IN THE

SUPREME COURT OF THE UNITED STATES

KENDALL WHITAKER,
PETITIONER,

v.

PATRICIA A. COYNE-FAGUE, Director/Warden,
Adult Correctional Institution,
RESPONDENT

APPENDIX
to
Petition for a Writ of Certiorari to the Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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APPENDIX A

DECISION ON THE APPLICATION FOR POST-CONVICTION RELIEF – APRIL 20, 2016

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

KENDALL WHITAKER

Vs. PM 2014-5309

STATE OF RHODE ISLAND

DECISION

ON

APPLICATION FOR POST-CONVICTION RELIEF

HEARD BEFORE

THE HONORABLE JUSTICE PATRICIA A. HURST

APRIL 20, 2016

APPEARANCES:

GEORGE J. WEST, ESQUIRE . . . . . FOR THE PETITIONER

LAUREN S. ZURIER, ESQUIRE . . . . . FOR THE STATE
SPECIAL ASST. ATTORNEY GENERAL

SUSAN L. INMAN
COURT REPORTER

CERTIFICATION

I, SUSAN L. INMAN, hereby certify that the succeeding pages, 1 through 57, are a true and accurate transcript of my stenographic notes.

Susan L. Inman

Susan L. Inman
Court Reporter

APRIL 20, 2016, A.M. SESSION

THE COURT: Good morning, everyone.

The matter before the Court is Kendall Whitaker vs. State of Rhode Island, Superior Court Case Number PM 2014-5309.

Would counsel identify themselves for the record?

MS. ZURIER: Lauren Zurier for the State, your Honor.

MR. WEST: George West for the defendant, Kendall Whitaker.

THE COURT: I see Mr. Whitaker is here, of course. Mr. Whitaker --

MR. WHITAKER: Yes.

THE COURT: You can sit down. Mr. Whitaker, you can sit down.

Mr. Whitaker, I'm not going to keep you in suspense or your family in suspense. I'll be vacating all five of the charges for which you were convicted of aiding and abetting. I'll be spending the next probably 30 to 40 minutes, maybe more, in explaining my reasoning. Your attorney can explain later if there are things you don't understand.

MR. WHITAKER: Okay.

THE COURT: But I need to go through all this detail so I make sure I have it right, okay?

MR. WHITAKER: Okay.

THE COURT: But, basically, you've won this case, okay?

MR. WHITAKER: Thank you.

THE COURT: Now, the case is before the Court on Mr. Whitaker's application for post-conviction relief. I previously heard arguments on this case and, on November 30th, 2015, I provided the parties with my initial impression of the issues that had been raised by Mr. Whitaker's application and the parties' memoranda. Thereafter, on March 4, 2016, Mr. Whitaker filed a supplemental memoranda. The State filed its second supplemental memoranda on April 11, 2016. Mr. Whitaker filed a reply on April 14, 2016. Mr. Whitaker's application for relief is now before the Court for final disposition.

Now, since we were last in court on November 30th, 2015, I've carefully re-read the jury instructions that were given in Mr. Whitaker's case, the jury verdict summary sheet, and the case law. I've arrived at conclusions that are different from my initial impressions that I provided to the parties on November 30th, 2015.

As I previously have stated on the record in this case, the trial evidence in Mr. Whitaker's case was

conflicting and there were multiple factual scenarios that could have taken place on the night in question. Each of the witnesses enjoyed profound credibility problems. As a result, the State relied on alternate theories of liability including (1) conspiracy; (2) strict liability for crimes taking place during the furtherance of the conspiracy; (3) liability for crimes taking place while aiding and abetting another in the commission of a crime pursuant to General Laws 11-1-3; and (4) direct responsibility for crimes personally committed.

Many of the essential facts are laid out in the Supreme Court opinion in *State vs. Whitaker* 79 A.3d 795. All the charges against Mr. Whitaker stem from a robbery and shooting that took place during a December 5, 2002 birthday party being held in an apartment in the City of Providence. The trial evidence included evidence that Brandon Robinson, who also was charged in connection with this incident, was in possession of a gun and brought it to the birthday party that night. There was evidence that Mr. Whitaker knew that Robinson was carrying a gun. There also was evidence that Mr. Whitaker also brought a gun to the birthday party. Brandon Robinson testified that shortly before the robbery, he and Mr. Whitaker were outside of the apartment discussing one of the party

goers -- discussing robbing one of the party goers, Joel Jackson, of a chain and medallion that Jackson was wearing that night. According to Robinson, he, Robinson, stated that shots would be fired during any robbery attempt and, further, that there was a risk that the police could quickly respond to the noise. According to Robinson, this conversation took place shortly before the two men walked back into the apartment. According to Robinson, Mr. Whitaker told Robinson to use his gun by simply holding it in his hand as opposed to firing it. Although Robinson testified that he was merely assisting Mr. Whitaker in Mr. Whitaker's plan to rob Joel Jackson, there also was evidence that Robinson wanted to rob Joel Jackson. Indeed, it was Robinson who actually tore the chain and medallion from Joel Jackson's neck without ever turning them over to Mr. Whitaker. Robinson also testified that he drew his weapon before re-entering the apartment. He testified that Mr. Whitaker did not draw his gun until after Mr. Whitaker saw that Robinson had drawn his. He testified that Joel Jackson charged at him, Robinson, when the women began to scream. He and Jackson became locked in a struggle for Robinson's gun. Moments later, another party goer, George Toby, came to Jackson's assistance and joined the struggle. Brandon Robinson testified that he did not hear any shots fired

until after he was under attack from Jackson and Toby. He testified that his gun never went off and that the shots that were fired came from a different weapon. He testified that he felt a burning sensation and yelled to Mr. Whitaker to stop shooting. He testified that he gave his gun to Mr. Whitaker who then left the apartment. He testified that Jackson had fallen onto him, at which point he, Robinson, seized the opportunity to pull the chain and medallion from Jackson's neck. When he got into his car where his friend Richard Isom was waiting, Robinson stated that he got the chain. Robinson testified that when he told Mr. Whitaker that Mr. Whitaker had shot him, Mr. Whitaker said it was an accident. Mr. Whitaker took Brandon Robinson to the hospital. There was evidence that Robinson had only known Mr. Whitaker for a month. There was evidence that Mr. Whitaker shot all three of the individuals who suffered gun shot wounds that night, including Joel Jackson who died of his injuries. However, there also was some evidence that Mr. Whitaker was not armed that night or, even if he was, he did not deploy his weapon. There was evidence that Mr. Whitaker was carrying a .22 caliber weapon and that Joel Jackson was killed by a bullet of that caliber. There was evidence that Mr. -- strike that. There was evidence that Brandon Robinson's

gun was a .357 caliber revolver. According to Robinson's testimony, he pleaded to second degree murder in connection with Joel Jackson's death. He also testified that he pleaded guilty to felony assault on George Toby.

Mr. Whitaker was charged with nine criminal offenses. The indictment was handed down on January 15, 2004. Mr. Whitaker and his co-defendant, Brandon Robinson, both were charged with murder, Count 1; first degree robbery, Count 2; conspiracy to commit robbery, Count 3; assault with a dangerous weapon on George Toby, Count 4; carrying a pistol or revolver without a license, Count 6; using a firearm while committing a crime of violence, robbery, Count 7; and discharging a firearm while committing a crime of violence, death resulting, Count 8; and committing a crime of violence while armed, Count 9. For a single count, Count 5, Mr. Whitaker alone was charged with assaulting Brandon Robinson with a dangerous weapon, a handgun. It was after reaching a plea agreement that Brandon Robinson testified against Mr. Whitaker.

Although there were only nine counts to the indictment, the jury verdict summary sheet consisted of 15 questions. This was a result of the competing factual scenarios raised by the evidence and the State's need to pursue the alternate theories of liability that I've

mentioned.

Mr. Whitaker was acquitted of the Count 3 conspiracy charge. Accordingly, to the extent that the State was relying on conspiracy based liability theories for other counts of the indictment, the jury also found Mr. Whitaker not guilty. In connection with conspiracy based liability, the jury was instructed that if it found that Mr. Whitaker and Brandon Robinson had entered into a conspiracy, it could convict Mr. Whitaker of the various offenses based upon either Brandon Robinson's conduct or Mr. Whitaker's conduct.

As to the offenses for which the State relied on a culpability-as-the-principal-actor theory, the jury verdicts were as follows: Mr. Whitaker was acquitted of the Count 4 charge that it was he who personally shot George Toby. He was convicted of the Count 5 assault with a dangerous weapon charge for having personally shot Brandon Robinson. He also was convicted of the Count 6 charge of personally carrying a revolver on or about his person without a permit.

For the offenses where the State relied upon an aiding and abetting theory, Mr. Whitaker was convicted on all five counts. These are the charges or offenses that are at issue in Mr. Whitaker's application for post-conviction relief. They appear under the jury

verdict summary sheet section entitled, "B. Aiding, Abetting or Assisting (No Conspiracy; Vicarious/Imputed Liability Does Not Apply)."

I remember this case very well. As I previously indicated, the State espoused multiple and sometimes conflicting theories of liability due to the competing potential factual scenarios and credibility problems that plagued all the witnesses. I cannot begin to describe the mental gymnastics involved in writing and organizing the jury instructions and the jury verdict summary sheet. Compounding the problem was the State's evidence that it was Mr. Whitaker who intended to rob Joel Jackson but it was his cohort, Brandon Robinson, who actually pulled the chain and medallion from Jackson's neck. In addition, the evidence that Brandon Robinson's gun never discharged was shaky. Hence, the State relied on conspiracy and aiding and abetting as theories of liability.

The charges for which the State relied on an aiding and abetting theory were laid out as numbers 7 through 11 on the jury verdict summary sheet. They were:

Summary sheet question 7 for Count 2: Aiding and abetting or assisting Brandon Robinson in the robbery of Joel Jackson;

Summary sheet question number 8 for Count 1: First degree murder because he aided, abetted, or assisted in

the robbery of Joel Jackson;

Summary sheet question 9 for Count 9: Carrying a dangerous weapon on or about his person while aiding, abetting, or assisting Brandon Robinson in a crime of violence, to wit, the robbery of Joel Jackson;

Summary sheet question 10, also for Count 9: Using a firearm when aiding, abetting, or assisting Brandon Robinson in the robbery of Joel Jackson;

Summary sheet question 11 for Count 8: Discharge of a firearm when attempting to commit a robbery or when aiding, abetting, or assisting Brandon Robinson in the robbery of Joel Jackson.

Notably, notwithstanding that question number 8 for the felony murder charge was based on liability as an aider or abettor, the jury instruction for felony murder did not include any instruction on aiding and abetting. Instead, the jury was instructed that it could find Mr. Whitaker guilty of felony murder if it found that (a) he was acting as part of a conspiracy or (b) he personally attempted to rob Joel Jackson and that the attempted robbery was a substantial factor in causing Joel Jackson's death.

Now, due to double jeopardy considerations, Mr. Whitaker's felony murder conviction merged, by operation of law, with the robbery conviction. The

judgment of conviction reflects this. It indicates, for Count 1, Murder 1, found guilty by jury, sentenced by Judge Hurst, 15 June 2006; Life Count 2 merged with Count 1. The judgment of conviction also states: Defendant found not guilty of Count 2. Presumably, this is the way the clerk of court's office reconciles the merger of the two offenses. Regardless, Mr. Whitaker was sentenced to life imprisonment pursuant to General Laws 11-23-1 and 2.

As grounds for his application for post-conviction relief, Mr. Whitaker asserts a Sixth Amendment ineffective assistance of counsel claim. He correctly contends that this trial justice erred when charging the jury with respect to aiding and abetting as a theory of liability and, further, that his trial attorney failed to properly challenge the Court's jury instructions. Mr. Whitaker's application for post-conviction relief was triggered by the recent U.S. Supreme Court decision in *Rosemond vs. United States*. Mr. Whitaker also relies on the more recently decided case of *United States vs. Encarnacion-Ruiz*, 787 F.3d 581. Mr. Whitaker also contends that defense counsel's performance was constitutionally deficient because counsel failed to raise that there was insufficient evidence to convict Mr. Whitaker under an aiding and abetting theory and because counsel failed to have this Court consider the

issue on the motion for new trial and consequently on appeal. As pointed out by the Rhode Island Supreme Court in Mr. Whitaker's appeal, defense counsel's written motion for new trial contained no grounds and, during the hearing on the motion, counsel merely asked this trial justice to function as the thirteenth juror and assess the evidence and credibility of the witnesses.

Now, I won't recite the applicable -- strike that. I won't recite the law applicable to the post-conviction relief and Sixth Amendment ineffective assistance of counsel claims. The attorneys have covered *Strickland* and its progeny in their briefing papers. Suffice it to say that the law is well settled: In order to sustain an argument of ineffective assistance of counsel, Mr. Whitaker must satisfy a two-part test. First he must show that his attorney's performance was deficient, that is, that the attorney made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second he must show that the deficient performance prejudiced the defense. This requires Mr. Whitaker to show that counsel's errors were so serious as to have deprived him of a fair trial.

As to all of the charges upon which the State relied on an aiding and abetting theory, Mr. Whitaker contends that defense counsel had a duty to urge the Court to

instruct the jury and the Court to thereafter instruct the jury to determine whether Mr. Whitaker had sufficient advanced knowledge of Brandon Robinson's intentions such that Mr. Whitaker could either alter that plan or withdraw from the enterprise. Mr. Whitaker relies on the *Rosemond* case. He contends that this Court erred by failing to instruct the jury that Mr. Whitaker needed advance knowledge that Brandon Robinson had a gun.

In *Rosemond*, the United States Supreme Court vacated the defendant's conviction for carrying a firearm during a federal drug trafficking offense, that is, an armed drug sale. In that case, carrying a firearm during the commission of the predicate offense, an illegal drug sale, was an essential element of the offense with which Rosemond was charged. The United States Supreme Court held that the trial justice's instructions on intent were misleading. The trial justice had instructed the jury on general knowledge of the predicate offense of a drug sale. He did not instruct the jury on the full scope of the crime charged. In other words, he did not instruct the jury that the defendant's intent must go to the specific and entire crime charged which, in that case, was the predicate crime plus an additional element: carrying a gun. The Supreme Court also faulted the trial justice for not instructing the jury that in order to

convict Rosemond, the prosecution must prove that Rosemond had sufficient advanced notice about his confederate's gun so as to be able to withdraw from the venture. In *Rosemond*, the issues were twofold: knowledge and timing. Rosemond's case was similar to Mr. Whitaker's in that the shooter's identity was in dispute.

