in a separate vehicle late that afternoon; their arrival was delayed by an unscheduled stop in St. Louis, where they had "a little drug party" involving mostly methamphetamines. While at the job site on Friday, the defendant and Gary spoke with the general contractor, who observed that they were already behind schedule.

The victim, Sherylann Miller, was also present at the construction site where the defendant and his relatives were working. Miller was the general manager of the future restaurant, and was in the process of accepting job applications and conducting interviews for employment there. Since the heating system had yet to be installed, the area was being kept warm by ****896** propane heaters. At one point, the defendant heard the victim say that she was cold, and suggested that she move closer to the heater; she also apologized to the defendant when she stepped on freshly laid tile. The two had no prior relationship and did not interact any further that day.

At approximately 4 P.M. on Saturday, December 9, the defendant, Gary, Monica, and Thomas were working at the job site when the defendant walked out the door. The other three continued ***459** to install tile until they heard the victim "hollering," "No, don't!" and "Stop, stop!" Monica turned around to see the defendant "wrestling" with the victim and "punching on her" while "dragging her backwards." Thomas saw the defendant holding the victim "around the waist or kind of in a bear hug."

Monica began "jumping up and down and hitting herself in the chest," and said to Gary, "It's Merle, it's Merle."[2] Gary turned around to see the defendant "punching [the victim] in the back." Gary ran to the defendant, pushed him against the wall, and asked, "What the fuck are you doing? What are you doing to this lady?" The defendant responded, "We'll tell them somebody else done it." By that time, the victim had fallen to the floor and a large amount of blood had begun to flow from her body. Gary directed Monica and Thomas to telephone

for help. Monica ran to a nearby gasoline station and the attendant there telephoned 911. The defendant walked to the front of the restaurant, saying, "Let's get this tile laid so we can get out of here and go to the house."

Clinton police responded within two minutes of receiving the 911 call. They encountered the family in various states of shock outside the restaurant. Monica was "hysterical"; Thomas was pacing nervously and crying; and Gary was standing over the defendant, yelling repeatedly, "What the fuck did you do that for?" The defendant was sitting on the curb outside the restaurant, acting "very calm" and not seeming at all upset. Monica pointed to the defendant and said, "He stabbed her, he did it." Thomas and Gary also indicated to police that the defendant had stabbed the victim. In response to questions regarding the whereabouts of the weapon, Gary stated that the defendant had had a knife, and that it had a green handle and a blade approximately five inches in length.

Police found the victim lying on the floor in the back of the restaurant with a large pool of blood around her head. The victim was transported to a local hospital, and then transferred via helicopter to a hospital in Worcester, where she was pronounced dead in the early morning hours of the following day.

Shortly after police arrived and his relatives identified him as ***460** the one who had stabbed the victim, the defendant was arrested, handcuffed, and placed in a police cruiser. Gary continued to yell at the defendant while he sat in the cruiser, "What are you doing, you didn't even know her." Monica was permitted to change clothes and throw out the clothing she had been wearing, as she had soiled herself.

The defendant, Gary, Monica, and Thomas were transported in separate police cruisers to the Clinton police station. There, Gary, Monica, and Thomas each gave a written statement while sitting in separate rooms; police observed that none appeared to be under the influence of drugs or alcohol. Gary again provided a description of the weapon used in the attack, and said that he had seen the defendant ****897** kneel down beside a bucket at the scene.[3] Officers located the bucket, filled with dirty water and plaster or mud, and retrieved a green-handled knife with a serrated edge from it; a red-handled knife was also recovered from the scene. The green-handled knife was brought back to the police station, where Gary identified it as belonging to the defendant.[4]

While the defendant was booked[5] and fingerprinted, officers observed a cut on his left hand. A Clinton police officer and a State trooper interviewed the defendant after reading him the Miranda rights and presenting him with a card listing those rights, which he initialed. The defendant agreed to speak with police and to allow police to transcribe his statement. During the interview, the defendant denied having had anything to do with the stabbing; police described him as "calm, cool, collected, very cooperative," and said that he did not appear to be under the influence of drugs or alcohol. Later that evening, the ***461**

defendant's vehicle was towed; an inventory search produced an unlicensed firearm, ammunition, and spent shell casings.

At approximately 2 A.M. Sunday morning, police learned that the victim had died as a result of her injuries, and booked the defendant on the additional charge of murder. Later that afternoon, after advising him of the Miranda rights, and procuring a waiver of his right to a prompt arraignment pursuant to *Commonwealth v. Rosario,* 422 Mass. 48, 661 N.E.2d 71 (1996) (*Rosario*), police again interviewed the defendant. He denied knowing anything about the source of the victim's injuries, but, in response to repeated questioning, eventually stated, "If I did do it, I didn't mean to kill her."

An autopsy revealed that the victim died as a result of six stab wounds to the neck, and that her injuries were consistent with having been stabbed from behind. Two of the wounds severed her spinal cord. Forensic testing established that a sample from a blood stain on the defendant's shirt cuff matched the victim's blood.[6] A hair matching the victim's was found on the green knife, as well as a piece of fabric that was consistent with the fabric of the jacket that the victim was wearing at the time of the attack.

b. *Pretrial motions.* The defendant filed a pretrial motion to suppress all statements made by him to the police, as well as all evidence obtained as a result of the search of his vehicle. He argued that the statements made to the police should be suppressed as involuntary, and that items found in his vehicle should be suppressed because they were the result of an illegal warrantless search. Both the defendant and the Commonwealth filed motions ****898** in limine regarding the admissibility of the statements made by the defendant's family members to the police.

After a hearing at which a number of local and State police officers testified, the motion judge allowed the defendant's motion in part and denied it in part. The judge held that, with regard to the police interviews of the defendant on December 9 and 10, 2000, the Commonwealth had met its burden of proving a valid waiver of Miranda rights beyond a reasonable doubt; the defendant had signed a written waiver form and there was no ***462** evidence that the defendant was under the influence of drugs or alcohol, and no evidence of police coercion. However, the judge ruled that, because the second interview came to an end when the defendant said, "I think I need a lawyer," no subsequent statement could be admitted unless the Commonwealth proved that the defendant initiated further communication with police officers. See *Commonwealth v. Contos,* 435 Mass. 19, 30, 754 N.E.2d 647 (2001). Since the Commonwealth failed to meet this burden, the judge suppressed the defendant's statements to police after the termination of the second interview when an officer approached him to ask about ownership of the firearm found in his vehicle.

The judge ruled that the warrantless search of the defendant's vehicle was lawful as an inventory search of an impounded vehicle, and that the firearm and ammunition

discovered during the search should not be suppressed. The judge determined that "it was reasonable for the police to take measures to guard against a potential claim of liability," where the vehicle was exposed to a risk of theft or vandalism where it was parked, and where the police had a reasonable basis to believe that the defendant would not be released due to the high cash bail.

Finally, the judge determined that statements made by Gary, Monica, and Thomas to police were admissible under the excited utterance exception to the hearsay rule, since they were made within minutes of the stabbing and there was ample evidence that each was very upset and under the influence of a startling event.

c. *Trial proceedings.* The defendant was tried on the charges of murder, assault and battery by means of a dangerous weapon, possession of a firearm in a motor vehicle, and possession of ammunition without a firearm identification card. He testified in his own defense. The defendant said that he did not kill the victim and did not know who did; he was installing tile when he looked up and saw the victim lying on the floor. When the defendant knelt down to check on her, Gary came running and shoved him against the wall, accusing him of stabbing the victim.