It seems plain enough that the core principles enunciated in *Rosemond* should apply in any situation in which the prosecution relies on a theory of aiding and abetting, regardless of whether or not there are additional elements over and above those supporting the predicate offense. Indeed, the First Circuit Court of Appeals said as much in *United States vs. Encarnacion-Ruiz* when it determined that nothing in the *Rosemond* opinion limited its application to double barreled crimes. Plainly, criminal culpability requires knowing and voluntary participation in a crime, as opposed to inadvertent, unplanned, or mistaken enablement of the crime. This necessarily would require the aider and abettor to fully understand his cohort's intentions beforehand and far enough in advance to opt out of the enterprise. This shouldn't require rocket science. Nonetheless, it also seems plain enough that these nuances have eluded the criminal defense bar and the

judiciary for far too long.

In order to decide Mr. Whitaker's application for post-conviction relief, the jury instructions and the jury verdict summary sheet questions must be discussed separately and on an offense-by-offense basis. I'll be addressing them out of order and not in the order they were given to the jury. Now, for immediate purposes, I will pretend that there was sufficient evidence to warrant an aiding and abetting instruction in the first place.

I'll start with the primary or core aiding and abetting instruction. When I gave this -- when I gave the jury this instruction, I gave it in the context of the instruction on Count 2 common law robbery. The core aiding and abetting instruction begins at the top of page 9 of the written jury instructions. It was a general knowledge-of-the-offense instruction. The corresponding question on the jury verdict summary sheet was question 7.

The aiding and abetting instruction stated in pertinent part, and I'll quote, "In addition, the law also provides that anyone who aids, abets, or assists another to commit a robbery is nonetheless criminally liable as if he were a principal or primary person in committing the crime. In other words, even where a

person is not part of a conspiracy to rob and did not personally do every act constituting the robbery, the law still holds that person responsible for the robbery if that person is guilty of aiding, abetting, or assisting another person in committing a robbery. If a person knowingly and wilfully associates himself in some way with a criminal venture, and participates in the commission of a crime, either before or at the time it is committed, that person is legally responsible for that crime just as if he had committed the crime alone. The State is required to prove that the person charged shared in the criminal intent of the principal person who committed the offense or offenses. In other words, the individual charged must have helped in planning or carrying out the robbery. His mere presence at the scene and/or his knowledge that a crime is going to be committed and/or his failure to prevent the crime is not enough, by itself, to establish that the individual aided and abetted in the commission of the crime." The instruction further stated on page 10: "Similarly, and with respect to the State's contention that Kendall Whitaker aided, abetted, or assisted Brandon Robinson in the robbery of Joel Jackson, the State must prove beyond a reasonable doubt that Brandon Robinson actually committed that robbery and that Kendall Whitaker

knowingly and intentionally aided and abetted or assisted him in it."

Insofar as it went, this instruction correctly recited the law of aiding and abetting. Unfortunately, however, it invited the jury to convict without advanced knowledge of intent. This is important because according to Brandon Robinson's testimony, he never intended to rob Joel Jackson and his doing so was almost serendipitous.

The core aiding and abetting instruction should have gone farther. Although implicit in the word "knowingly" and in the words "share in the criminal intent" is cognizance of the alleged perpetrator's intentions, in this case Brandon Robinson's intention to rob Joel Jackson, I should have instructed the jury in more detail to make it clear that an aider and abettor must be sufficiently aware of the principal's intentions such that there is support for the elements of the particular criminal offense at issue. Indeed, if I had to do it again, I probably would instruct separately on aiding and abetting instead of folding it into the instruction on the predicate offense, in this case robbery.

The jury should have been instructed along the following lines:

"Ladies and gentlemen, the State makes alternate contentions about what happened on the night in question.

It contends that either (1) Mr. Whitaker attempted to rob Joel Jackson with Brandon Robinson's assistance; (2) Brandon Robinson attempted to and did successfully rob Joel Jackson with Mr. Whitaker's assistance; or (3) that the two men together conspired to rob Joel Jackson as a joint enterprise.

"I already instructed you on the law of conspiracy. In addition to being charged with conspiracy to commit robbery, Mr. Whitaker has also been charged with several other crimes in connection with the robbery and death of Joel Jackson. The charges against him include robbery in the first degree, first degree murder, and several weapons charges. One of the alternate theories the State relies upon is Mr. Whitaker's liability as an aider and abettor.

"A person who aids, abets --" strike that. "A person who aids, assists, or abets another in a commission of a crime is considered just as guilty as the one who actually perpetrate the crime. In other words, even if there is no conspiracy as I've defined it, a person who knowingly and voluntarily facilitates another person in committing a crime is held equally accountable. The law provides that anyone who aids, abets, or assists another to commit a robbery is nonetheless criminally liable as if he were a principal or primary person in

committing the crime. In other words, even where a person is not part of a conspiracy and did not personally do every act constituting the crime, the law still holds that person responsible for that crime if that person is guilty of aiding abetting or assisting another person in committing it. You see, if a person knowingly and wilfully associates himself in some way with a criminal venture and participates in the commission of a crime, either before or at the time it is committed, that person is legally responsible for that crime just as if he had committed the crime alone. As a result, the State is required to prove that the person charged shared in the criminal intent of the principal person who committed the offense or offenses. In other words, the individual charged must have helped in planning or carrying out the crime. His mere presence at the scene and/or his knowledge that a crime is going to be committed and/or his failure to prevent the crime is not enough, by itself, to establish that the individual aided and abetted in the commission of the crime.

"You heard testimony from Brandon Robinson that Mr. Whitaker was the one who wanted to rob Joel Jackson of his chain and medallion and, further, that Robinson was only helping out Mr. Whitaker. However, you also heard evidence that it was Brandon Robinson who entered

the apartment with his gun drawn, actually took the chain and medallion from Joel Jackson and that he kept the chain and medallion for himself rather than giving it to Mr. Whitaker.

"To the extent that the State relies on the theory that Mr. Whitaker aided and abetted Brandon Robinson in the robbery of Joel Jackson, the evidence in this case requires you to decide whether the State has proved beyond a reasonable doubt that it was Brandon Robinson who intended to rob Joel Jackson and, further, that Mr. Whitaker knowingly and voluntarily facilitated Robinson's effort, as opposed to Mr. Whitaker having embarked upon a parallel plan of his own to rob Jackson. Due to the nature of the charges in this case, the question of whether or not Mr. Whitaker knowingly and voluntarily facilitated Brandon Robinson's ultimately successful effort to rob Joel Jackson will require you to determine what, if anything, Mr. Whitaker knew about Brandon Robinson's general intention to rob Joel Jackson and what, if anything, he knew about Brandon Robinson's more specific intention about the nature and character of the robbery. There was evidence that Brandon Robinson was armed with a gun and that he intended to use that gun when robbing Joel Jackson.

"Let's start with the weapons offenses.

"In connection with aiding and abetting Brandon Robinson's robbery of Joel Jackson, Mr. Whitaker has been charged with committing a robbery while armed and having available a firearm. He also has been charged with using a dangerous weapon while committing a crime of violence. He also has been charged with discharging a firearm while committing a crime of violence, death resulting. In connection with these particular charges and his culpability as an aider and abettor, the State contends that it was Mr. Whitaker who, himself, personally carried, used, and discharged a .22 caliber firearm while aiding and abetting Brandon Robinson in Robinson's attempt to rob Joel Jackson.

"In order to prove Mr. Whitaker's guilt as an aider and abettor, the State must prove beyond a reasonable doubt that Brandon Robinson in fact intended to rob Joel Jackson and that Mr. Whitaker knew, generally, of Robinson's intentions. By that I mean that Mr. Whitaker knew of Robinson's intentions to wrongfully take Joel Jackson's chain and medallion from his person by force or putting him in fear. The State also must prove beyond a reasonable doubt that Mr. Whitaker knowingly and voluntarily aided and abetted Robinson in that endeavor. Finally, the State also must prove beyond a reasonable doubt that Mr. Whitaker knew of Robinson's intentions far

enough in advance such that he had a meaningful opportunity to withdraw from the crime. When I use the words 'meaningful opportunity,' I mean an opportunity to bow out without increasing the risk of danger already presented by the circumstances.

"For the charge of personally carrying a dangerous weapon while committing a crime of violence, the State must prove beyond a reasonable doubt that: (1) Brandon Robinson intended to rob Joel Jackson; (2) Mr. Whitaker knew about Robinson's general intentions far enough in advance to withdraw from the crime but failed to do so and, instead, knowingly and voluntarily facilitated that crime; and (3) Mr. Whitaker personally carried a dangerous weapon while facilitating Brandon Robinson's effort to rob Joel Jackson.

"The State also contends, in the alternative, that Mr. Whitaker should be found guilty due to Brandon Robinson's having committed a crime of violence, a robbery, while armed. In order to prove Mr. Whitaker guilty of this charge due to in Brandon Robinson's committing an armed robbery, the State must prove that Mr. Whitaker had advanced knowledge of Robinson's specific intentions. The State must prove beyond a reasonable doubt that: (1) Brandon Robinson intended to rob Joel Jackson and, more specifically, that Robinson

intended to do so while carrying a dangerous weapon; (2) Mr. Whitaker knew that Robinson was armed and intended to rob Joel Jackson while armed; (3) Mr. Whitaker knew about Robinson's specific intentions far enough in advance to withdraw from the crime but failed to do so and, instead, knowingly and voluntarily facilitated that crime.

"Similarly, for the charge of personally using a dangerous weapon while committing a crime of violence, the State must prove beyond a reasonable doubt that: (1) Brandon Robinson intended to rob Joel Jackson; (2) Mr. Whitaker knew about his general intentions far enough in advance to withdraw from the crime but failed to do so and, instead, knowingly and voluntarily facilitated that crime; and (3) Mr. Whitaker personally used a dangerous weapon while facilitating Brandon Robinson's effort to rob Joel Jackson.

"The State also contends, in the alternative, that Mr. Whitaker should be found guilty of this offense due to Brandon Robinson's having used a dangerous weapon while committing a crime of violence. In order to prove Mr. Whitaker guilty of this charge due to Brandon Robinson using a dangerous weapon while committing a crime of violence, the State must prove that Mr. Whitaker had advanced knowledge of Robinson's specific intentions. The State must prove beyond a reasonable doubt that: (1)

Brandon Robinson intended to rob Joel Jackson and, more specifically, to use a dangerous weapon while doing so; (2) Mr. Whitaker knew about Robinson's specific intentions far enough in advance to withdraw from the crime but failed to do so and, instead, knowingly and voluntarily facilitated that crime.

"Lastly, for the charge of personally discharging a firearm while committing a crime of violence, death resulting, the State must prove beyond a reasonable doubt that: (1) Brandon Robinson intended to rob Joel Jackson; (2) Mr. Whitaker knew about his general intentions far enough in advance to withdraw from the crime but failed to do so and, instead, knowingly and voluntarily facilitated that crime; (3) Mr. Whitaker personally discharged a firearm while facilitating Brandon Robinson's effort to rob Joel Jackson; and (4) Joel Jackson's death was the proximate result of Mr. Whitaker's having discharged that firearm.

"The State also contends, in the alternative, that Mr. Whitaker should be found guilty of this offense due to Brandon Robinson's having discharged the firearm while committing a crime of violence. In order to prove Mr. Whitaker guilty of this charge due to Brandon Robinson's discharging a firearm while committing a crime of violence, the State must prove that Mr. Whitaker had

advanced knowledge of Robinson's specific intentions. The State must prove beyond a reasonable doubt that: (1) Brandon Robinson intended to rob Joel Jackson and, more specifically, to discharge a dangerous firearm while doing so." Strike the word "dangerous." "(2) Mr. Whitaker knew about Robinson's specific intentions far enough in advance to withdraw from the crime but failed to do so and, instead, knowingly and voluntarily facilitated that crime; and (3) Joel Jackson's death was the proximate result of Brandon Robinson's having discharged that firearm."

Those are the lines along which the jury should have been charged. Now, I can see that the instructions I just posed contain some flaws but I think I've made my point. One of the problems with this case was that even the State's attorneys were confused about if and how the aiding and abetting instructions should be applied to the various charges. In the end, for all that Mr. White insisted that aiding and abetting -- that an aiding and abetting instruction be given to the jury, Mr. Montecalvo never once referred to that theory of liability in his closing argument.

Now, if I am incorrect about the manner in which I believe I should have charged the jury, it would only be if Mr. Whitaker was entitled to an instruction on

advanced knowledge of Brandon Robinson's specific intentions even where the basis of liability was Mr. Whitaker's personally carrying, using, or discharging a firearm. With respect to his personally carrying, using, or discharging a firearm, I think that the general knowledge of intent would have been sufficient. In a few moments I'll get back to the weapons charges.

I'll now turn to the first degree robbery and murder charges. And, once again, I will, for immediate purposes, pretend that the evidence warranted a jury instruction on aiding and abetting.

I should have instructed the jury as follows:

"Ladies and gentlemen, let's turn to the first degree robbery and murder charges. These offenses involve additional elements over and above Mr. Whitaker merely having advanced knowledge of Brandon Robinson's general intention to rob Joel Jackson.

"In addition to proving that Mr. Brandon Robinson intended to rob Joel Jackson, the State must prove beyond a reasonable doubt that Mr. Whitaker not only knew about Brandon Robinson's general intention to rob Joel Jackson, but that Mr. Whitaker also knew about Robinson's specific intentions concerning the manner in which Robinson would carry out the crime such that Mr. Whitaker fully understood the nature and character of the crime that he

would be facilitating. In other words, the State must prove that Mr. Whitaker understood the proposed nature and character of the robbery, that is, an armed robbery. The State also must prove beyond a reasonable doubt that Mr. Whitaker knew about Brandon Robinson's specific intentions far enough in advance such that Mr. Whitaker had a meaningful opportunity to bow out of the enterprise. You see, absent a conspiracy, the law does not hold an aider and abettor responsible for his or her cohort's actions unless it is proved beyond a reasonable doubt that he or she had all of the relevant facts in his or her possession. In connection with first degree robbery and murder, knowing the relevant information would have meant knowing about Brandon Robinson's specific intentions to commit an armed robbery. In addition, with respect to first degree robbery -- strike that. In addition, with respect to the first degree robbery and murder charges, the State also must prove beyond a reasonable doubt that injury to or death of another person was therefore a foreseeable, natural, and probable consequence of Brandon Robinson's disclosed robbery plan."