The defense strategy was to maintain the defendant's innocence and to suggest that Monica was the true perpetrator. Counsel suggested that Monica, as a methamphetamine addict, ***463** robbed and killed the victim in order to obtain money for drugs. Monica's guilt was evidenced by her quickness to blame the defendant and deflect attention from herself, her melodramatic state after the attack, and the fact that, immediately after the stabbing, she threw away her clothes before the police could examine them. Because Monica "fingered" the defendant immediately, counsel argued, the police focused their investigation on the defendant from the start and, as a result, did not search Monica's vehicle. Counsel also impeached the credibility of Gary, Monica, and Thomas by pointing to their heavy methamphetamine use prior to the stabbing.

The jury convicted the defendant of murder in the first degree on a theory of extreme atrocity or cruelty and assault ****899** and battery by means of a dangerous weapon; the defendant was acquitted of the firearms and ammunition charges. The judge dismissed the assault and battery conviction as merged with the murder conviction. See *Commonwealth v. Valliere,* 437 Mass. 366, 371–372, 772 N.E.2d 27 (2002).

d. *First motion for new trial.* In February, 2007, the defendant moved for a new trial pursuant to Mass. R.Crim. P. 30(b), as appearing in 435 Mass. 1501 (2001), on the ground that two eyewitnesses, Gary and Monica, had recanted their testimony. The defendant submitted affidavits from Gary and Monica averring that they, in fact, did not see the defendant argue with, fight with, or stab the victim. Gary stated also in his affidavit that, before trial, he wanted to alter the statement he gave to Clinton police on the evening of the stabbing, but the prosecutor told him that if

he changed it, he "would do an automatic [seven] years for perjury." Monica stated that either the assistant district attorney's partner or secretary "coached [her] into saying only yes or no to defense counsel's questions [and] not to be explicit in [her] answers" and that she "was under the influence of methamphetamine and many other mind-altering drugs—[her] memory of what happened wasn't close to the truth." In response, the prosecutor submitted an affidavit stating that he never told Gary that he would serve time for perjury if he changed his statement.

The motion judge, who was also the trial judge, denied the motion without a hearing, declining to credit Gary's and Monica's ***464** affidavits. The judge found that the affidavits contradicted accounts that the two repeatedly had given throughout the proceedings as well as other evidence presented at trial, and that the affidavits were less credible in light of the six years that had passed since the stabbing. Moreover, the judge concluded that, even if the affidavits were accurate, the evidence against the defendant was "solid" without Gary's and Monica's trial testimony.

e. *Second motion for new trial.* In July, 2010, represented by new appellate counsel, the defendant filed a second motion for a new trial. He argued that trial counsel was ineffective for failing to investigate a defense based on lack of criminal responsibility, where posttrial investigation yielded substantial evidence that the defendant's mental health was impaired at the time of the stabbing. According to the defendant, affidavits of various family members and documentary evidence revealed his significant history of alcohol and methamphetamine abuse; previous psychotic episodes, including hallucinations, potentially associated with methamphetamine abuse; and the presence of various "stressors" in his life at the time of the killing. Given the unusual and apparently motiveless circumstances of the crime, and the strength of the evidence against him, the defendant asserted that trial counsel "should have recognized his prospects for acquittal were minimal—even nonexistent" and instead pursued the "obvious alternative" of a defense premised on his mental state. The defendant argued that, had evidence related to his mental state been presented to the jury, it could have influenced the verdict.

A judge who was not the trial judge denied the motion after a hearing at which a clinical psychologist, trial counsel, and the defendant testified. The psychologist, Dr. Helene Presskreischer, opined that it was most likely that,[7] at the time of the ****900** stabbing, the defendant was suffering from a spontaneous recurrence of a methamphetamine-induced psychosis and acted in what he perceived to be self-defense; this psychosis would have affected his ability to appreciate the wrongfulness of, and to control, his behavior such that he could have been found not guilty by ***465** reason of insanity. Presskreischer's opinion was based on the defendant's nearly twenty-year history of chronic methamphetamine abuse beginning at the age of fourteen; prior incidents of hallucinations; and certain

"stressors" in his life at the time of the killing, including his father's recent death and the defendant's having taken over the family tiling business, his ongoing divorce, and the stressful and noisy working environment prior to the murder. [8]

Presskreischer testified to her review of a number of medical records and reports concerning the defendant's previous psychotic episodes. In 1997, three years before the stabbing, he was observed waving and yelling at motorists driving by his home. Police transported him to a community health center, where he reported that someone was trying to kill him and that he had seen four satellites collide over his house; he was diagnosed with amphetamine-induced psychotic disorder, with hallucination. Sometime after his father's death in 1999, the defendant's mother observed the defendant "talking crazy" and, concerned, asked his cousin Terry to come to the house. When Terry arrived, the defendant was moving about his house as if to evade detection, and was frightened that someone was trying to kill him. Terry took him to the hospital. Several months before the stabbing, Gary found the defendant in "stocking feet" outside his home, standing in snow and ice, holding a gun. He discovered that the defendant had shot bullet holes in his bathroom ceiling and garage door, in order to fend off intruders who he believed were trying to kill him. No evidence of intruders was discovered.

Presskreischer opined that, based on her observations of the defendant during their meetings, he continued to suffer from residual psychosis. She also testified to the long-term effects of methamphetamine abuse. She said that chronic abuse of the drug can lead to structural changes in the brain that may cause ***466** up to three-quarters of abusers to experience psychotic episodes. She testified further that, even when active drug use has ceased, users can experience "flashbacks," or spontaneous recurrences of psychotic episodes, that may be triggered by even mild "psychosocial stressors." While the specific diagnosis of spontaneous recurrence of methamphetamine-induced psychosis was not listed in the edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) that was current at the time of trial, that edition did include a chapter on amphetamine-induced disorders; Presskreischer also submitted a bibliography of articles on the topic published in peer-reviewed journals before the date of the stabbing.

The judge found that "the post trial affidavits and expert testimony of Dr. Presskreischer suggest that methamphetamine psychosis may have been a viable defense," but nonetheless concluded that "the facts known to, or accessible to [trial ****901** counsel], did not raise a reasonable doubt as to the defendant's mental state" and that "[t]he investigation conducted by [trial counsel] was constitutionally effective based on the information available to her." The judge noted that trial counsel met with the defendant approximately twelve times prior to trial, and during such meetings, the defendant consistently maintained his

innocence. Although he told trial counsel of his history of drug abuse, the defendant also stated that he was not under the influence of methamphetamine or other drugs at the time of the crime, and that he had not used any drugs on the day of the stabbing. The judge found that trial counsel conducted a reasonable investigation of the defendant's family; the defendant's mother provided the name of an Oklahoma facility where the defendant received drug and mental health treatment as a teenager, but trial counsel was unsuccessful in obtaining medical records from that facility. The judge found that trial counsel was not otherwise on notice of any mental health problems affecting the defendant, and did not observe or learn of any instances of hallucinations, delusions, or other indicators of mental illness.

The defendant appeals from his conviction of murder and from the denials of his motions for a new trial.

[1] 2. *Discussion.* a. *Denial of motion to suppress statements.* ***467** The defendant argues that the motion judge erred in denying his motion to suppress his statement to police that "if [he] did do it, [he] didn't mean to kill [the victim]," as it was involuntary. The defendant contends that involuntariness is demonstrated by his invocation of his right to counsel immediately after making the inculpatory statement, and by the interviewing officers' use of a "ruse" while questioning him, in that they asked him why he had committed the killing after he repeatedly had denied involvement. The involuntariness of the statement was exacerbated, the defendant maintains, by his "long isolation" in a holding cell before the ruse was employed.

[2] **[3]** As in all cases where the Commonwealth intends to rely on a defendant's confession to a crime, the Commonwealth here "bear[s] the 'heavy burden of establishing that [the confession] was voluntary.' " *Commonwealth v. Baye,* 462 Mass. 246, 256, 967 N.E.2d 1120 (2012), quoting *Commonwealth v. Meehan,* 377 Mass. 552, 563, 387 N.E.2d 527 (1979), cert. dismissed, 445 U.S. 39, 100 S.Ct. 1092, 63 L.Ed.2d 185 (1980). "In meeting this burden, the Commonwealth must prove beyond a reasonable doubt that 'in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was [not] overborne,' but rather that the statement was 'the result of a free and voluntary act.' " *Id.,* quoting *Commonwealth v. Durand,* 457 Mass. 574, 595–596, 931 N.E.2d 950 (2010).

[4] **[5]** While police officers' use of trickery and other deceptive tactics during an interrogation may cast doubt on both the validity of a suspect's waiver of rights and the voluntariness of any ensuing confession, "the interrogator's use of trickery is to be considered as part of the totality of the circumstances." *Commonwealth v. DiGiambattista,* 442 Mass. 423, 433, 813 N.E.2d 516 (2004). "[W]here the use of a false statement is the *only* factor pointing in the direction of involuntariness, it will not ordinarily result in suppression." *Id.*

The officers' interrogation tactics in this case were not of a variety that we have

previously condemned as impermissibly misleading. The officers properly questioned the defendant about the circumstances of the stabbing and any involvement **902 he had in it. Although they varied their line of questioning at one point to ask why the defendant had committed the crime, such a change in the form of a question falls far short of an intentional *468 misrepresentation that "may undermine 'the defendant's ability to make a free choice,' " *Commonwealth v. Scoggins,* 439 Mass. 571, 576, 789 N.E.2d 1080 (2003), quoting *Commonwealth v. Meehan, supra* at 563, 387 N.E.2d 527, nor does it constitute a false statement. At no point did officers improperly imply that confessing would benefit the defendant, or exaggerate the strength of the evidence against him. See *Commonwealth v. Johnson,* 463 Mass. 95, 105, 972 N.E.2d 460 (2012).

That the defendant invoked his right to counsel immediately after making the inculpatory statement does not render otherwise voluntary statements involuntary. Cf. *Commonwealth v. Contos,* 435 Mass. 19, 27–32, 754 N.E.2d 647 (2001) (statements made after invocation of right to counsel should have been suppressed, but error was harmless where statements "mirrored" similar voluntary statements made prior to invoking right). The same is true regarding the length of time between the defendant's initial arrest and the time at which the statement in question was made. Although the statement was made during an interview in the midafternoon of the day following his arrest, after the defendant had been held in the police station overnight, he was advised properly of his right to a prompt arraignment under *Rosario, supra,* and executed a waiver. There is no indication that the defendant was deprived of food or sleep while being held at the police station, nor is there any suggestion "that the delay in any way tainted the otherwise free, intelligent and voluntary statements of the defendant." *Commonwealth v. Butler,* 423 Mass. 517, 526, 668 N.E.2d 832 (1996).

[6] b. *Joinder of charges at trial.* The defendant argues that the joinder of the firearms charges with the murder charge for trial posed a substantial likelihood of a miscarriage of justice, where they were not "related offenses" within the meaning of Mass. R.Crim. P. 9(a), 378 Mass. 859 (1979).

[7] **[8]** Mass. R.Crim. P. 9(a) permits the joinder of "related offenses" for trial "if they are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan." "Factors a judge may consider in determining whether offenses are related include factual similarities, ... closeness of time and space[, and] ... whether evidence of the other offenses would be admissible in separate trials on each offense." *469 *Commonwealth v. Pillai,* 445 Mass. 175, 180, 833 N.E.2d 1160 (2005), and cases cited. "Offenses are related if the 'evidence in its totality shows a common scheme and pattern of operation that tends to prove' each of the complaints." *Id.,* quoting *Commonwealth v. Feijoo,* 419 Mass. 486, 494–495, 646 N.E.2d 118 (1995). See

Commonwealth v. Sylvester, 388 Mass. 749, 755–758, 448 N.E.2d 1106 (1983).

[9] **[10]** A defendant claiming that two or more offenses have been joined improperly for trial bears the burden of demonstrating prejudice from misjoinder. *Commonwealth v. Zemtsov,* 443 Mass. 36, 45, 818 N.E.2d 1057 (2004). "Prejudice requiring severance does not arise from the mere fact that the defendant's chances for acquittal of [one of the charges] might have been better" had the offenses been tried separately. *Commonwealth v. Gallison,* 383 Mass. 659, 672, 421 N.E.2d 757 (1981). Rather, the defendant must show that a particular tactic or right was foreclosed by the joinder. See *id.*

****903** **[11]** Here, while the firearms and murder charges were not "related offenses," the defendant has not met his burden of demonstrating a specific ground of prejudice. It is the case, as the defendant argues, that "the firearms charges were entirely distinct from the homicide." The victim was stabbed with a knife; the firearm played no role in the attack, but was discovered in the defendant's vehicle as part of an inventory search following his arrest, along with ammunition. However, the defendant claims only that joinder tended to show his bad character or propensity to commit a crime; he does not point to a specific right or defense tactic that was unavailable to him as a result of such joinder. In any event, the jury acquitted the defendant of the firearms charges. "Such discernment by the factfinder in assessing the evidence is a strong indication that a misjoinder of offenses has not resulted in any actual prejudice to the defendant." *Commonwealth v. Green,* 52 Mass.App.Ct. 98, 103, 750 N.E.2d 1041 (2001). See *Commonwealth v. Delaney,* 425 Mass. 587, 595, 682 N.E.2d 611 (1997), cert. denied, 522 U.S. 1058, 118 S.Ct. 714, 139 L.Ed.2d 655 (1998).

[12] c. *Admission of hearsay evidence.* The defendant argues that the improper admission of hearsay evidence created a substantial likelihood of a miscarriage of justice. Specifically, he contends that testimony from a State trooper regarding Gary's identification of the green-handled knife as belonging to the defendant, not objected to at trial, was improper, since too much time had elapsed for it to qualify as an excited utterance; made almost ***470** five hours after the stabbing at the police station, it was not a "spontaneous reaction to an exciting event." *Commonwealth v. DiMonte,* 427 Mass. 233, 240, 692 N.E.2d 45 (1998).