Those are the lines along which I should have charged the jury for the first degree robbery and murder charges.

The jury instructions which I actually gave to the jury were, as I've said, good as far as they went. In *Rosemond*, the trial justice was faulted not because his general knowledge of the offense instruction was incorrect, but because he did not address the additional "plus gun" element with respect to either full knowledge or timing.

In Mr. Whitaker's case, it was not generally disputed that Joel Jackson was shot and killed during the robbery. Thus, Mr. Whitaker was charged with first degree robbery and the penalty set forth in General Laws 11-39-1(a) were applicable. As a result, it was essential to instruct the jury that the State was required to prove beyond a reasonable doubt that Mr. Whitaker had full knowledge of Brandon Robinson's specific intentions, i.e. to commit a robbery while armed or to use a firearm to accomplish the robbery. In addition to the question of knowledge of Brandon Robinson's specific intentions, Mr. Whitaker also correctly contends that the Court generally failed to illuminate or expound upon the advanced knowledge requirement. Counsel broadly frames the issue on page 22 of his April 3, 2015 memorandum. Then, beginning at the bottom of page 23 he argues that the jury instructions and the jury verdict summary sheet questions were devoid

of language instructing the jury that they were required to find that Mr. Whitaker had prior knowledge of the firearm and the intent to use it. He argues similarly on page 33 of his memorandum, although the argument is somewhat muddy. He points to the *Rosemond* case and argues that "The State must prove as part of the knowledge element that the accomplice had the opportunity to walk away after learning of the gun but chose to proceed thereby incurring liability of this statute." Obviously, the federal statute in *Rosemond* is different from Rhode Island state statutes pursuant to which Mr. Whitaker was convicted. However, *Rosemond's* core principles of full knowledge of relevant facts, intent, and advanced knowledge all apply.

Plainly, however, in connection with the first degree robbery and murder charges, this Court should have instructed the jury that the State was required to prove that Mr. Whitaker had sufficient advanced knowledge not only of Brandon Robinson's general intention to rob Joel Jackson but, also, his specific intentions concerning the nature and the character of that robbery. More specifically, that Robinson would attempt to commit the robbery while armed and to use his gun during that attempt. However, the jury was merely instructed that the State was required to prove beyond a reasonable doubt

that Mr. Whitaker knowingly and wilfully associated himself with the criminal venture that he shared -- strike that -- that Mr. Whitaker knowingly and wilfully associated himself with the criminal venture that he shared in Robinson's criminal intent and that he must have helped in planning or carrying out the robbery. Although having time to decline might seem to be implicit in the requirement of knowingly and wilfully associating oneself with a criminal venture and sharing in the other's criminal intent, that language merely begs the question of what it was that the State was required to prove that Mr. Whitaker knew about and when he knew it.

Had defense counsel brought all of this to my attention, I would have instructed the jury differently. The State's competing theories of liability were confused and confusing. I was ill at ease with both the jury instructions and the jury verdict summary sheet questions. I remember that. Unfortunately, I just couldn't place what was wrong.

In addition to the instruction that I recited a few moments ago, I also should have included instructions along the following lines:

"Before you may find Mr. Whitaker guilty of first degree robbery, the State must prove that Mr. Whitaker had more than knowledge of Brandon Robinson's general

intention to rob Joel Jackson. The State must prove beyond a reasonable doubt that Mr. Whitaker had enough information about Brandon Robinson's specific intentions concerning the nature and character of the robbery such that Mr. Whitaker knew that injury to another person was a foreseeable, natural, and probable consequence of that robbery. The State also must prove beyond a reasonable doubt that Mr. Whitaker knew about Robinson's specific intentions beforehand and, further, that he knew about them far enough in advance such that he had a meaningful opportunity to withdraw from the crime but failed to do so. In determining whether or not the State has proved these additional elements by proof beyond a reasonable doubt, you should consider all of the facts and circumstances proved at trial including, but not limited to, whether or not Brandon Robinson was armed, what were his specific intentions about how he would carry out the robbery and, importantly, the extent to which Mr. Whitaker knew about these and any other relevant facts.

"You also must consider the evidence demonstrating when it was that Mr. Whitaker learned about Brandon Robinson's specific intentions. You see, the State is also required to prove beyond a reasonable doubt that Mr. Whitaker knew enough about Robinson's intentions such

that Mr. Whitaker had a meaningful opportunity to withdraw from the criminal enterprise, the robbery attempt, but that he failed to do so. When I use the words "meaningful opportunity," I mean the opportunity to withdraw from the crime without increasing the risk of danger already posed by Brandon Robinson's plan. You see, unlike a conspiracy where the co-conspirators are strictly liable for each other's conduct, an aider and abettor is only held responsible for facilitating the crime when he has full knowledge of his or her cohort's illegal scheme. Once he or she has full knowledge of his or her cohort's illegal scheme, the law holds the aider and abettor responsible, as a principal, if he or she knowingly and voluntarily chooses to aid and abet that illegal scheme. Importantly, however, even if you find that Mr. Whitaker knew about Brandon Robinson's general scheme to rob Joel Jackson, it does not necessarily follow that Mr. Whitaker also had full advanced knowledge of Robinson's specific intentions and therefore possessed enough relevant information to know that injury to another was a foreseeable, natural, and probable consequence of the robbery. Although robbery is a dangerous game, not all robberies result in an injury. It also does not necessarily follow that Mr. Whitaker had that information far enough in advance that he had a

meaningful opportunity to withdraw from the enterprise. Depending on the circumstances, an attempt to withdraw from a crime could increase the risk of harm already posed by those circumstances."

Plainly, the jury instructions that I actually gave to the jury fell short when it came to first degree robbery. Accordingly, with respect to the Count 2 first degree robbery charge, Mr. Whitaker has demonstrated ineffective assistance of counsel of such proportions that it affected his right to a fair trial. The prejudice is obvious. Mr. Whitaker was convicted of facilitating a robbery, during which the victim was injured and died. He also was convicted in the absence of a jury instruction that would have permitted the jury to find that he lacked the requisite relevant factual knowledge, intent, and a meaningful opportunity to withdraw from the robbery attempt. Thus, the State was relieved of its burden to prove each of the essential elements of the charge of first degree robbery by proof beyond a reasonable doubt. Plainly, defense counsel's failure to object to and preserve the issue for appeal deprived Mr. Whitaker of a fair trial with respect to that particular charge. The error is so serious that counsel was not acting as the "counsel" guaranteed by the Sixth Amendment. Plainly, the *Rosemond* opinion was based

upon common law principles that were in existence at the time of Mr. Whitaker's trial. In *Rosemond*, Justice Kagan simply extended those principles to the combination crime at issue in that case. The trial evidence in this case was rife with conflicts and each and every one of the witnesses had credibility problems. There's no telling what the jury would have done if properly charged. I find that Mr. Whitaker has satisfied both prongs of a *Strickland* analysis with respect to this particular charge.

This brings me to the felony murder charge. The Count 1 felony murder conviction also must be vacated. Not only did the errors which permeated the first degree robbery instruction necessarily infect the first degree murder conviction, the instructions I gave for the felony murder charge were flawed in and of themselves. The errors contained in the felony murder instructions compounded the errors contained in the first degree robbery instructions. And, actually, vice versa.

The evidence was that there were two guns present that night. The evidence was that Brandon Robinson was in possession of one of them, a .357 caliber revolver. The evidence was that Mr. Whitaker was in possession of the other, a .22 caliber revolver. There was some suggestion that a third firearm might have been present

but there was no evidence -- no substantial evidence to support that theory.

There were three bases of liability, each premised on a different scenario. Scenario number 1: Robinson and Mr. Whitaker formed a conspiracy to rob Joel Jackson and one or the other of them shot Jackson in the process. Mr. Whitaker would have been strictly liable regardless of which one of them fired the shot that killed Joel Jackson. Indeed, if it had found a conspiracy existed, the jury would not have had to think much farther. It wouldn't matter which of the two men shot Joel Jackson.

The second scenario was that there was no conspiracy and, instead, Mr. Whitaker personally was attempting to rob Joel Jackson and that he, Mr. Whitaker, personally shot Joel Jackson in the process. Mr. Whitaker would have been liable pursuant to General Laws 11-23-1 as the principal.

The third scenario was that Brandon Robinson was intending to rob Joel Jackson; that Mr. Whitaker knowingly and voluntarily aided and abetted him in that endeavor; and that one or the other of them shot Jackson in the process.

The felony murder charge was contained in Count 1 of the January 15, 2004 indictment. The corresponding question on the jury verdict summary sheet was question

8. As I previously indicated, question number 8 asked: "Has the State proved beyond a reasonable doubt that Kendall Whitaker is guilty of murder in the first degree because he aided and abetted or assisted in the robbery of Joel Jackson?" This question clearly implicated scenario number 3.

Despite the fact that the question implicated scenario number 3, I did not provide the jury with any additional aiding and abetting instruction in connection with the felony murder charge. The only aiding and abetting instructions that the jury had were the primary or core instruction that I gave as part of the robbery instruction and any follow up or additional instructions that I gave in connection with the other charges. More specifically, for the Count 1 felony murder charge, I merely instructed the jury on the elements of common law murder and told them that the law treats a murder as murder in the first degree where the killing is a or was a foreseeable, natural, and probable consequence of the robbery. I also instructed them that robbery had to be -- that the robbery had to be a primary or moving cause of the killing. I instructed the jury that Mr. Whitaker could be held liable as a co-conspirator. I also instructed the jury that it could find Mr. Whitaker guilty if he personally attempted to rob Joel Jackson and

that the robbery attempt was a substantial factor in causing Joel Jackson's death. Those instructions were correct, but only so far as they went.

To the extent it was relying on aider and abettor liability for the felony murder charge, the State was also required to prove beyond a reasonable doubt that Mr. Whitaker had enough information about Brandon Robinson's specific intention such that Mr. Whitaker could understand that another person's death was a foreseeable, natural, and probable consequence of Robinson's attempt to rob Joel Jackson - even if that death ultimately proved to be by Mr. Whitaker's own hand. And I underscore that latter part. This is important because there was evidence that Mr. Whitaker did not draw his gun until after he saw that Robinson had drawn his and that Mr. Whitaker did not fire his gun until after Joel Jackson and George Toby began to struggle with Brandon Robinson.

Although portions of the felony murder instructions that I gave to the jury may have been good as far as they went, the first degree felony murder charge that I gave does not survive the lack of an instruction on *a Rosemond* plus gun type element, any more than the first degree robbery instruction does. When I say "plus gun type element," I mean the added element of knowing enough

about Brandon Robinson's specific intentions concerning how he would accomplish the robbery such that Mr. Whitaker could know that another person's death was a foreseeable, natural, and probable consequence of that robbery even if it was Mr. Whitaker himself who ended up doing the shooting.

You see, the fact that Mr. Whitaker might have had his own weapon does not relieve the State from its burden to prove beyond a reasonable doubt that Mr. Whitaker knew enough about Brandon Robinson's -- and I underscore that -- Brandon Robinson's intentions such that Mr. Whitaker could see that bullets, including his own, might start to fly. We cannot say "It doesn't matter if Mr. Whitaker didn't know enough about Brandon Robinson's specific intentions or didn't have the opportunity to opt out because Mr. Whitaker has his own gun and that, in and of itself, made someone's death reasonably foreseeable." The fact that Mr. Whitaker knew that he, personally, was armed or had a handle on his own intentions doesn't necessarily mean that he could see that someone's death was foreseeable due to Brandon Robinson's specific intentions. Although robbery is a dangerous game, not all robberies produce a fatality.

Rosemond stands for the proposition that an aider and abettor can only be held liable if he or she was in

possession of all of the relevant facts, that is, full knowledge of the scope of the crime. The *Encarnacion-Ruiz* court also was clear: An aider and abettor cannot be convicted without proof of relevant knowledge. Plainly, where liability under the Rhode Island felony murder rule is predicated on aiding and abetting, the relevant knowledge would have to include enough knowledge of the other's specific intent concerning the nature and character of the crime such that someone's death is a foreseeable, natural, and probable consequence of the commission of that particular crime. The jury in Mr. Whitaker's case was not instructed on this essential element. Nor was it instructed on timing. True, the instruction that I actually gave the jury did contain an instruction on foreseeability. However, that instruction was given in the context of Mr. Whitaker's liability as a co-conspirator and a principal. The jury was never instructed on the added element of foreseeability in the context of aiding and abetting.

Now, the State asserts in its papers that Mr. Whitaker's conviction rested upon a felony murder and not an aiding and abetting theory. The State argues that the trial evidence was that Mr. Whitaker was the person responsible for the shootings. Although the evidence was

such that it would seem unlikely that the jury would find that someone other than Mr. Whitaker shot Joel Jackson, the State nonetheless never wholly foreclosed that option. Mr. White was urging an aiding and abetting instruction for precisely that reason. On the other hand, Mr. Montecalvo argued during closing arguments, "First degree murder, conspiracy and felony murder. That's even if he didn't intend to kill anybody. We don't have to -- excuse me. That's even if he's the one that's not the triggerman, the gunman. We don't have to prove that, right? Conspiracy, you heard that read a number of times, regardless of who fired the fatal shot. I'm going to tell you something though, he did fire that fatal shot and that makes him guilty of second degree murder." As I have said, the evidence was conflicting and there were so many credibility issues that the State faced serious problems with its proof. Let's not forget that Mr. Whitaker was acquitted of assault with a dangerous weapon in connection with George Toby having been shot. Therefore, we cannot say "It doesn't matter if the jury was asked to answer an equivocal question for which it was not given full and adequate instructions - after all, the trial evidence was that Mr. Whitaker did the shootings." It's simply impossible to determine what the jury thought or what it might have found if it had

been properly instructed.

To reiterate, the jury was asked: "Has the State proved beyond a reasonable doubt that Kendall Whitaker is guilty of murder in the first degree because he aided, abetted, or assisted in the robbery of Joel Jackson?" I cannot assume that the jury ignored the basis for liability in that question. It's equally as probable that when the jury saw question 8, it fell back on the aiding and abetting instructions that I gave in connection with the other charges, instructions that lacked language about advanced knowledge of Robinson's specific intentions and timing.