[13] **[14]** **[15]** **[16]** The Commonwealth argues that the testimony was proper as an extrajudicial identification, rather than as an excited utterance. "Testimony by a third party, such as a police officer, regarding a witness's extrajudicial identification is substantively admissible if the identifying witness is unable or unwilling [to make an identification] in court and is available for cross-examination.... [I]t is immaterial that the identifying witness disavows having made a prior extrajudicial identification, or even denies having any basis for making an identification." *Commonwealth v. Raedy,* 68 Mass.App.Ct. 440, 446–447, 862 N.E.2d 456 (2007), citing *Commonwealth v. Cong*

Duc Le, 444 Mass. 431, 441, 828 N.E.2d 501 (2005). Such testimony is admissible to establish identifying features of a defendant "because of the superior probative worth of an identification made closer in time to the events in question." *Commonwealth v. Daye,* 393 Mass. 55, 61, 469 N.E.2d 483 (1984), overruled on other grounds by *Commonwealth v. Cong Duc Le, supra.* Where the identifying witness disavows his or her earlier identification, other prior identification testimony can be put to the jury, who "can determine whose version to believe." *Commonwealth v. Cong Duc Le, supra* at 439–440, 828 N.E.2d 501. In addition to testimony regarding the defendant's physical characteristics, see *Commonwealth v. Weichell,* 390 Mass. 62, 72, 453 N.E.2d 1038 (1983), cert. denied, 465 U.S. 1032, 104 S.Ct. 1298, 79 L.Ed.2d 698 (1984), we have permitted descriptions of the weapon used by the defendant under this rule. See *Commonwealth v. Martinez,* 431 Mass. 168, 170–171, 175–176, 726 N.E.2d 913 (2000) (statement regarding color of defendant's gun, by declarant who knew that defendant possessed silver gun and saw him shoot victim with it, was properly admitted).

****904** Here, though he denied that the knife produced at trial belonged to the defendant, Gary both testified that he previously had identified the knife as the defendant's and was available for cross-examination. The knife had unique features, including a green handle and a serrated edge, and matched the earlier description that Gary had given to police at the scene of the crime. However, Gary did not witness the defendant use the knife to ***471** commit a crime, as in *Commonwealth v. Martinez, id.* at 171, 726 N.E.2d 913, but rather identified the knife on the basis of his personal knowledge regarding his brother's possessions. Neither is it clear from the record when Gary last saw the defendant in custody of the knife.

Assuming without deciding, however, that it was error to admit the testimony, any such error did not create a substantial likelihood of a miscarriage of justice. Although the testimony created an additional linkage between the defendant and the stabbing, that linkage was cumulative of other evidence against the defendant, including testimony about Gary's description of the defendant's knife at the scene of the crime, testimony from an employee of the general contractor who saw a green knife next to the defendant before the stabbing, eyewitness accounts, and forensic evidence.

[17] d. *Denial of first motion for new trial without hearing.* The defendant argues that it was error to deny the first motion for a new trial without a hearing, particularly where the motion was based on recantation affidavits of Gary and Monica. The defendant maintains that an evidentiary hearing on the motion was required, given that recantation by witnesses requires "serious consideration from the motion judge." See *Commonwealth v. Jones,* 432 Mass. 623, 632–633, 737 N.E.2d 1247 (2000), quoting *Commonwealth v. Watson,* 377 Mass. 814, 837–838, 388 N.E.2d 680 (1979), *S.C.,* 409 Mass. 110, 565 N.E.2d 408 (1991).

[18] **[19]** **[20]** **[21]** Because the defendant's appeals of the denial of his first and second motions for a new trial have been consolidated with his direct appeal, we review them under the substantial likelihood of a miscarriage of justice standard. *Commonwealth v. Gomez,* 450 Mass. 704, 711, 881 N.E.2d 745 (2008), citing *Commonwealth v. Morgan,* 449 Mass. 343, 353, 868 N.E.2d 99 (2007). See G.L. c. 278, § 33E. Further, with respect to the first motion for a new trial, "[i]n reviewing an order granting or denying a motion for a new trial, we accord deference to the views of a motion judge who was also the trial judge." *Commonwealth v. LeFave,* 430 Mass. 169, 176, 714 N.E.2d 805 (1999), citing *Commonwealth v. Grace,* 397 Mass. 303, 307, 491 N.E.2d 246 (1986). Even where a motion for a new trial is based on the recantation of trial witnesses, a defendant "may be required to present the evidence upon affidavits alone." ***472** *Commonwealth v. Jones, supra* at 632, 737 N.E.2d 1247, quoting *Commonwealth v. Coggins,* 324 Mass. 552, 557, 87 N.E.2d 200, cert. denied, 338 U.S. 881, 70 S.Ct. 152, 94 L.Ed. 541 (1949). The decision to grant or deny a motion for a new trial "is left to the sound discretion of the motion judge." *Id.* at 633, 737 N.E.2d 1247, citing *Commonwealth v. Stewart,* 383 Mass. 253, 418 N.E.2d 1219 (1981).

Here, the motion judge, who was also the trial judge, reviewed the recantation affidavits and determined that they were not credible, and, even if true, the absence of Gary's and Monica's testimony at trial would not have changed the verdict. In denying the motion for a new trial without a hearing, the motion judge properly "[took] into account his knowledge of what occurred at trial [in order to] assess questions ****905** of credibility." *Commonwealth v. Ortiz,* 393 Mass. 523, 536–537, 471 N.E.2d 1321 (1984), citing *Commonwealth v. Little,* 384 Mass. 262, 269, 424 N.E.2d 504 (1981). There was no abuse of discretion.

[22] e. *Ineffective assistance of counsel.* The defendant argues that in deciding the second motion for a new trial, the motion judge erred in "papering over a wealth of evidence" regarding the inadequacy of trial counsel's investigation of a defense based on the defendant's mental health. The defendant contends that trial counsel's forgoing of a comprehensive examination of the defendant's mental state and reliance instead on "so palpably inadequate a defense" of actual innocence was constitutionally ineffective assistance.

[23] **[24]** Pursuant to G.L. c. 278, § 33E, we consider claims of ineffective assistance to determine "whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion." *Commonwealth v. Wright,* 411 Mass. 678, 682, 584 N.E.2d 621 (1992). If we conclude "that counsel erred by failing to raise a substantial defense, 'a new trial is called for unless we are substantially confident that, if the error had not been made, the jury verdict would have been the same.' " *Commonwealth v. Sena,* 429 Mass. 590, 595, 709 N.E.2d 1111 (1999), *S.C.,* 441 Mass. 822, 809 N.E.2d 505 (2004), quoting *Commonwealth v. Ruddock,*

428 Mass. 288, 292 n. 3, 701 N.E.2d 300 (1998).

[25] **[26]** "Failure to investigate an insanity defense would fall below the level of competence demanded of attorneys, if facts known to, or accessible to, trial counsel raised a reasonable doubt as to ***473** the defendant's mental condition." *Commonwealth v. Doucette,* 391 Mass. 443, 458–459, 462 N.E.2d 1084 (1984), citing *Osborne v. Commonwealth,* 378 Mass. 104, 111, 389 N.E.2d 981 (1979). Such a failure to investigate an insanity defense is especially unreasonable where it is the only viable defense available to a defendant. See, e.g., *Commonwealth v. Haggerty,* 400 Mass. 437, 441–442, 509 N.E.2d 1163 (1987) (defendant deprived of effective assistance of counsel where "defense counsel abandons the only defense available to a defendant and leaves the defendant without any defense at all"). However, a decision not to pursue an insanity defense for tactical reasons, for instance because in the circumstances the defense would be factually weak, is not tantamount to ineffective assistance of counsel. See, e.g., *Commonwealth v. Genius,* 387 Mass. 695, 699, 442 N.E.2d 1157 (1982), *S.C.,* 402 Mass. 711, 524 N.E.2d 1349 (1988).