Now, at one point I thought including the words "because he aided, abetted, or assisted in the robbery of Joel Jackson" in question 8 was probably just a cut and paste error on my part. I think I mentioned this on November 30th, 2015 when I was giving the parties my initial impression. However, having spent more time on this case, I now remember more about it. That's not what happened. That wasn't a cut and paste error. First of all, question 8 is too subtle and too nuanced to be the result of a cut and paste error on my part. I think those who are familiar with my jury verdict summary sheets and jury instructions would agree with that. The other questions are different and you can see the

contrast. In addition, my initial approach to the jury instructions was to charge on robbery, conspiracy, first and second degree murder, and the weapons charges. Then when the State pressed for an aiding and abetting instruction, I had to retrofit that into my instructions which skewed everything. I don't know how many drafts of these instructions I ended up doing. I remember staring at the statute, General Laws 11-1-3, and scratching my head. I knew there was something wrong with the picture but precisely what that was eluded me. I very carefully worded all of the aiding and abetting and jury verdict -- strike that. I very carefully worded all of the aiding and abetting instructions and the jury verdict summary sheet questions including question 8. I'm not faulting Mr. White. He was doing his job and the subtleties of this escaped everyone.

Had defense counsel properly explained this to me, I would have re-worded the jury verdict summary sheet questions number 8 and 15. At the very least, I would have cleaned up 8. For 15, I would have made it a two-part question with one part going to first degree murder and another going to second degree murder.

Even if I had properly instructed the jury on first degree robbery, which I did not, I should have instructed the jury along the following lines for the felony murder

charge: This would be in addition to the *Rosemond* type instructions that I previously articulated in today's bench ruling.

"If you find that the robbery indeed was a substantial factor in causing Joel Jackson's death and you also find that Mr. Whitaker is guilty of aiding and abetting Brandon Robinson in that robbery, you must next consider the question of whether or not Mr. Whitaker is guilty of first degree murder. The question of whether or not Mr. Whitaker is guilty of first degree murder as a result of aiding and abetting Brandon Robinson in the robbery of Joel Jackson is a different question from the question of whether or not Mr. Whitaker is guilty of aiding and abetting Brandon Robinson in the robbery of Joel Jackson. You see, even if you find that the State has proved beyond a reasonable doubt that Mr. Whitaker knowingly and voluntarily aided and abetted Brandon Robinson in the robbery of Joel Jackson, it does not necessarily follow that Mr. Whitaker is guilty of first degree murder. Before you may find Mr. Whitaker guilty of first degree murder, the State must prove beyond a reasonable doubt that Mr. Whitaker had enough information about Brandon Robinson's specific intentions concerning the nature and character of the robbery such that Mr. Whitaker knew that another person's death was a

foreseeable, natural, and probable consequence of that robbery. The State also must prove beyond a reasonable doubt that Mr. Whitaker knew this beforehand and far enough in advance that he had a meaningful opportunity to withdraw from the crime but failed to do so. In determining whether or not the State has proved these additional elements by proof beyond a reasonable doubt, you should consider all of the facts and circumstances proved at trial including, but not limited to, whether or not Brandon Robinson was armed, what were his specific intentions about how he would carry out the robbery, and the extent to which Mr. Whitaker knew about these and other relevant facts.

"You also must consider the evidence demonstrating when it was that Mr. Whitaker learned about Brandon Robinson's specific intentions. You see, the State is also required to prove beyond a reasonable doubt that Mr. Whitaker knew enough about the relevant facts such that he had a meaningful opportunity to withdraw from the criminal enterprise, the robbery attempt. When I use the words "meaningful opportunity" I mean the opportunity to withdraw from the crime without increasing the risk of danger already posed by the circumstances. You see, unlike a conspiracy where the co-conspirators are strictly liable for each other's conduct, an aider and

abettor is only liable for the other's actions when he has full knowledge of the illegal scheme. Just because Mr. Whitaker may have known, generally, about Brandon Robinson's scheme to rob Joel Jackson, it does not necessarily follow that he had full knowledge of Robinson's specific intentions and therefore had enough information to understand that someone's death was a foreseeable, natural, and probable consequence of the robbery."

I should then have moved on to second degree murder. In hindsight, I should have added a jury verdict summary sheet question that asked a direct question of whether or not the State had proved beyond a reasonable doubt that Kendall Whitaker actually fired the shot that killed Joel Jackson and, further, that he did so with the definite intention of killing Jackson or doing serious bodily harm to him.

With respect to the Count 1 felony murder charge, Mr. Whitaker has demonstrated ineffective assistance of counsel of such proportions that it affected his right to a fair trial. Again, the prejudice is obvious. Mr. Whitaker was convicted of facilitating a murder in the absence of a jury instruction that permitted the jury to find he lacked the requisite knowledge, intent, and opportunity to withdraw from the crime. Therefore, the

State was relieved of its burden to prove these essential elements of the charge of felony murder by proof beyond a reasonable doubt. Plainly, defense counsel's failure to object to and preserve the issue for appeal deprived Mr. Whitaker of a fair trial with respect to that particular charge. The error is so serious that counsel was not acting as "counsel" guaranteed by the Sixth Amendment. The prejudice is obvious. There's no telling what the jury would have done if properly charged. I find that Mr. Whitaker has satisfied both prongs of a *Strickland* analysis with respect to the felony murder charge.

Okay, now, I'm going to return to the weapons offenses. For these offenses, not only were my instructions flawed because they failed to include proper instructions on advanced knowledge of intent and timing, they were generally confusing, misleading, and too highly nuanced.

I'm going to take Count 7, 8, and 9 out of order. I'll start with Count 8, discharging a firearm while committing a crime of violence, death resulting. This would be jury verdict summary sheet question number 11.

Question 11 asked: "Has the State proved beyond a reasonable doubt that Kendall Whitaker is guilty of discharging a firearm when attempting to commit a robbery

or when aiding, abetting, or assisting Brandon Robinson in the robbery of Joel Jackson with the death of Joel Jackson resulting?"

For Count 8, the conspiracy based vicarious or strict liability instruction begins in the middle of page 20. It permitted the jury to convict Mr. Whitaker if either he or Brandon Robinson discharged a firearm during the robbery. As I previously indicated, the jury found Mr. Whitaker not guilty under the State's conspiracy theory.

The Count 8 supplemental aiding and abetting based instruction begins at the bottom of page 20. It builds on the inadequate primary aiding and abetting instruction that I gave in connection with the robbery instruction. For Count 8, the jury was instructed that the State was required to prove beyond a reasonable doubt that Brandon Robinson actually robbed or attempted to rob Joel Jackson and that Kendall Whitaker aided, abetted, or assisted Brandon Robinson in doing so and that Kendall Whitaker, himself, discharged a firearm while doing so and that his discharging a firearm was a substantial factor in causing Joel Jackson's death. The word "himself" appeared in the instruction. Plainly, Mr. Whitaker's liability as an aider and abettor rested upon his personally having discharged a firearm with Joel Jackson's death resulting.

However, the core problem is that the jury was not properly instructed on aiding and abetting in the first instance. The State was required to prove beyond a reasonable doubt that Mr. Whitaker had advanced knowledge of Robinson's intentions, as I have previously discussed, and Mr. Whitaker was entitled to a jury instruction to that effect. I previously indicated how I would have instructed the jury. The instructions that I actually gave the jury for Count 8 don't come close.

This brings me to the remaining counts of the January 15, 2004 indictment. Count 7 charged Mr. Whitaker with using a firearm while committing a crime of violence. The corresponding jury verdict summary sheet question was number 10. Count 9 charged Mr. Whitaker with committing a robbery while armed and having available, on his person, a firearm. The corresponding jury verdict summary sheet question is question number 9. The State continued to rely, in part, on a conspiracy theory with respect to Counts 7 and 8 but, ultimately, did not do so with respect to Count 9. For Count 7, conspiracy based jury instructions begin on page 17. The jury acquitted Mr. Whitaker on that theory of liability.

For Count 7, the issue is partly framed beginning at the bottom of page 17 and it goes on to the top of page

18. This instruction left room for the jury to convict Mr. Whitaker on account of Brandon Robinson's having used a firearm while in the commission of a robbery which Mr. Whitaker was facilitating. Although Kendall Whitaker was identified by name, the jury instruction was equivocal. The jury was instructed as follows: "First, the State contends that Kendall Whitaker is vicariously liable for using a firearm during a robbery on account of Whitaker's participation in a conspiracy based robbery of Joel Jackson during which conspiracy a firearm was used. The State contends that the use of a firearm was a foreseeable, natural, and probable consequence of the plan to rob Joel Jackson and that the robbery plan was a substantial factor in causing the use of the firearm during the commission of the robbery. Second, the State contends that Kendall Whitaker, apart from any conspiracy, used a firearm while aiding, abetting, or assisting Brandon Robinson in robbing Joel Jackson. Third, the State contends that Kendall Whitaker, himself, used a firearm while attempting to commit a robbery - even if not actually committing that robbery."

Just as importantly, the aiding and abetting instruction specific to Count 7, such as it was, did not contain the necessary language on general or specific intent and advanced knowledge or timing. And, as we

know, the primary aiding and abetting instruction that was paired with the robbery instruction did not adequately expound on advanced knowledge of intent, or timing for that matter.

The instruction for Count 9 begins on page 22. The issue is framed at the top of that page. The language tracks the language contained in the Count 7 instruction almost identically. Although Mr. Whitaker again was identified by name, that portion of the instruction was deliberately equivocal because there was evidence that Brandon Robinson was carrying a firearm on or about his person and, at least at some point, he intended to commit a robbery.

In addition, as with Count 7 and 8, the jury was not properly instructed on aiding and abetting in the first instance. The State was required to prove beyond a reasonable doubt that Mr. Whitaker had advanced knowledge of Robinson's intentions as previously discussed. Mr. Whitaker therefore was entitled to a jury instruction to that effect.

Plainly, for Counts 7, 8, and 9, Mr. Whitaker again has demonstrated ineffective assistance of counsel of such proportions that it affected his right to a fair trial on those particular charges. The prejudice again is obvious. Mr. Whitaker was convicted of aiding and

abetting in the absence of a jury instruction that would have permitted the jury to find that he lacked the requisite advanced knowledge of intent. As a result of the faulty jury instructions, the State again was relieved of its burden to prove these essential elements of these charges by proof beyond a reasonable doubt. Defense counsel's failure to object deprived Mr. Whitaker of a fair trial in respect to these counts of the indictment. In addition, the jury instructions were confusing, misleading, and equivocal. Yet, defense counsel failed to preserve his objections and urge the Court to clarify. These errors are so serious that counsel was not acting as the "counsel" guaranteed by the Sixth Amendment. The prejudice is obvious. I find that Mr. Whitaker has satisfied both prongs of a *Strickland* analysis with respect to these particular charges.

I'll now turn to Mr. Whitaker's other arguments. Mr. Whitaker also contends that defense counsel failed to raise that there was insufficient evidence for the jury to convict him under an aiding and abetting theory. He argues, in part, that the State failed to prove the existence of a conspiracy and the only evidence that supported aiding and betting was the same evidence that supported the conspiracy count. This particular argument lacks merit. It is well settled that conspiracy and

aiding and abetting have different elements. An aider and abettor is one who is present at the crime scene and by word or deed gives active encouragement to the perpetrator of the crime, or by conduct makes it clear that he or she is ready to assist the perpetrator if assistance is needed. In other words, the aider and abettor need only assist, supplement, promote, or encourage the crime. Conspiracy, on the other hand, requires a common unlawful agreement to commit a crime. Therefore, defense counsel's failure to object or argue this point does not constitute ineffective assistance of counsel in violation of the Sixth Amendment. As we know, Mr. Whitaker was acquitted of the conspiracy charges. So for this particular argument, Mr. Whitaker has not met the first prong of the *Strickland* analysis and he has not demonstrated prejudice again with respect to this particular argument.

However, Mr. Whitaker also argues that defense counsel failed to raise that there was insufficient evidence for the jury to convict if it had been instructed pursuant to a *Rosemond* analysis. I think the Rhode Island Supreme Court got it wrong when it stated in the opinion in Mr. Whitaker's appeal that there was sufficient evidence to instruct the jury on aiding and betting. I should have been reversed. The Supreme Court

had it as badly as the attorneys and I did when we tried Mr. Whitaker's case.

There was circumstantial evidence that Brandon Robinson harbored a secret intent to rob Joel Jackson. Although he testified that it was Mr. Whitaker who wanted to rob Joel Jackson, his credibility was suspect. The evidence was that Robinson entered the apartment with his weapon drawn, that he was the one that forcibly took the chain from Joel Jackson, and that he never surrendered the chain and medallion to Mr. Whitaker. However, there was no evidence whatsoever that Mr. Whitaker was privy to Robinson's intentions. If Robinson meant all along to rob Joel Jackson, he never indicated this to Mr. Whitaker and the evidence is devoid of any evidence that Mr. Whitaker knew about any such intentions on the part of Robinson. In fact, the evidence was the exact opposite. According to Robinson, he told Mr. Whitaker that robbing Joel Jackson was a bad idea. Just as importantly, even accepting Robinson's testimony that his decision to take the chain and medallion was serendipitously last minute, then Mr. Whitaker could not have had advanced knowledge of Robinson's newly formulated intentions. By the time Mr. Whitaker could have known that Robinson formed a last minute intention to take the chain and medallion, Robinson's crime was

complete. Sure, as the Supreme Court pointed out in Mr. Whitaker's appeal, there was evidence that Mr. Whitaker shot Joel Jackson and that Robinson was therefore able to effectuate a robbery. However, the Supreme Court fell into the same trap that I did. There was no proof that Mr. Whitaker had advanced knowledge of Robinson's intentions. Sure, there was evidence that it was Mr. Whitaker who intended to rob Joel Jackson and was the one who shot him, but that puts us outside of an aiding and abetting theory. You can't have it both ways. If you're going to convict someone on an aiding and abetting theory, you have to prove the elements. You can't cobble together elements of competing theories.

In retrospect, perhaps the State should have stuck with the more straightforward theories of conspiracy and attempted robbery. The problem was, however, there was scant evidence to suggest that Mr. Whitaker did anything to effectuate his supposed intent to rob Joel Jackson. According to Brandon Robinson, all Mr. Whitaker did was to follow Robinson into the apartment and stand near Jackson. The next thing that happened was that Jackson flew across the room charging at Robinson.

For these reasons, too, Mr. Whitaker has demonstrated ineffective assistance of counsel of such proportions that it affected his right to a fair trial on

the charges for which the State relied upon an aiding and abetting theory. The prejudice is obvious. Mr. Whitaker was convicted of aiding and abetting in the absence of sufficient evidence to support the elements of advanced knowledge and intent -- strike that -- advance knowledge of intent and timing. Yet, the defense attorney failed to preserve his objections and urge the Court to altogether refrain from instructing the jury on aiding and abetting. This error was so serious that counsel was not acting as the "counsel" guaranteed by the Sixth Amendment. The prejudice is obvious. For these reasons, too, I find that Mr. Whitaker has satisfied both prongs of a *Strickland* analysis.

This brings me to the remaining question posed by the parties: Should *Rosemond* be applied retroactively? As the First Circuit Court of Appeals noted in *Encarnacion-Ruiz*, the United States Supreme Court in *Rosemond* clarified the mens rea requirement for aiding and abetting a crime. As Justice Kagan pointed out in *Rosemond*, the common law principle that a person who facilitates any part of a criminal venture may be held liable for a crime as an aider and abettor continues to govern the aiding and abetting law. However, the issue in *Rosemond* was more subtle. Rosemond dealt with a combination crime. The purpose of the federal statute at

issue in *Rosemond* was to combat the dangerous combination of drugs and guns. It was an act relating to drugs just as much as it was an act relating to guns. The Court clarified that the defendant's intent must extend to the entire scope of a combination or double barreled crime. It stated, "When an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or, even if not, he may at that late point have no realistic opportunity to quit the crime. And, when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun." In order to have greater liability, the defendant must have greater intent. Although now that *Rosemond* is decided, this principle seems self-evident and dictated by established precedent. However, the various federal courts seem to be split on the question of whether or not *Rosemond* has retroactive application in collateral proceedings. Some courts take the position that *Rosemond* announced a substantive rule that is retroactively applicable because it defines aiding and abetting in a manner that creates a risk that individuals convicted prior to *Rosemond* were convicted of a non-extant offense and that *Rosemond* places certain conduct beyond the authority of the criminal law to proscribe. Others deem *Rosemond* to be a watershed rule of criminal procedure

implicating fundamental fairness and accuracy of the criminal proceeding. Other cases remind that a new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive. Notably, *Rosemond* was before the United States Supreme Court on direct review, not collateral review, and there's nothing contained in *Rosemond* to indicate that it should be retroactively applied on collateral review.

Regardless of whether or not *Rosemond* is retroactive, this Court has the authority to grant Mr. Whitaker's application for post-conviction relief pursuant to Rhode Island General Laws 10-9.1-1 et seq. We are not operating under federal habeas corpus. Rhode Island General Laws 10-9.1-1, subsection (a)(1) permits the Court to vacate a conviction or sentence if either the conviction or sentence was in violation of the constitution of the United States or the laws of this state. As I've already stated, with respect to Counts 1, 2, 7, 8, and 9, Mr. Whitaker has demonstrated ineffective assistance of counsel of such proportions that it affected his right to a fair trial on each and every one of these charges. Mr. Whitaker has satisfied both prongs of a *Strickland* analysis.

Mr. Whitaker's application for post-conviction relief is granted in part -- strike that -- is granted.

The judgment of conviction and sentence imposed in P1 04-0145G on Counts 1, 2, 7, 8, and 9 of the indictment are vacated.

To the extent that the petition challenges the other convictions, it's denied in that respect.

The parties will present an order, please, indicating that in accordance with the reasons stated in today's bench ruling, the application for post-conviction relief is granted; the judgment of conviction and sentences imposed in P1 04-0145G on Counts 1, 2, 7, 8, and 9 of the indictment are vacated.

In addition to the order, I'm going to need a final judgment. And, Mr. West, I need you to get that electronically filed ASAP.

MR. WEST: Yes, your Honor.

THE COURT: Like today, okay?

MR. WEST: Yes, your Honor.

THE COURT: And I'll direct the clerk to make the appropriate entry in the criminal docket.

I'll note the State's objection for the record.

And I'll see counsel in my chambers.

* * * * * *

APPENDIX B

RHODE ISLAND SUPERIOR COURT FINAL JUDGMENT – APRIL 20, 2016

Case Number: PM-2014-5309
Filed in Providence/Bristol County Superior Court
Submitted: 4/20/2016 4:05:45 PM
Envelope: 582599
Reviewer: Alexa Goneconte

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

KENDALL WHITAKER, Petitioner	:	
v.	:	Case No.: PM-14-5309 (Case No.: P1/2004-0145)
A.T. Wall, Respondent	:	

FINAL JUDGMENT

This matter came on to be heard before the Court for the Plaintiff/Petitioner's Post Conviction Relief action, pursuant to Rhode Island General Laws § 10-9.1-1, et seq., and, for the reasons, explanations, analysis, findings and rulings set forth in a Bench Decision read into the record this April 20, 2015, in open court and pursuant to the Order of even date entered herein, it is hereby:

ORDERED, ADJUDGED and DECREED

1. The Petition for Post-Conviction Relief filed October 30, 2014, by Petitioner Kendall Whitaker for relief from the convictions set forth in the Final Judgment entered on June 15, 2006, by this Court in P1/2004-0145, is granted.

2. The Judgment of Conviction in Counts 1, 2, 7, 8 and 9 and the sentences imposed thereon in P1/2004-0145 are hereby vacated.

ENTERED as the Final Judgment of this Court this _____ day of

_____, 2016.

PER ORDER

/s/ Patricia A. Hurst

Presented by:

/s/ Robert Quirk

Deputy Clerk 04-21-16

/s/ George J. West
George J. West, #3052
One Turks Head Place, Suite 312
Providence, RI 02903
401-861-9042
401-861-0330 fax

CERTIFICATION

I hereby certify that I caused the filing of the above-entitled Final Judgment through the State of Rhode Island Superior Court's ECF System be forwarded to Jeanine Perella McConaghy, Esq. jmcconaghy@riag.ri.gov; Lauren S. Zurier, Esq. LZurier@riag.ri.gov and Aaron Weisman, Esq. at RWeisman@riag.ri.gov on April 20, 2016.

/s/ George J. West

APPENDIX C

SUPREME COURT OF RHODE ISLAND DECISION – JANUARY 17, 2019

Whitaker v. State

Supreme Court of Rhode Island. | January 17, 2019 | 199 A.3d 1021 | 2019 WL 237935

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Outline

199 A.3d 1021
Supreme Court of Rhode Island.

Kendall WHITAKER
v.
STATE of Rhode Island.

No. 2016-102-M.P.
|
(PM 14-5309)
|
January 17, 2019

Synopsis

Background: After convictions and sentences for first-degree murder, robbery, and related firearms offenses were affirmed on direct appeal, 79 A.3d 795, defendant filed application for postconviction relief, based on claims of ineffective assistance of counsel. The Superior Court, Providence County, Patricia A. Hurst, Associate Justice, granted application and vacated certain convictions. State petitioned for review.

Holdings: The Supreme Court, Flaherty, J., held that:

[1] United States Supreme Court's holding in *Rosemond v. United States*, 134 S.Ct. 1240, relating to government's burden of proving liability on theory of aiding and abetting under federal law did not create new constitutional rule warranting postconviction review of state convictions;

[2] *Rosemond* did not apply retroactively on postconviction review;

[3] even assuming arguendo that *Rosemond* applied, trial counsel's failure to raise *Rosemond* objection to aiding and abetting instruction was not deficient performance; and

[4] counsel's failure to challenge sufficiency of evidence to charge defendant on theory of aiding and abetting was not deficient performance.

Judgment granting postconviction relief quashed; convictions reinstated; remanded.

Procedural Posture(s): Post-Conviction Review.

West Headnotes (19)

[1] **Criminal Law** Constitutional or fundamental error

Postconviction relief is a remedy available to a convicted defendant who contends that his original conviction or sentence violated rights afforded to him under the state or federal constitution. R.I. Gen. Laws Ann. § 10-9.1-1.

[2] **Criminal Law** Degree of proof

An applicant for postconviction relief bears the burden of proving, by a preponderance of the evidence, that such relief is warranted.

[3] **Criminal Law** Post-conviction relief

The Supreme Court will not disturb a hearing justice's factual findings made on an application for postconviction relief absent clear error or a showing that the hearing justice overlooked or misconceived material evidence in arriving at those findings.

[4] **Criminal Law** Review De Novo

The Supreme Court will review de novo any post-conviction relief decision involving questions of fact or mixed questions of law and fact pertaining to an alleged violation of an applicant's constitutional rights.

[5] **Criminal Law** Questions of Fact and Findings

When the Supreme Court is called upon to conduct a de novo review with respect to issues of constitutional dimension, the Court will still accord great deference to a hearing justice's findings of historical fact and to inferences drawn from those facts.

[6] **Criminal Law** Standard of Effective Assistance in General

Criminal Law Prejudice in general

When examining claims of ineffective assistance of counsel, the court will adhere to the requirements set forth in *Strickland*, and the benchmark issue is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. U.S. Const. Amend. 6.

[7] **Criminal Law** Deficient representation and prejudice

An applicant seeking postconviction relief must satisfy two criteria to prevail on a claim of ineffective assistance of counsel: first, the applicant must demonstrate that counsel's performance was deficient, to the point that the errors were so serious that trial counsel did not function at the level guaranteed by the Sixth Amendment, and second, the applicant must show that the deficient performance prejudiced the defense. U.S. Const. Amend. 6.

[8] **Criminal Law** Deficient representation in general

The "deficient performance" prong of a claim of ineffective assistance of counsel can be satisfied only by a showing that counsel's representation fell below an objective standard of reasonableness. U.S. Const. Amend. 6.

[9] **Criminal Law** Presumptions and burden of proof in general

Criminal Law Strategy and tactics in general

In evaluating counsel's performance on a claim of ineffective assistance of counsel, the court keeps in mind that there is a strong presumption that an attorney's performance falls within the range of reasonable professional assistance and sound strategy. U.S. Const. Amend. 6.

[10] **Criminal Law** Prejudice in general

The prejudice prong of the *Strickland* test governing a claim of ineffective assistance of counsel requires the defendant to demonstrate that the deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the defendant's right to a fair trial; in other words, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, which is a highly demanding and heavy burden. U.S. Const. Amend. 6.

[11] **Criminal Law** Community of unlawful intent

To convict a defendant as an aider and abettor under Rhode Island law, the circumstances must establish that a defendant shared in the criminal intent of the principal, and that there was a community of unlawful purpose at the time the act was committed. R.I. Gen. Laws Ann. § 11-1-3.

[12] **Criminal Law** Aiding, abetting, or other participation in offense

To convict on a theory of aiding and abetting, the prosecution must

present some evidence that a defendant participated in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed; however, the accused need not foresee the consequences of such unlawful acts. R.I. Gen. Laws Ann. § 11-1-3.

[13] **Criminal Law** Aiding, abetting, or other participation in offense

Under Rhode Island law, only if the defendant knowingly and intentionally aided and abetted the crime could he be held responsible for the natural, or reasonable, or probable consequences of that act. R.I. Gen. Laws Ann. § 11-1-3.

1 Cases that cite this headnote

[14] **Criminal Law** Change in the law

United States Supreme Court's holding in *Rosemond v. United States*, 134 S.Ct. 1240 that, on federal charge for using or carrying firearm during and in relation to any crime of violence or drug trafficking crime, criminal liability for that offense on theory of aiding and abetting required government to prove that defendant knew about presence of gun in advance and knowingly participated in criminal venture with intent to aid armed offense, did not set out rule of constitutional law that warranted postconviction review of defendant's convictions for first-degree murder, robbery, and related firearms offenses, on theory of aiding and abetting, under Rhode Island law; rather, *Rosemond* merely addressed government's burden of proof on elements of federal firearm and aiding and abetting statutes. 18 U.S.C.A. §§ 2, 924(c); R.I. Gen. Laws Ann. § 11-1-3.

4 Cases that cite this headnote

[15] **Courts** In general; retroactive or prospective operation

A case announces a new rule, for the purposes of retroactivity analysis, if the result was not dictated by precedent existing at the time the defendant's conviction became final.

[16] **Courts** In general; retroactive or prospective operation

United States Supreme Court's holding in *Rosemond v. United States*, 134 S.Ct. 1240 that, on federal charge for using or carrying firearm during and in relation to any crime of violence or drug trafficking crime, criminal liability for that offense on theory of aiding and abetting required government to prove that defendant knew about presence of gun in advance and knowingly participated in criminal venture with intent to aid armed offense, did not establish new rule or impose new obligation on state law, and thus did not apply retroactively to application for postconviction review of convictions, under Rhode Island law, for first-degree murder, robbery, and related firearms offenses, on theory of aiding and abetting; rather, *Rosemond* was dictated by established precedent, and nowhere did Supreme Court state that it was breaking new ground. 18 U.S.C.A. §§ 2, 924(c); R.I. Gen. Laws Ann. § 11-1-3.

2 Cases that cite this headnote

[17] **Courts** Operation and effect in general

Although unpublished opinions have no precedential value, courts may consider them when addressing an issue the courts believe to be instructive.

[18] **Criminal Law** Objecting to instructions

Even assuming arguendo that United States Supreme Court's holding in *Rosemond v. United States*, 134 S.Ct. 1240 that, on federal charge for using or carrying firearm during and in relation to any crime of violence or drug trafficking crime, criminal liability for that offense on theory of aiding and abetting required government to prove that defendant knew about presence of gun in advance and knowingly participated in criminal venture with intent to aid armed offense, applied to convictions for first-degree murder, robbery, and related firearms offenses, on theory of aiding and abetting, under Rhode Island law, trial counsel's failure to raise *Rosemond* objection to aiding and abetting instruction was not deficient performance, as required to support claim for ineffective assistance of counsel, where defendant had shown accomplices gun that he was carrying before they entered apartment, accomplice testified that defendant said he wanted to steal victim's gold chain, that accomplice told defendant it was not good idea because "worse come to worse, shots are going to be fired," to which defendant replied, "I got it," and slugs taken from all three men who were hit came from same type of weapon that accomplices testified that defendant was carrying at time of crimes. U.S. Const. Amend. 6; R.I. Gen. Laws Ann. § 11-1-3.