The defendant argues that this case is akin to *Commonwealth v. Roberio,* 428 Mass. 278, 279–282, 700 N.E.2d 830 (1998), *S.C.,* 440 Mass. 245, 797 N.E.2d 364 (2003), where we held that the defendant's right to effective assistance of counsel was violated by trial counsel's failure to investigate a defense based on a lack of criminal responsibility. In that case, the defendant's parents told defense counsel, prior to trial, that the defendant had received mental health treatment at the suggestion of the police, "before [the] crime and before trial." *Id.* at 279, 700 N.E.2d 830. Trial counsel did not follow up on this information, nor did he attempt to obtain further information from the local mental health center or ask the defendant to submit to a psychiatric evaluation. *Id.* Instead, trial counsel made his own assessment of the defendant's mental health. *Id.* We stated in that case that trial counsel "could not have made an accurate assessment of the defendant's mental state at the time of the crime without expert training." *Id.* at 279 n. 2, 700 N.E.2d 830. The defendant argues that here, likewise, trial counsel's ****906** opinion as to his mental state was an inadequate substitute for a court-appointed psychiatric evaluation.

The Commonwealth maintains that the circumstances here instead should be compared to *Commonwealth v. Walker,* 443 Mass. 213, 225–228, 820 N.E.2d 195 (2005), where we rejected the defendant's argument that trial counsel rendered ineffective assistance. There, trial counsel was aware of the defendant's history of alcohol and drug abuse, his prior suicide attempt, and the fact ***474** that he had been discharged from the armed services due to psychiatric problems. *Id.* at 223, 820 N.E.2d 195. However, we held that such facts were insufficient to suggest a potential mental health defense, where the suicide attempt and discharge had occurred thirteen years previously and neither incident suggested that the defendant was suffering from mental illness at the time of the crime. *Id.* at 225, 820 N.E.2d 195.

Moreover, in meetings with trial counsel, the defendant consistently presented himself as a responsible father and maintained that he had committed the crime in self-defense. *Id.* at 226, 820 N.E.2d 195. The Commonwealth argues that trial counsel similarly lacked notice of the defendant's mental problems in this case, and that a defense based on a lack of criminal responsibility would have been inconsistent with the defendant's adamant and unfailing denial of any involvement in the killing.

Although the question is a close one, we are ultimately convinced that trial counsel's assistance was not ineffective. It remains the case that an attorney's own assessment of her client cannot replace the opinion of a mental health professional with expert training, see *Commonwealth v. Roberio, supra* at 279 n. 2, 700 N.E.2d 830; however, here, there were no facts known or accessible to trial counsel that would have put her on notice of the need to obtain a psychiatric evaluation of her client, even after she conducted additional investigation.

Trial counsel met with the defendant approximately twelve times. During those meetings, the defendant did not appear to be suffering from psychiatric problems, nor did he report any prior hallucinations. Although he discussed his history of chronic methamphetamine abuse, and the fact that he had been treated for alcohol abuse as a teenager, he stated that he was not under the influence of methamphetamine at the time of the stabbing, nor had he consumed the drug that day. There is no suggestion in the record that he told counsel of any prior psychotic episodes or hallucinatory behavior. The defendant complied with counsel's recommendations as to how to conduct himself during the arraignment, and did not exhibit hallucinatory behavior either during trial preparation or during the trial itself. There are likewise no reports in the record of the defendant suffering from any hallucinations or psychotic episodes while incarcerated awaiting trial. As in *Commonwealth v. Walker, supra* at 226, 820 N.E.2d 195, where the ***475** defendant consistently maintained that he was acting in self-defense, here, too, the defendant claimed innocence, thus presenting trial counsel with a theory of defense to pursue at trial other than lack of criminal responsibility. Indeed, the two discussed strategy at their many meetings.

In addition to meeting with the defendant on twelve occasions, trial counsel actively communicated with the defendant's mother. Counsel asked her about the incident involving treatment at a rehabilitation center for alcohol abuse that the defendant had discussed with her. The defendant's mother indicated that the care the defendant had received was not, in fact, related to alcohol, but that when he was fifteen or ****907** sixteen years old,[9] the defendant had had a "break" for which he received mental health treatment. Counsel attempted to obtain the medical records, almost twenty years old, from the treatment facility, but was unsuccessful in doing so.

However, there is no evidence that the defendant's mother discussed with trial counsel the incident that the mother later

recounted in her affidavit submitted in connection with the defendant's second motion for a new trial, where she spoke of the defendant "talking crazy" and being taken to the hospital, over ten months before the stabbing. There is likewise no evidence that the hallucinations described by other family members in affidavits, submitted ten years after the stabbing, were recounted to counsel before the trial in 2003. In addition to speaking with the defendant's mother, counsel spoke with the defendant's ex-wife, with his brother Gary, and with his cousin Thomas in preparing her defense. None of them mentioned that the defendant was suffering or had suffered from psychiatric problems, nor did any speak of the defendant having experienced hallucinations at any point.

Thus, the only information concerning possible mental illness of which trial counsel was on notice was a "break" that had occurred while the defendant was a teenager, approximately two decades earlier. After interviewing four different family members and attempting to locate nearly twenty year old medical records, counsel had no concrete information available to her ***476** regarding the defendant's current mental state that would have suggested a defense of lack of criminal responsibility. Cf. *Commonwealth v. Walker, supra* at 225, 820 N.E.2d 195 (counsel was informed that defendant had attempted suicide thirteen years earlier, but such incident did not suggest that defendant was suffering from mental illness).

We recognize that, given the unusual and apparently motiveless circumstances of the crime, the defendant's flat affect, the Commonwealth's forensic and eyewitness evidence, and the defendant's history of methamphetamine abuse, another attorney might well have investigated the psychological effects of this type of drug abuse to determine whether it would have had a possible connection with the crime. Research into the effects of long-term methamphetamine abuse would presumably have revealed the extant DSM chapter on amphetamine-induced disorders, including amphetamine-induced psychotic disorder with hallucinations,[10] as well as academic literature on the spontaneous recurrence of methamphetamine-induced psychosis. In light of the strong evidence against him, establishing that the defendant was suffering from methamphetamine-induced psychosis at the time of the stabbing might have been a more powerful defense.

However, in the circumstances here, particularly where trial counsel was not on notice of the defendant's belatedly-asserted prior psychotic episodes and hallucinations, she was not under a constitutional duty to undertake a supplemental investigation. This is especially so given the limited prevalence of methamphetamine use in the Commonwealth in the early 2000s, and the attendant limited exposure of attorneys to methamphetamine-related ****908** crimes at that time. Trial counsel testified at the hearing on the second motion for a new trial that, at the time of trial preparation, methamphetamine was "not something that was common yet to our area." Presskreischer, the psychologist, who opined that the defendant was "most likely"[11]

suffering from a *477 spontaneous recurrence of methamphetamine-induced psychosis, acknowledged that she had no professional experience with psychosis induced by methamphetamine in particular, since that drug is not as common in the "mid-Atlantic States" as it is in other parts of the country. Indeed, a 2001 report on drug prevalence in the Commonwealth notes that, at the time,

> "[m]ethamphetamine [was] available in small quantities in Massachusetts, but the drug [was] not a significant threat to users or society. Some reporting occasionally suggest[ed] that methamphetamine might be growing in popularity in New England, but the region [had] yet to see a widespread increase in trafficking, distribution, or use. Methamphetamine production occur[ed] in Massachusetts on only a very small scale."
>
> National Drug Intelligence Center, Massachusetts Drug Threat Assessment at 32 (2001).