1 Cases that cite this headnote

[19] **Criminal Law** Trial in general; reception of evidence

Trial counsel's failure to challenge sufficiency of evidence to charge defendant on theory of aiding and abetting was not deficient performance, as required to support claim of ineffective assistance of counsel, where, on direct appeal, Supreme Court addressed issue and noted testimony of accomplices that defendant showed them gun he was carrying before they entered apartment first time, that they left apartment but re-entered after defendant expressed interest in taking victim's gold chain, and that accomplice actually took victim's chain after they re-entered apartment, and eyewitness testimony that, during physical struggle that ensued, she saw defendant draw gun and aim it towards scrum. U.S. Const. Amend. 6.

***1024** Providence County Superior Court, Associate Justice Patricia A. Hurst

Attorneys and Law Firms

For Petitioner: George J. West, Esq.

For Respondent: Aaron L. Weisman, Department of Attorney General.

Present: Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia, JJ.

OPINION

Justice Flaherty, for the Court.

The State of Rhode Island seeks review of a Superior Court judgment that granted **Kendall Whitaker's** application for postconviction relief. Before this Court, the state argues that it was error for the hearing justice to determine that trial counsel rendered constitutionally deficient representation when counsel (1) did not request a jury instruction for the aiding-and-abetting charges in line with *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014); and (2) did not challenge the sufficiency of the evidence that would support an aiding-and-abetting conviction. For the reasons set forth in this opinion, we quash the judgment of the Superior Court.

I

Facts and Travel

In 2006, **Whitaker** was convicted of (1) count one, first degree murder, which merged with count two, first degree robbery, and sentenced to life; (2) count five, assault with a dangerous weapon, and sentenced to fifteen years, with ten years to serve and five years suspended, with probation; (3) count six, carrying a handgun without a license, and sentenced to five years; (4) count seven, use of a firearm during the commission of a violent crime, and sentenced to twenty years to serve; (5) count eight, discharging a firearm in the commission of a crime of violence, and sentenced to life to be served consecutively with the first life sentence; and (6) count nine, committing a crime of violence while armed and having available a firearm, and sentenced to ten years. We affirmed his conviction in *State v.* ***Whitaker***, 79 A.3d 795 (R.I. 2013), and the facts pertinent to the underlying case are set forth in that opinion. In this opinion, we will discuss only those facts that are relevant to this petition, which was filed by the state after the Superior Court granted **Whitaker's** application for postconviction relief.

Whitaker was present at the apartment of Tammy Kennedy on the night in 2002 that Joel Jackson was shot and killed. He was accompanied by two friends, Brandon Robinson and Richard Isom. The three men had gathered earlier in the evening at Robinson's home. When they arrived at Kennedy's apartment, George Toby—Kennedy's friend—engaged the three men in conversation, and at some point **Whitaker**, Robinson, Isom, and Toby all withdrew to the hallway outside the apartment. After engaging in another brief conversation, Toby left the three men in the hallway and returned to the apartment. According to Robinson and Isom, **Whitaker** stated that he wanted to steal a gold chain that Jackson was wearing.

Robinson and **Whitaker** then re-entered the apartment and a scuffle ensued. Toby testified that he saw Robinson and Jackson struggling and that he entered the fight to separate the men. As he did, he noticed that Robinson was holding a gun, and he grabbed his hand in an effort to control the weapon. Corissa Richardson, who was only thirteen years of age at the time, but sixteen when she testified at trial, had accompanied Jackson to the party and said ***1025** that she saw **Whitaker** remove a handgun from his coat pocket and point it in the direction of the melee. Isom, who testified pursuant to a cooperation agreement with the state, also said that **Whitaker** entered the apartment with a firearm on his person, and Robinson, who was also a cooperating witness, said that **Whitaker** drew his gun after he came back into the apartment. The end result was that Robinson, Jackson, and Toby all received gunshot wounds; Jackson's was fatal.

Robinson further testified at trial that, after Jackson was shot, he took the gold chain and a medallion that Jackson had been wearing. He said that he placed the gold chain in his coat pocket and carried the medallion in his hand. Isom testified that he later removed the gold chain from Robinson's coat pocket. **Whitaker**, Robinson, and Isom were eventually arrested and both Robinson and Isom agreed to testify against **Whitaker** in exchange for charging and sentencing considerations.

After **Whitaker** was convicted, he filed a direct appeal to this Court in which he asserted various claims of error. Relevant to this appeal, **Whitaker** claimed on direct appeal that there had been insufficient evidence for the jury to convict him under an aiding-and-abetting theory. ***Whitaker***, 79 A.3d at 805. However, we determined that this issue was not properly raised before the trial justice and therefore had been waived. *Id.* **Whitaker** also claimed on direct appeal that the aiding-and-abetting instruction that had been provided by the trial justice to the jury was erroneous. *Id.* at 807. Specifically, **Whitaker** claimed that "there was insufficient evidence in the record to support an aiding-and-abetting instruction because there [was] no evidence in the record to establish an action consistent with his supposed criminal intent." *Id.* However, we held that, based on the testimony of Robinson, Isom, and Richardson, there was sufficient evidence in the record to support an aiding-and-abetting instruction. *Id.*

Nearly one year after we affirmed his conviction, **Whitaker** filed an application for postconviction relief. In that filing, he claimed that trial counsel had failed to propose jury instructions in line with *Rosemond*; specifically, that the state should have

had to prove that **Whitaker** actively participated in the underlying violent crime with advance knowledge that a confederate would use or carry a gun during the commission of the crime. **Whitaker** further argued that his trial counsel "failed to raise that there was insufficient evidence for the jury to convict him under an aiding-and-abetting theory because the jury found that there was no conspiracy, and the only evidence that supported aiding and abetting was the same evidence that supported the conspiracy count, on which defendant was acquitted." [1]

After a hearing, the hearing justice granted **Whitaker's** application, directing that counts one (murder), two (first degree robbery), seven (using a firearm during the commission of a violent crime), eight (discharging a firearm during the commission of a violent crime), and nine (carrying a firearm during the commission of a violent crime) be vacated. In her bench decision, the hearing justice stated that the United States Supreme Court's decision in *Rosemond* "should apply in any situation in which the prosecution relies on a theory of aiding and abetting, regardless of whether or not there are additional elements over and above those supporting the ***1026** predicate offense." [2] The hearing justice also held that, although the federal aiding-and-abetting statute and the Rhode Island aiding-and-abetting statute were different, *Rosemond* nonetheless applied to this case. Specifically, she found that "criminal culpability requires knowing and voluntary participation in a crime, as opposed to inadvertent, unplanned, or mistaken enablement of the crime[,]" and that "[t]his necessarily would require the aider and abettor to fully understand his cohort's intentions beforehand and far enough in advance to opt out of the enterprise." Additionally, the hearing justice recognized that there was a split of authority across jurisdictions as to whether *Rosemond* should be given retroactive effect. However, irrespective of *Rosemond*'s retroactivity, she stated that she had the authority to grant **Whitaker's** application for postconviction relief based on ineffective assistance of counsel. It was her opinion that the various aiding-and-abetting instructions she had given at **Whitaker's** trial failed to incorporate *Rosemond*'s holding; namely, that the government had to prove beyond a reasonable doubt "that the defendant actively participated in the underlying * * * violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." *Rosemond*, 572 U.S. at 67, 134 S.Ct. 1240. She further stated that, had defense counsel objected to her charge, she would have considered *Rosemond* and instructed the jury differently. She therefore concluded that, because **Whitaker's** trial counsel failed to so object, **Whitaker** had satisfied both prongs of the analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), with respect to his claim of ineffective assistance of counsel. *See* *Strickland*, 466 U.S. at 690, 694, 104 S.Ct. 2052.

Moreover, the hearing justice remarked that this Court, in the opinion affirming **Whitaker's** conviction on direct appeal, "got it wrong when it stated * * * that there was sufficient evidence to instruct the jury on aiding and [a]betting." Indeed, she offered that she should have been reversed on that claim because there was no proof that **Whitaker** had advance knowledge of Robinson's intentions. Accordingly, the hearing justice granted **Whitaker's** application as to the aforementioned counts and directed that the judgment of conviction and sentences for those counts be vacated. We granted the state's petition for writ of certiorari.

II

Standard of Review

[1] [2] [3] [4] [5] Pursuant to G.L. 1956 § 10-9.1-1, postconviction relief is a remedy "available to a convicted defendant who contends that his original conviction or sentence violated rights afforded to him under the state or federal constitution." *Barros v. State*, 180 A.3d 823, 828 (R.I. 2018) (quoting *Hazard v. State*, 968 A.2d 886, 891 (R.I. 2009)). An applicant for postconviction relief bears "[t]he burden of proving, by a preponderance of the evidence, that such [postconviction] relief is warranted[.]" *Navarro v. State*, 187 A.3d 317, 325 (R.I. 2018) (quoting *Motyka v. State*, 172 A.3d 1203, 1205 (R.I. 2017)). "This Court

will not disturb a [hearing] justice's factual findings made on an application for post[ ]conviction relief absent clear error or a showing that the [hearing] justice overlooked or misconceived material evidence in arriving at those findings." *Id.* (quoting ***1027** *Chapdelaine v. State*, 32 A.3d 937, 941 (R.I. 2011)). However, as we have frequently stated, "this Court will review *de novo* any post-conviction relief decision involving questions of fact or mixed questions of law and fact pertaining to an alleged violation of an applicant's constitutional rights." *Barros*, 180 A.3d at 828 (quoting *Hazard*, 968 A.2d at 891). Nonetheless, "when we are called upon to conduct such a *de novo* review with respect to issues of constitutional dimension, we still accord great deference to a hearing justice's findings of historical fact and to inferences drawn from those facts." *Id.* (quoting *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011)).

III

Discussion

Before this Court, the state argues that the hearing justice erred when she held that **Whitaker's** trial counsel rendered constitutionally deficient representation because he did not request a jury instruction based on *Rosemond* for the aiding-and-abetting counts. The state also argues that the hearing justice erred when she held that trial counsels' performance was deficient for failing to challenge the sufficiency of the evidence in support of an aiding-and-abetting theory.

[6] When examining claims of ineffective assistance of counsel, it is well settled that we will adhere to the requirements set forth in *Strickland v. Washington*. *Navarro*, 187 A.3d at 325. "[T]he benchmark issue is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Barros*, 180 A.3d at 828 (quoting *Young v. State*, 877 A.2d 625, 629 (R.I. 2005)).

[7] **[8]** **[9]** An applicant must satisfy two criteria to prevail on a claim of ineffective assistance of counsel. *Navarro*, 187 A.3d at 326. "First, the applicant must demonstrate that counsel's performance was deficient, to the point that the errors were so serious that trial counsel did not function at the level guaranteed by the Sixth Amendment." *Id.* (quoting *Chapdelaine*, 32 A.3d at 941). "This prong can be satisfied only by a showing that counsel's representation fell below an objective standard of reasonableness." *Id.* (quoting *Chapdelaine*, 32 A.3d at 941). In evaluating counsel's performance, we keep in mind that there is "a strong presumption * * * that an attorney's performance falls within the range of reasonable professional assistance and sound strategy[.]" *Id.* (quoting *Rivera v. State*, 58 A.3d 171, 180 (R.I. 2013)).

[10] "Second, the defendant must show that the deficient performance prejudiced the defense." *Navarro*, 187 A.3d at 326 (quoting *Neufville v. State*, 13 A.3d 607, 610 (R.I. 2011)). Specifically, the second prong of *Strickland* requires the applicant to "demonstrate that the deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial." *Barros*, 180 A.3d at 829 (quoting *Page v. State*, 995 A.2d 934, 943 (R.I. 2010)). In other words, the applicant must show that "there is a reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (emphasis in original) (quoting *Page*, 995 A.2d at 943). We have held that "[t]his is a 'highly demanding and heavy burden.' " *Id.* (quoting *Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006)).

A

Rosemond's Applicability

The state argues that trial counsel did not render deficient representation by not seeking a *Rosemond* jury instruction for ***1028** the aiding-and-abetting charges. The state contends that *Rosemond* should not be given retroactive effect because (1) the ruling in that case did not come into existence until nine years after the trial in this case, and (2) the Supreme Court of the United States did not specify its retroactivity to

cases on collateral review. Moreover, the state posits that **Whitaker** cannot be entitled to postconviction relief under *Rosemond* when there is evidence that he brought a weapon to the scene of the crime himself and that he discharged that weapon.

In *Rosemond*, the defendant participated in a "drug deal gone bad" in which either he or one of his confederates fired a weapon. *Rosemond*, 572 U.S. at 67, 134 S.Ct. 1240. As a result of the uncertainty as to who discharged the firearm, the United States charged the defendant with violating 18 U.S.C. § 924(c), which prohibits "us[ing] or carry[ing]" a firearm "during and in relation to any crime of violence or drug trafficking crime[,]" as well as aiding and abetting that offense under 18 U.S.C. § 2. *Id.* at 68, 134 S.Ct. 1240. The defendant was convicted and filed an appeal to the United States Court of Appeals for the Tenth Circuit, which affirmed his conviction. *Id.* at 69, 134 S.Ct. 1240. In vacating the defendant's conviction, the Supreme Court, on the defendant's petition for writ of certiorari, first noted that the federal aiding-and-abetting statute derives from common-law standards for accomplice liability, and that "a person is liable under [18 U.S.C.] § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Id.* at 70, 71, 134 S.Ct. 1240. The Court acknowledged that an aider and abettor's conduct need only facilitate one element of the principal crime. *Id.* at 74, 75, 134 S.Ct. 1240 ("In helping to bring about one part of the offense (whether trafficking drugs or using a gun), [the defendant] necessarily helped to complete the whole. And that ends the analysis as to his conduct.").

However, with respect to proving *mens rea*, the Supreme Court held that a defendant's intent must extend to the entire principal offense to be convicted of an aiding-and-abetting crime. *Rosemond*, 572 U.S. at 77-78, 134 S.Ct. 1240. In connection with 18 U.S.C. § 924(c), the Supreme Court stated:

> "An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one." *Id.*

The Supreme Court further stated that, under 18 U.S.C. § 924(c), the defendant's knowledge of the presence of a firearm must be advance knowledge; in other words, "[w]hen an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an *armed* offense." *Id.* at 78, 134 S.Ct. 1240 (emphasis in original).

[11] **[12]** **[13]** We note, however, that **Whitaker** was convicted not under federal law, but under Rhode Island's aiding-and-abetting statute for the principal crimes of murder, robbery, and the weapons offenses. General Laws 1956 § 11-1-3 states:

> "Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as principal or as an accessory before the fact, according ***1029** to the nature of the offense committed, and upon conviction shall suffer the like punishment as the principal offender is subject to by this title."

To convict a defendant as an aider and abettor under Rhode Island law, "the circumstances must establish that a defendant shared in the criminal intent of the principal [and that there was] a community of unlawful purpose at the time the act [was] committed." *State v. Delestre*, 35 A.3d 886, 895 (R.I. 2012) (quoting *State v. Gazerro*, 420 A.2d 816, 828 (R.I. 1980)). The prosecution must also "present some evidence that a defendant 'participat[ed] in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed.' " *Id.* (quoting *Gazerro*, 420 A.2d at 828). However, these "standards do not require * * * that the accused must foresee the consequences of such unlawful acts." *Id.* (quoting *State v. Diaz*,

654 A.2d 1195, 1202 (R.I. 1995)). Under Rhode Island law, "(only) if [the] defendant knowingly and intentionally aided and abetted [the crime] could he be held responsible for the natural, or reasonable, or probable consequences of that act." *Id.*; *see also State v. Lambert*, 705 A.2d 957, 963 (R.I. 1997) (holding that a jury instruction that stated that "[a] person who aids or abets is held responsible for the natural, or reasonable, or probable consequences of any act that he knowingly and intentionally aided or in which he assisted or participated" had "adequately summarized and instructed on the applicable law of Rhode Island on aiding and abetting").

[14] In our opinion, *Rosemond* plows no new constitutional ground and applies only to 18 U.S.C. § 924(c) and the federal aiding-and-abetting statute. It has no impact on state law. Other states and federal circuit courts are in agreement with this principle. *See* *Hicks v. State*, 295 Ga. 268, 759 S.E.2d 509, 514-15 n.3 (2014) (noting, in a case involving state crimes, that *Rosemond* "arose under federal law and thus does not control here"); *State v. Ward*, 473 S.W.3d 686, 693 (Mo. Ct. App. 2015) ("Nothing in *Rosemond*, suggests that its holding rests on any constitutional requirement or has any application to state criminal laws on accomplice liability; rather, the Court's analysis was merely a question of federal interpretation of the federal aiding and abetting statute. As such, it does not control here even where the federal statute and state aiding and abetting statutes are similar."). [3]

Whitaker cites to caselaw from the United States Court of Appeals for the First Circuit that was already in existence at the time that this case was tried in support of his contention that the First Circuit followed *Rosemond*'s analysis even before *Rosemond* was decided. However, it is significant that the cases cited by **Whitaker** were also interpreting 18 U.S.C. § 924(c) and the federal aiding-and-abetting statute and for those same reasons are inapplicable ***1030** to this jurisdiction's aiding-and-abetting statute. *See* *United States v. Medina-Román*, 376 F.3d 1, 5-6 (1st Cir. 2004) ("Knowledge is the central element of the crime of aiding and abetting the carrying or use of a firearm in violation of [18 U.S.C.] § 924(c)(1). To support aiding and abetting criminal liability under 18 U.S.C. § 2, that knowledge cannot be mere knowledge of a likelihood that a firearm will be carried or used but rather must amount to a practical certainty of the other's carrying or use."); *United States v. Spinney*, 65 F.3d 231, 239 (1st Cir. 1995) (under 18 U.S.C. § 924(c), the government has the burden of providing evidence "suggesting that firearms were actually contemplated in the planning stages, or that [the aider and abettor] had any actual knowledge that [the principal] would be armed"). Likewise, *United States v. Encarnación-Ruiz*, 787 F.3d 581 (1st Cir. 2015)—upon which the hearing justice in the present case relied in deciding that *Rosemond* was not limited to double-barreled crimes—also interpreted the federal aiding-and-abetting statute for the principal crime of producing child pornography and thus is also not applicable here. *See* *Encarnación-Ruiz*, 787 F.3d at 584 (stating that the defendant was charged with aiding and abetting under 18 U.S.C. § 2251(a) and 18 U.S.C. § 2). [4]

B

***Rosemond*'s Retroactive Application on Collateral Review**

[15] **[16]** **Whitaker's** appeal was decided in 2013, and *Rosemond* was not decided until 2014. **Whitaker** sought to have *Rosemond* apply retroactively, in his postconviction relief application, a case on collateral review. We addressed the circumstances under which a new rule of law is to be given retroactive application in *Pailin v. Vose*, 603 A.2d 738 (R.I. 1992). There, we adopted the framework set forth by the Supreme Court of the United States in *Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and *Griffith v. Kentucky*, 479 U.S. 314,

107 S.Ct. 708, 93 L.Ed.2d 649 (1987). *Pailin*, 603 A.2d at 741. Relevant to this opinion, in *Teague*, the Supreme Court held that a new rule for the conducting of criminal prosecutions should be given retroactive application to cases on collateral review. *Teague*, 489 U.S. at 301, 109 S.Ct. 1060. Specifically, "[t]he Court held that 'a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.' " *Pierce v. Wall*, 941 A.2d 189, 195 (R.I. 2008) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. 1060). "Thus, 'a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.' " *Id.* (emphasis in original) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. 1060).

[17] It is our firm conclusion that *Rosemond* did not establish a new rule, nor did it impose a new obligation on state law. *See* *Hicks*, 759 S.E.2d at 514-15 n.3; *Ward*, 473 S.W.3d at 693.[5] Also, the holding ***1031** in *Rosemond* was dictated by established precedent, and nowhere in that decision did the Supreme Court state that its holding broke "new ground." *See* *Rosemond*, 572 U.S. at 76-78, 134 S.Ct. 1240. The Supreme Court first observed that the federal aiding-and-abetting statute "reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." *Id.* at 70, 134 S.Ct. 1240. It then reviewed "some basics about [the] aiding and abetting law's intent requirement," and noted that it had "previously found [the] intent requirement satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Id.* at 76, 77, 134 S.Ct. 1240. The Court then stressed that "[*t*]*he same principle holds here*: An active participant in a drug transaction has the intent needed to aid and abet a [18 U.S.C.] § 924(c) violation when he knows that one of his confederates will carry a gun[,]" and it additionally held that the defendant's knowledge of a firearm must be advance knowledge. *Id.* at 77, 78, 134 S.Ct. 1240 (emphasis added).[6] Therefore, it is clear that the Court founded its decision in *Rosemond* on established precedent, and it did not create a new rule that was to be retroactive to cases on collateral review. *See* *id.*; *Pierce*, 941 A.2d at 195.[7]

C

Whitaker Himself Was Armed

[18] Moreover, Robinson and Isom each testified that, before the day of the incident, **Whitaker** had shown them his .22 caliber pistol, and that, on the day of the incident, the three men traveled to **Whitaker's** home to retrieve the weapon because, as Robinson testified, Robinson was concerned that Kennedy's apartment was located in a dangerous neighborhood. Robinson testified that, later that evening while inside Kennedy's apartment complex, **Whitaker** told him he wanted to steal Jackson's chain, and Robinson "told [**Whitaker**] that it wasn't a good idea [because] worse come to worse, shots are going to be fired." According to Robinson, **Whitaker** then replied, "I got it[,]" which, according ***1032** to Robinson, meant that **Whitaker** had everything "under control."

Richardson also testified that, once **Whitaker** was back inside Kennedy's apartment, and as the struggle ensued, "he reached into his coat and took out a gun" and "pointed it in the direction of Joel [Jackson] and Brandon [Robinson.]" As we noted in **Whitaker's** direct appeal, "Robinson also testified that **Whitaker** drew his gun after he came back into the apartment," and "Isom testified that **Whitaker** had brought a weapon to the apartment." ***Whitaker***, 79 A.3d at 801, 801 n.4. Both Toby and Robinson testified that the shots that were fired did not come from Robinson's gun. Moreover, an expert testified that the slugs taken from all three of the men who were hit came from a .22 caliber weapon, the same type of weapon that Isom and Robinson testified that **Whitaker** was carrying at the time. As this Court said in **Whitaker's** direct appeal, a jury certainly could have found, and did find, that **Whitaker** brought a gun to the scene of the crime. *See id.* at 810. As other jurisdictions have held, **Whitaker's** reliance on *Rosemond*, even

if the case was applicable here, would nonetheless be misplaced, because he would have already had advance knowledge that a weapon was going to be used to commit the robbery. This is so because he carried one himself. *See Jefferson v. United States*, 2017 WL 2819812, at *3-4 (N.D. Miss. Jun. 28, 2017) (holding that, even if *Rosemond* was applicable, the defendant would nonetheless have been convicted; citing to cases on direct appeal for summary of evidence in ruling that not only did the defendant know that firearms would be used in commission of his drug crimes, but "*he actually provided firearms for others to use during the crimes* ") (emphasis in original); *Jimenez v. United States*, 2015 WL 4507764, at *2 (S.D.N.Y. July 23, 2015) ("*Rosemond* would only affect the outcome of [a] proceeding if (1) [the defendant] himself did not use, carry, and possess a firearm in relation to the robberies with which he was charged, *and* (2) [the defendant] did not have advance knowledge that one of his confederates would use or carry a gun during those robberies."); *United States v. Burwell*, 79 F.Supp.3d 1, 30 (D.D.C. 2015) ("Here, it is clear that Burwell himself carried a weapon during the commission of two of the bank robberies and, thus, his reliance on *Rosemond* is misplaced."). Thus, trial counsels' performance was not deficient in failing to propose aiding-and-abetting jury instructions in line with *Rosemond* because that case is simply inapplicable.

D

Sufficiency of the Evidence

[19] The state also maintains that trial counsels' performance was not deficient because of a failure to raise a challenge to the sufficiency of the evidence to charge **Whitaker** under an aiding-and-abetting theory. To support this argument, the state directs us to the statement in our opinion on **Whitaker's** direct appeal that there was sufficient evidence for an aiding-and-abetting jury instruction. *See* ***Whitaker***, 79 A.3d at 807. The state also contends that, in his brief on direct appeal, **Whitaker** conceded that there was sufficient evidence to charge him with an aiding-and-abetting theory.

We conclude that **Whitaker's** trial attorneys did not provide deficient representation when they did not challenge the sufficiency of the evidence to charge **Whitaker** under an aiding-and-abetting theory. On direct appeal, **Whitaker** attempted to argue that there was insufficient evidence for the jury to convict him under an aiding-and-abetting theory, but we ruled that this issue had been waived because it was not ***1033** raised before the trial justice. ***Whitaker***, 79 A.3d at 805. However, in that appeal, **Whitaker** also argued, in a separate argument that was not waived, "that there was insufficient evidence in the record to support an aiding-and-abetting instruction because there is no evidence in the record to establish an action consistent with his supposed criminal intent." *Id.* at 807. In turning aside this argument, we stated the following:

> "The defendant overlooks, however, that the testimony of Isom and Robinson includes their statements that he arrived at the apartment armed, that before re-entering the apartment he expressed an interest in taking Jackson's chain, that he and Robinson then re-entered the apartment, and that Robinson actually took Jackson's chain. Further, Richardson testified that during the struggle over Robinson's gun, she observed defendant draw a gun and aim it towards the scrum.
>
> "We are of the firm opinion that, based on the evidence presented during the trial, it was not improper for the trial justice to instruct the jury on aiding and abetting." [8] *Id.*

We hold that that evidence was also sufficient to convict **Whitaker** under an aiding-and-abetting theory. [9] *See id.*; *see also State v. Long*, 61 A.3d 439, 446-47 (R.I. 2013). Accordingly, the hearing justice erred when she held that trial counsel rendered ineffective assistance by failing to challenge the sufficiency of the evidence with respect to an aiding-and-abetting theory.

IV

Conclusion

For the reasons set forth in this opinion, we quash the judgment granting postconviction relief and reinstate **Whitaker's** conviction with respect to the aiding-and-abetting counts for felony murder (count one), robbery (count two), using a firearm in the commission of a crime of violence (count seven), discharging a firearm in the commission of a crime of violence (count eight), and committing a crime of violence while armed and having available a firearm (count nine). The papers in this case are ***1034** remanded to the Superior Court with our decision endorsed thereon.

All Citations

199 A.3d 1021

Footnotes

1 **Whitaker** raised additional arguments in his application, none of which are before us in this review.

2 The hearing justice also cited *United States v. Encarnación-Ruiz*, 787 F.3d 581 (1st Cir. 2015), for the proposition that *Rosemond* did not limit its application to so-called double-barreled crimes.

3 We also note the following unpublished opinions which we do not cite for precedential value, but by way of example. *See Cordero v. United States*, No. 15-530, 2015 U.S. App. LEXIS 23112 at *2 (2d Cir. Mar. 19, 2015) ("*Rosemond* does not set out a rule of constitutional law; however, even if that opinion is deemed to have announced a constitutional rule, it has not been made retroactive to cases on collateral review by the Supreme [Court]."); *Hughes v. Epps*, 561 Fed. App'x. 350, 354 n.4 (5th Cir. 2014) (noting that *Rosemond* does not apply to state law robbery crime); *People v. Jordan*, No. 326735, 2016 WL 5930006, at *2 (Mich. Ct. App. Oct. 11, 2016) ("*Rosemond* is limited to prosecutions for particular statutory federal offenses, is irrelevant to this case, and does not change the aiding-and-abetting standard in Michigan."); *State v. Dull*, 372 Wis.2d 458, 2016 WL 6271732, at *2 (2016) ("The [C]ourt's decision [in *Rosemond*] was based upon its interpretation of federal statutes, not constitutional principles.").

4 The state also argues that *Rosemond* is inapplicable to Rhode Island's "natural, or reasonable, or probable consequences" aiding-and-abetting doctrine. However, because we rule that *Rosemond* is inapplicable to state law, we need not, and do not, reach this argument.

5 We also refer back to the previously cited unpublished opinions, which have no precedential value, but which we believe to be instructive. *See Cordero*, 2015 U.S. App. LEXIS 23112, at *2; *Hughes*, 561 Fed. App'x. at 354 n.4; *Jordan*, 2016 WL 5930006, at *1; *Dull*, 2016 WL 6271732, at *2.