We discern no error in the judge's determination that the defendant did not demonstrate that facts known or accessible to trial counsel would have put her on notice of a potential mental health defense. Nor do we discern error in his conclusion that trial counsel's failure to investigate a mental health defense did not fall below constitutional standards of competency. Accordingly, because the defendant was not deprived of the effective assistance of counsel, the motion for a new trial properly was denied.

f. *Relief under G.L. c. 278, § 33E.* We have conducted plenary review of the entire record pursuant to our obligation under G.L. c. 278, § 33E. We are satisfied that the defendant did not receive ineffective assistance of counsel and that he was afforded a fair trial. The extraordinary remedy of relief under G.L. c. 278, § 33E, is not warranted in the circumstances of this case, and therefore, we decline to disturb the jury's verdict.

Judgment affirmed.

Orders denying motions for a new trial affirmed.

All Citations

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Footnotes

1 Because they share a last name, we refer to husband and wife Gary Spray and Monica Spray by their first names. For consistency, we also refer to the defendant's cousins Thomas Barron and Terry Barron by their first names.

2 The defendant was known by his middle name, Merle.

3 Gary testified that he had given police information regarding the weapon only because police threatened that, if he did not do so, neither he nor Monica nor Thomas would be permitted to leave the Commonwealth. The officers denied making any threats.

4 One of the general contractor's employees also testified at trial that he had seen a green-handled knife with a serrated edge on the floor beside the defendant while he was working on Friday afternoon. While Gary acknowledged having identified the weapon, he denied that the knife produced at trial belonged to the defendant. The defendant also denied

that the knife produced at trial belonged to him, and stated that he did not bring his green knife with him on the trip from Oklahoma to Massachusetts.

5 As part of the booking process, the defendant was advised of the Miranda rights, a printed copy of which also appeared on the booking sheet.

6 The defendant's shirt cuff was the only portion of his clothing that tested positive for human blood.

7 Dr. Helene Presskreischer declined to give her opinion to a reasonable degree of psychological certainty.

8 Presskreischer's conclusions were founded on, inter alia, four meetings with the defendant that lasted a total of approximately eight hours; affidavits from and communications with the defendant's friends, family, and trial counsel; the defendant's medical records; and deposition testimony from a psychiatrist retained by the decedent victim's estate in a related civil proceeding, who concluded, to a reasonable degree of medical certainty, that the defendant stabbed the victim while in a state of drug-induced psychosis.

9 The defendant was thirty-three years old at the time of the stabbing.

10 The DSM chapter available, however, would not have included the diagnosis of spontaneous recurrence of methamphetamine-induced psychosis, the diagnosis that the defendant's expert proffered at the motion for new trial hearing in 2012 to characterize the defendant's mental state at the time of the stabbing, over a decade earlier.

11 See footnote 7, *supra.*

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2001-00143

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COMMONWEALTH

vs.

QUILLIE MERLE SPRAY, II

MEMORANDUM AND DECISION ON DEFENDANT'S SECOND MOTION FOR A NEW TRIAL

INTRODUCTION

At trial the Commonwealth was represented by Joseph T. Moriarty, Jr. On this motion for a new trial the Commonwealth was represented by Assistant District Attorneys Donna-Marie Haran and Jeffrey T. Travers. The defendant Quillie Merle Spray, II was represented at trial by Margaret R. Guzman, Esq.[1] Post trial, he was represented by Eric S. Brandt, Esq., Roger A. Cox, Esq., and Richard J. Shea, Esq., all from the Office of Public Counsel. On this second motion for a new trial, he was represented by Charles K. Stephenson, Esq.

FACTUAL BACKGROUND

Quillie Merle Spray, II was indicted by the Gand Jury in Worcester on April 6, 2001 charging him with the following: G.L. c. 265, § 1 Murder of Sherylann Miller; G.L. c. 265, § 15A(b), assault and battery with a dangerous weapon; G.L. c. 269, § 10A, possession of a firearm in a motor vehicle without a license and G.L. c. 269, § 10H, possession of ammunition without a firearm ID card. He

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[1] At present, Margaret Guzman is a justice on the District Court.

was tried in January of 2003.

Spray was convicted of first degree murder by reason of extreme atrocity and cruelty, and assault and battery with a dangerous weapon. He was acquitted on the other two charges. The trial justice dismissed the assault and battery with a dangerous weapon charge as being merged with the murder conviction.

On February 28, 2007, Spray filed a motion for a new trial on the basis of newly discovered evidence. The trial justice denied the motion and an appeal was taken. While pending, Spray's appellate counsel withdrew from the case and the case was stayed. Subsequently, the defendant filed a motion for funds to conduct psychological testing and forensic research. That was denied by Lemire, J.

On July 16, 2010, Spray filed a second motion for a new trial and renewed motion for funds for psychological testing. That is the motion presently before this court.

FACTUAL BACKGROUND

In December of 2000, a Kentucky Fried Chicken (KFC) and Taco Bell Restaurant was being constructed on Main Street in Clinton, Massachusetts. Quillie Merle Spray, II ("Spray"), his brother Gary Spray, his sister-in-law Monica Spray, and his cousin Thomas Barron were hired to lay tile in the restaurant.

Spray arrived on the job site in his own vehicle on the early morning of December 8, 2000. The remaining tile crew arrived in a separate vehicle later that afternoon. They began laying tile in the restaurant that day.

Kevin Somero, a supervisor for Boss Contractors, arrived at the restaurant that day. He observed Spray laying base tile. He also saw a knife with a three inch serrated blade and plastic green handle next to Spray as he worked. The knife was subsequently tested and identified as the

knife used to kill the victim Sherylann Miller ("Miller").

The following day, December 9, 2000, at approximately 4:00 p.m. Miller, the manager at the restaurant, was in the back kitchen area accepting job applications. Gary Spray, Monica Spray, and Thomas Barron were laying tile in the front of the restaurant. Spray got up and walked out of the building. Monica, Gary and Thomas were continuing to work when they heard a commotion coming from the back of the restaurant and heard Miller screaming for help and yelling "no don't" and "stop". Monica turned and saw Spray and Miller wrestling in the back of the building and saw Spray drag the victim from behind and punched her in the neck and back. Thomas saw Spray with his arms around Miller in a bear hug around her waist.

Monica screamed "Gary" and "It's Merle". Gary turned around and saw Spray punch the victim in the back. Gary ran and grabbed Spray and pushed him against the wall and asked Spray "What the fuck are you doing?", to which Spray replied, "We'll just tell them someone else done it." Monica and Thomas saw Miller fall to the floor. They saw a large amount of blood coming out from underneath her. Gary yelled to his wife and Thomas to call for the paramedics for help. Spray walked to where the tile was being laid and said "Let's get this tile laid so we can get out of here and go to the house." Monica ran to a nearby gas station and told attendant Ernesto Calderon to call an ambulance because someone had been stabbed. Calderon called 911 and reported the stabbing. Clinton Police responded immediately. Police observed Monica screaming and yelling and observed Gary and Spray walk out the side door of the building. Police found the victim lying on the floor in the back of the restaurant bleeding profusely from the head. The EMTs arrived. Miller was transported to Clinton Hospital and later to UMass by life flight. She died around 2:00 a.m. on December 10, 2000, as a result of injuries sustained during the attack.

An autopsy revealed Miller died as a result of six stab wounds to her neck. One stab wound

severed her spinal cord causing immediate paralysis of her arms and legs and severe impairment of her diaphragm, breathing and ability to speak. It was also determined Miller had been stabbed from behind.

When the police arrived, Monica was hysterical and cried "He stabbed her, he did it" and pointed to Spray. Gary was standing over the defendant yelling "What the fuck did you do that for?" Thomas was standing off to the right and stated "He did it" while pointing to the defendant. They each reiterated that when questioned by Clinton Police. Spray was placed in a cruiser. Gary repeatedly went to the cruiser and yelled at Spray "What are you doing, you didn't even know her."

Monica told the police that she heard a female scream and saw Spray wrestling with Miller until Miller fell to the floor. She said that she saw Spray on top of the victim with his arm making "an up and down overhead motion." Gary described the knife used in the stabbing as a green knife with a blade about five inches long and told police that Spray had the knife.

The police recovered a green knife from the bucket filled with muddy water that was at the scene. Gary identified the knife as belonging to Spray. A hair found on the knife was determined to be a strand of hair from the victim. A piece of fabric on the knife was consistent with the fabric on the jacket the victim was wearing when she was stabbed. There were no fingerprints on the knife. Miller's blood was found on the shirt of the defendant.

At trial Spray took the stand and testified that he was working in the front of the restaurant tiling. He turned around and saw Miller lying on the floor in the back of the restaurant. He went and bent over the victim to check on her. His brother came running over and asked "What the fuck did you do," to which Spray replied that he "didn't do anything." Spray claims he then told his brother they should call the police. Spray also claimed he never heard the victim scream because they had two propane heaters going which were very loud and sounded "like a jet plane was taking off."

Spray claims he never saw any stab wounds on the victim and he did not see any blood coming from her. The strategy of Spray's trial counsel, Margaret Guzman, was to suggest that the defendant's sister in law, Monica Spray, committed the murder and not the defendant. Attorney Guzman argued that Monica Spray's guilt was evidenced by her quickness to volunteer information, her hysterical overexcited state, and the fact that she immediately threw away her blood soaked clothing. Trial counsel suggested that the throwing away of the clothing was an intentional destruction of evidence that indicates consciousness of guilt. Attorney Guzman argued that due to the violent nature of the stabbing, the injury would have produced a substantial amount of blood, and the defendant should have had more of the victim's blood on him if he was the attacker. Trial counsel also attacked the credibility of the witnesses by pointing to their heavy methamphetamine use. Attorney Guzman suggested that Monica Spray attacked the victim as part of a theft, that was motivated by a need to pay for her methamphetamine use. Attorney Guzman argued in her closing argument that police made up their mind about the defendant's guilt at the crime scene, and did not investigate the possibility of a different attacker.

After a finding of guilty Spray filed a Motion for a New Trial with supporting affidavits from Gary Spray and Monica Spray claiming that alleged newly discovered evidence cast reasonable doubt on the defendant's guilt and entitled him to a new trial. Gary claimed he was in the bathroom at the time of the murder and did not see the defendant argue with, fight with or beat or stab Miller. Gary also claims he never saw a knife in Spray's hand any time prior to or after the murder. He claimed police pressured him to give them a name. He claimed he told the prosecutor before trial he wanted to change his statement, but the prosecutor threatened him with seven years for perjury if he changed his statement and so he did not.

Monica Spray claimed she did not hear anyone scream or fight with Miller before she was

stabbed and did not see anybody attack or kill her and did not see Spray argue with, hit or stab her. Monica claimed she jumped to a conclusion that Spray must have done it. She claimed she was coached to saying only yes or no to defense counsel's questions by someone on the prosecution's team. She claimed she did not perjure herself because she was under the influence of methamphetamine and many other mind altering drugs and her memory wasn't close to the truth.

The trial justice did not credit the affidavits and concluded that Spray failed to produce any new evidence casting doubt on the jury's verdict. The motion was denied.

Spray now claims that Attorney Guzman rendered ineffective assistance by failing to investigate and present a lack of criminal responsibility defense and/or cast doubt on his ability to form the requisite intent to commit murder. Spray attached affidavits from a cousin who claimed he saw Spray experience two incidents of hallucinations and asserts Spray's behavior changed after his father died; from his mother who claimed that Spray was experiencing a great deal of stress after his father's death and knew from other family members that Spray was having problems; and from his brother Gary who claims Spray was an infrequent drug user and recalled one incident when he believed the defendant was hallucinating. Spray attached his own affidavit and detailed his drug history, the divorce from his wife and the stress from the job and his father's death. He also attached medical records dated August 2, 1997, which diagnosed him as suffering from amphetamine induced psychotic disorder with hallucinations and antisocial personality disorder. He attached a copy of a deposition of a psychiatrist who testified in a civil suit whose opinion was based solely on the defendant's medical records and trial records. Spray submitted an affidavit from his trial counsel who claims she did not consider any form of the diminished capacity defense and that Spray denied any drug use on the day of the murder and that she believed the appropriate strategy was to deny that he was the perpetrator and to challenge the evidence to the contrary. Spray attached the opinion of his expert that his history of drug use, prior hallucination experience, stress of losing his father,

taking over the business and his divorce in combination with the stressful and noisy working environment prior to the murder caused him to experience a spontaneous recurrence of psychosis at the time of the murder and acted in what he perceived to be self defense. The expert opined that the defendant could have been found not guilty by reason of insanity.

The Commonwealth opposed an evidentiary hearing.

This court allowed an evidentiary hearing on July 27, 2012. At the hearing the expert opined essentially what is set for above.

DISCUSSION

On this motion for a new trial, the defendant asserts that counsel was ineffective for failing to investigate and present an insanity defense based on his alleged methamphetamine induced spontaneous recurrence of psychosis at the time of the homicide. The defendant also argues that his trial counsel was constitutionally ineffective for not raising the defense that he was unable to form the requisite mental state for murder by extreme atrocity and cruelty because of methamphetamine psychosis.

1. Standard

To determine whether a court should grant a new trial because of unconstitutional ineffective assistance of counsel, the trial judge must conduct a "discerning examination and appraisal of the specific circumstances of the given case to see whether there has been serious incompetency, inefficiency, or inattention of counsel - behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer - and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). See Commonwealth v. Clarke, 460 Mass. 30, 45 (2011) (citing Saferian, 366 Mass. at 96). With regard to the second element, "there ought to be some showing that better work might have accomplished something material for the defense."

Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977).

2. Failure to Investigate Psychosis Defense

To establish ineffective assistance of counsel for failure to investigate an insanity defense a defendant must establish that "facts known to, or accessible to, trial counsel raised a reasonable doubt as to the defendant's mental condition", and counsel nonetheless failed to investigate the defense. Commonwealth v. Doucette, 391 Mass. 443, 458-459 (1984) (citing Osborne v. Commonwealth, 378 Mass. 104 , 111 (1979)).

Spray's trial counsel was effective because the facts known to, or accessible to her, did not raise a reasonable doubt as to the defendant's mental state. The investigation conducted by Attorney Guzman was constitutionally effective based on the information available to her.

Attorney Guzman met with Spray, by her estimate, around twelve of times prior to trial, and during these conversations Spray consistently asserted that he did not stab the victim. See Commonwealth v. Walker, 443 Mass. 213, 226 (2005) (finding no ineffectiveness for not raising mental capacity where defendant "consistently asserted his belief that he had acted in self-defense.") During these conversations Spray also indicated to his counsel that he was not under the influence of methamphetamine or other drugs at the time of the crime, and that he had not used any drugs that day. Spray told attorney Guzman that he had used drugs in the past. Attorney Guzman conducted an investigation of Spray's family. During this investigation attorney Guzman contacted Spray's mother, who lives in Oklahoma, by telephone. Spray's mother told attorney Guzman about Spray's drug use and provided the name of a Oklahoma facility where Spray received drug treatment and related mental health treatment as a teenager. Attorney Guzman attempted to obtain records from the facility but was unsuccessful.

Trial counsel may have known that the defendant had a drug problem, however, drug addiction is not a mental disease or defect under the McHoul insanity test, 352 Mass. 544, 546-547

(1967). See Commonwealth v. DiPadova, 460 Mass. 424, 431 (2011); Commonwealth v. Sheehan, 376 Mass. 765, 767 (1978). "[A] defendant whose lack of substantial capacity is due solely to [drug addiction], and not to any mental disease or defect, is criminally responsible." DiPadova, 460 Mass. at 431. In this case there were no facts known or accessible to trial counsel that would have suggested that the defendant was suffering from a mental disease or defect. Trial counsel was unaware prior to trial that the defendant had experienced hallucinations. Attorney Guzman met with Spray around twelve times and spoke with Spray's family members, and no incidences of hallucinations were reported. Attorney Guzman was experienced in representing criminal defendants, and testified that during her many meetings with Spray and her observations of the defendant she did not observe any hallucinations or other indicators of mental problems. The post trial accounts of Spray's cousin and brother of observing Spray hallucinating were unknown to trial counsel pretrial, despite her diligent investigation. While Attorney Guzman was aware that the defendant may have received some mental health treatment in connection with his drug abuse as a youth, Attorney Guzman's investigation of the issue did not amount to constitutionally ineffective assistance of counsel. After being unsuccessful in obtaining the medical records from the facility that the defendant received treatment, it was not ineffective representation for trial counsel to suspend that aspect of her investigation. See Commonwealth v. Doucette, 391 Mass. 443, 459 (1984). In Doucette, the court found that it was not ineffective assistance for trial counsel to fail to investigate an insanity defense where counsel was aware that the defendant was receiving treatment at a methadone clinic and that he had some emotional problems. Id. Similarly, in Commonwealth v. Walker, the court found that it was not ineffective assistance for trial counsel to fail to investigate a mental health defense where counsel was aware that the defendant had a history of alcohol and drug abuse, and had attempted suicide thirteen years earlier. 443 Mass. at 205-206.

By contrast, in Commonwealth v. Roberio, the defendant's parents told trial counsel that the

defendant had received mental health treatment at the suggestion of police. 428 Mass. 278, 279 (1998). Nonetheless, trial counsel did not investigate this information or attempt to obtain records from the mental health facility, and did not ask the defendant to submit to a psychiatric evaluation. Id. Defense counsel instead "made his own assessment of the defendant's mental health." Id. The instant case is distinguishable from Roberio, where the court found ineffective investigation. In this case, unlike Roberio, trial counsel attempted to obtain medical records from a treatment facility but was unsuccessful. It was not ineffective assistance for trial counsel not to ask the defendant to submit to a psychiatric evaluation, where the only indication that the defendant may have a mental condition was the fact that he had received drug abuse treatment in the past. See Doucette, 391 Mass. at 459.

Spray argues that the bizarre, apparently motiveless, nature of the crime should have put defense counsel on notice that lack of criminal responsibility might have been a viable defense. The "circumstances of a crime may be evidence of a lack of criminal responsibility . . . [but] a senseless crime alone does not entitle the defendant to a jury instruction on criminal responsibility." Osborne v. Commonwealth, 378 Mass. 104 , 111 (1979). While Spray's alleged actions might have seemed bizarre or senseless to defense counsel, this alone should not have put defense counsel on notice that the defense counsel may have lacked criminal responsibility due to a mental condition. See Doucette, 391 Mass. at 459 (rejecting argument that bizarre death by multiple stabbing should have indicated to defense counsel the necessity of pursuing an insanity defense).

In sum, there was no "serious incompetency, inefficiency, or inattention of counsel" in attorney Guzman's investigation. While the post trial affidavits and expert testimony of Dr. Presskreischer suggest that methamphetamine psychosis may have been a viable defense, "the test is not to be made with the advantage of hindsight . . . ." Commonwealth v. Drumgold, 423 Mass. 230, 262 (1996). The facts reasonably accessible to trial counsel prior to trial simply did not raise

a reasonable doubt as to the defendant's mental condition.

3. Failure to Present Psychosis Defense

Claims of ineffective assistance of counsel based on tactical decisions must be denied unless the decision was "manifestly unreasonable" when it was made. Commonwealth v. Walker, 443 Mass. 213, 225 (2005); Commonwealth v. Adams, 374 Mass. 722, 728 (1978). "The decision regarding the best defense or combination of defenses to pursue at trial is a tactical decision for which trial counsel is largely, although not always exclusively, responsible." Commonwealth v. Lacava, 438 Mass. 708, 714 (2003).

It was not ineffective assistance of counsel for Spray's trial counsel to not raise a mental health defense. Based on the facts ascertainable to trial counsel it was reasonable for trial counsel to conclude that her chosen defense was the best available one. The facts reasonably accessible to counsel would not have entitled the defendant to a lack of criminal responsibility jury instruction. Osborne, 378 Mass. at 112-113. A defense of lack of criminal responsibility was inconsistent with Spray's consistent assertions to counsel that he did not commit the attack. The raising of the mental health defense would have likely adversely impacted the defense that Monica Spray was the attacker. See Walker, 443 Mass. at 226. Under these circumstances, it was a reasonable tactical decision for trial counsel not to raise a mental health defense.

ORDER

The Defendant's Motion For a New Trial is **DENIED**.

John S. McCann
Justice of the Superior Court

DATED: September 18, 2012

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
(A) the applicant has exhausted the remedies available in the courts of the State; or
(B)(i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
(A) the claim relies on--
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Massachusetts General Law, c. 123 § 15

§ 15. Competence to stand trial or criminal responsibility; examination; period of observation; reports; hearing; commitment; delinquents

(a) Whenever a court of competent jurisdiction doubts whether a defendant in a criminal case is competent to stand trial or is criminally responsible by reason of mental illness or mental defect, it may at any stage of the proceedings after the return of an indictment or the issuance of a criminal complaint against the defendant, order an examination of such defendant to be conducted by one or more qualified physicians or one or more qualified psychologists. Whenever practicable, examinations shall be conducted at the court house or place of detention where the person is being held. When an examination is ordered, the court shall instruct the examining physician or psychologist in the law for determining mental competence to stand trial and criminal responsibility……