6 We also note that, although federal circuit courts have not discussed whether *Rosemond* announced a new rule, some imply that it did not. *See United States v. García-Ortiz*, 792 F.3d 184, 190 (1st Cir. 2015) ("[T]his court had already been applying the 'advance knowledge' requirement for aiding and abetting a [18 U.S.C.] § 924(c)(1) crime prior to *Rosemond*."); *Goree v. Chapa*, 589 Fed. App'x. 275, 276 (5th Cir. 2015) (noting precedent under which the petitioner was convicted "was consistent with *Rosemond*"); *Berry v. Capello*, 576 Fed. App'x. 579, 592 (6th Cir. 2014) (noting that the "Supreme Court did not state whether the principles explained in *Rosemond* apply retroactively to convictions that are final under state law"). Additionally, an overwhelming majority of federal district courts have found that *Rosemond*'s holding was

determined by existing precedent. *See, e.g.*, *Gonzalez v. Baltazar*, 2017 WL 2175804, at *3 n.2 (M.D. Pa. May 17, 2017); *Kerr v. United States*, 2016 WL 958202, at *3 (E.D.N.C. Mar. 8, 2016); *Cooper v. O'Brien*, 2015 WL 6085717, at *4 (N.D.W. Va. Oct. 16, 2015); *United States v. Davis*, 2015 WL 13721525, at *4 (D.S.C. Feb. 9, 2015).

7 Although we are cognizant that the Seventh Circuit has held that *Rosemond* is applicable to cases on collateral review, it is significant that that court recognized that *Rosemond* is applicable only to 18 U.S.C. § 924(c) and the federal aiding-and-abetting statute, not state law. *See Montana v. Cross*, 829 F.3d 775, 784 (7th Cir. 2016) ("*Rosemond*, *which addressed the requirements for criminal liability under* [*18 U.S.C.*] *§ 924(c)*, is a substantive rule, and we therefore shall apply it retroactively to cases on collateral review.") (emphasis added). We thus reiterate our reasoning above and find that *Rosemond* has no implications on state law.

8 We note that the trial justice did not give an aiding-and-abetting instruction, written or oral, with respect to the felony murder charge. The jury verdict summary sheet, however, provided an aiding-and-abetting charge for felony murder. **Whitaker** argued below that, had a jury instruction in line with *Rosemond* been given regarding the felony murder charge, he would have been acquitted of that charge. However, the robbery jury instruction—which was the underlying charge for felony murder—contained an aiding-and-abetting instruction, and thus a reading of the entire instructions as a whole would have not misled the jury. *See Roach v. State*, 157 A.3d 1042, 1049 (R.I. 2017) ("This Court examines the instructions in their entirety to ascertain the manner in which a jury of ordinary intelligent lay people would have understood them, * * * and * * * review[s the] challenged portions * * * in the context in which they were rendered.") (quoting *State v. Long*, 61 A.3d 439, 445 (R.I. 2013)).

9 Moreover, we agree with the state that, in his direct appeal, **Whitaker** conceded that there was sufficient evidence to charge him under an aiding-and-abetting theory. *See* Opening Brief of Appellant, *State v.* ***Whitaker***, 79 A.3d 795 (R.I. 2013) (No. 2007-145-C.A.), 2002 WL 11875284, *7, *8 ("[N]o evidence *other than the two cooperating witnesses' allegations of an agreement* - rejected by the jury in its conspiracy verdicts - could possibly support a conviction based upon aiding and abetting. * * * Apart from the brief testimony by Richard Isom and Brandon Robinson about the conversation that the three men had in the hallway regarding robbing Joel Jackson, which formed the basis for the conspiracy instruction, there is nothing else to support the trial justice instructing the jury on aiding and abetting.") (emphasis added).

APPENDIX D

UNITED STATES DISTRICT COURT DECISION – JANUARY 27, 2021

Whitaker v. Coyne-Fague

United States District Court, D. Rhode Island. | January 27, 2021 | 516 F.Supp.3d 179 | 2021 WL 271834

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Outline

516 F.Supp.3d 179
United States District Court, D. Rhode Island.

Kendall WHITAKER, Petitioner
v.
Patricia A. COYNE-FAGUE, Respondent

No. 1:19-cv-00051-MSM-LDA
|
Signed 01/27/2021

Synopsis

Background: Following affirmance of his convictions for murder, discharging firearm during commission of crime of violence, death resulting, and related charges, 79 A.3d 795, state inmate filed petition for writ of habeas corpus. Respondent moved to dismiss.

[Holding:] The District Court, Mary S. McElroy, J., held that petitioner was not denied effective assistance of counsel as result of counsel's failure to request *Rosemond* instructions.

Motion granted.

Procedural Posture(s): Post-Conviction Review.

West Headnotes (1)

[1] **Criminal Law** Trial in general; reception of evidence

Criminal Law Offering instructions

United States Supreme Court's decision in *Rosemond v. United States*, 134 S.Ct. 1240, that federal prosecution for aiding and abetting carrying firearm during crime of violence requires proof that alleged aider and abettor knew that principal was armed, did not announce rule binding on states as matter of federal constitutional law, and thus defendant was not denied effective assistance of counsel as result of counsel's failure to request *Rosemond* instructions or to complain of *Rosemond*-type insufficiencies in evidence in his Rhode Island prosecution for discharging firearm during commission of crime of violence premised on aiding and abetting liability. U.S. Const. Amend. 6.

1 Cases that cite this headnote

Attorneys and Law Firms

George J. West, Providence, RI, for Petitioner.

Christopher R. Bush, Office of the Attorney General, Providence, RI, for Respondent.

MEMORANDUM AND ORDER

MARY S. McELROY, United States District Judge

***180** Kendall Whitaker is a state prisoner, confined to the Adult Correctional Institutions in Cranston, Rhode Island, by virtue of his convictions for a series of offenses arising out of a robbery and fatal shooting. On June 15, 2006, he was sentenced to life for murder and a consecutive life sentence for discharging a firearm during the commission of a crime of violence, death resulting. He was also sentenced to other, lesser sentences for charges contained in the same indictment. His conviction was upheld on appeal. *State v. Whitaker,* 79 A.3d 795 (R.I. 2013). Although Mr. Whitaker challenged, on direct appeal, both the jury instructions and sufficiency of the evidence related to the state's aiding and abetting theory of liability, he did not raise the claim that forms the core of his allegations in this Court: the fact that the jury was not required to find that Mr. Whitaker had actual advance knowledge that his confederate, who may have carried out the fatal shooting, was armed. [1] That claim did not crystallize until the United States Supreme Court decided the case of *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014). *Rosemond,* resolving a conflict among the Circuit Courts of Appeals, held that a prosecution pursuant to 18 U.S.C. § 924(c), for aiding and abetting the carrying a firearm during a crime of violence, requires

proof that the alleged aider and abettor knew that the principal was armed. Reasoning that aiding and abetting is a purposeful crime, requiring the intent to assist, the Court found that a critical component of the *mens rea* is the desire to assist in the specific crime charged. That desire requires knowledge of the component that makes that act a crime – i.e., that the principal was carrying a firearm. That knowledge must exist early enough to enable the aider and abettor "to make the relevant legal (and indeed, moral) choice" to "alter the plan or ... withdraw from the enterprise." *Id.* at 78, 134 S.Ct. 1240.

Whittaker's prosecution in state court was predicated on aiding and abetting liability. The evidence is recounted in more detail at *State v. Whitaker,* 79 A.3d 795 (R.I. 2013). For purposes of this petition, it suffices to say that the government alleged, and proved to a jury's satisfaction, that Mr. Whitaker arrived at Tammy Kennedy's apartment in the company of Brandon Robinson and Richard Isom. A birthday party was ongoing. Mr. Whitaker had allegedly said, prior to arriving at the apartment, that he wanted to "steal a gold chain that [party-goer Joel] Jackson was wearing." *Id.* at 801. For reasons that are irrelevant here, a scuffle broke out between Robinson and Jackson and another partygoer, George Toby. The three struggled over a gun that Robinson was holding. A shot was fired, which killed Jackson. There was some testimony from Robinson, corroborated by Toby, that he had not fired his gun. There was also testimony that Whitaker had drawn a gun and pointed ***181** it at the scuffle, but not that he had fired it.

Whitaker's jury was instructed on aiding and abetting liability. While Whitaker claimed error in the aiding and abetting instructions, and claimed insufficiency of the aiding and abetting evidence, *Rosemond* had not yet been decided and he did not frame the issue in those terms. The Rhode Island Supreme Court found that there was no error in the instructions and that there had been a waiver of the sufficiency claim. After denial of his direct appeal, Whittaker brought an application for post-conviction relief in the state trial court, and that application was granted. The trial justice held that *Rosemond* should apply to Whitaker's trial, and that Whitaker's counsel had been ineffective for not challenging both the instruction and evidence on *Rosemond* grounds. The Rhode Island Supreme Court reversed. *Whitaker v. State*, 199 A.3d 1021, 1026 (R.I. 2019). The Rhode Island Court reasoned that *Rosemond* was a sub constitutional decision, affecting only prosecutions under the federal statute and did not therefore impact Rhode Island's longstanding law that an aider and abettor "is held responsible for the natural, or reasonable, or probable consequences of any act that he knowingly and intentionally aided," without regard to his advance knowledge or ability to foresee precise consequences. *Id.* at 1029. In addition, the Court rejected the notion that *Rosemond*, if it applied, deserved retroactive effect. *Id.* at 1030-31.

I. STANDARD OF REVIEW

A state prisoner seeking relief in the federal courts must demonstrate under 28 U.S.C. § 2254(d), that the state court's judgment was "contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts ..." I find that neither predicate has been met.

II. ANALYSIS

Mr. Whitaker filed a petition under 28 U.S.C. § 2254 claiming that his conviction resulted from the ineffective assistance of counsel. He has framed four separate counts, pointing to counsel's failure to raise *Rosemond* objections to the jury instructions, the failure of the jury verdict sheet to reflect *Rosemond* requirements, [2] counsel's failure to pursue *Rosemond* deficiencies in the evidence, and the denial of fundamental fairness predicated on the failure to apply *Rosemond* to his trial. [3]

Although framed in four separate ways, this petition turns on two straightforward questions: Is *Rosemond* a constitutionally ***182** grounded decision? If it is, does it have retroactive effect? If it is not constitutionally based, the Rhode Island Supreme Court is entitled to define the theory of aiding and abetting liability. While *Rosemond* and the First Circuit (and out of state) cases that agree with it seem to have the benefit of wisdom

and logic, they lack the binding force of authority over Rhode Island state courts. [4]

As this Court reads *Rosemond*, and decisions interpreting it, the answer is that *Rosemond* is not a constitutionally binding decision and even if it were, it would not be retroactive as a matter of federal law.

Grounds for Habeas Relief

1. ***Rosemond* – Federal Law.**

There is nothing in Rosemond that even hints of a constitutionally based decision. There are no constitutional provisions cited, the word "constitutional" is mentioned only once in the dissent's discussion of a Ninth Circuit case, Rosemond at 91, and the entire decision is framed as a discussion of common-law elements of aiding and abetting. There is no language in the opinion that can reasonably be read as related to any specific constitutional amendment, nor to the more amorphous concepts of "fair trial" or "fundamental fairness." The First Circuit has applied *Rosemond* in *United States v. Ford*, 821 F.3d 63 (1st Cir. 2016) and in *United States v. Encarnacion-Ruiz*, 787 F.3d 581 (1st Cir. 2015), and there is nothing in either decision that indicates a constitutionally based analysis. *See McKinnon v. Spaulding*, 444 F.Supp.3d 255, 260 (D. Mass. March 13, 2020) (*Rosemond* did not announce new rule of constitutional law). *Accord, Vazquez-Castro v. United States,* 53 F.Supp.3d 514, 522 (D.P.R. 2014). Several state courts have held the same. *State v. Ward*, 473 S.W.3d 686, 693 (Mo. App. 2015) (*Rosemond* not constitutionally based and does not affect Missouri aiding and abetting law). *Accord, State v. Dull,* 372 Wis.2d 458, 888 N.W.2d 247 (Table), 2016 WL 6271732 at *2 (Wis. App. 2016); *People v. English,* Docket No. 327206, 2016 WL 4375959, at *4, n. 3 (Mich. App. 2016); *Hicks v. State*, 295 Ga. 268, 759 S.E.2d 509, 514, n. 3 (2014).

Because *Rosemond* is not a constitutionally based decision and does not affect Rhode Island's aiding and abetting liability definition, there is no need to discuss retroactivity. [5]

Nothing in Rhode Island's determination of this case conflicts with clearly settled federal constitutional law. Because *Rosemond* is not binding on Rhode Island's interpretation of its aiding and abetting law, counsel's failure to request *Rosemond* instructions or to complain of *Rosemond*-type insufficiencies in the evidence cannot have been ineffective. They reflect actual Rhode Island state law, and that interpretation of state law is binding on this Court. *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602, 603, 163 L.Ed.2d 407 (2005). Even in a jurisdiction where *Rosemond* ***183** dictated a change in law, the failure to predict that change would not be clearly ineffective. *Steiner v. United States,* 940 F.3d 1282, 1285 (11th Cir. 2019) (cannot be ineffective where actions were consistent with stated law at the time of trial).

2. **State Court Determination of Facts.**

Mr. Whitaker fails to satisfy the second prong of 18 U.S.C. § 2254. His Petition does not identify any findings of fact that are unreasonable. The Rhode Island Supreme Court, in addition to rejecting the applicability of *Rosemond* went on to note that even if *Rosemond* applied, the facts established that Mr. Whitaker himself was armed. Thus, it found that, even if Mr. Whitaker lacked advance knowledge that *Robinson* had a gun, and even if such knowledge were required, the fact that he himself was carrying would provide sufficient *scienter* for a conviction of aiding and abetting.

> As other jurisdictions have held, Whitaker's reliance on *Rosemond,* even if the case was applicable here, would nonetheless be misplaced, because he would have already had advance knowledge that a weapon was going to be used to commit the robbery. This is so because he carried one himself.

Whitaker v. State, supra at 1032.

The Petition itself recounts the testimony that Mr. Whitaker was also armed: "The women started to scream, and Mr. Jackson jumped up and charged him. He stated that Mr. Whitaker then pulled his own gun

out. Tr. 1123-24." (ECF No. 10, p. 16.) Thus, to the extent that the Rhode Island Supreme Court relied on these facts, doing so was not unreasonable.

III. CONCLUSION

All of Mr. Whitaker's claims in this Petition rest on his argument that *Rosemond v. United States* announced a rule binding on the states as a matter of federal constitutional law. As this Court reads that decision, it did not. Thus, as a matter of law, the Petition presents no grounds for relief in this Court. The respondent's Motion to Dismiss (ECF No. 12) is GRANTED and the case is DISMISSED.

IV. RULING ON CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Proceedings in the United States District Courts (§ 2245 Rules), this Court finds that this case is not appropriate for the issuance of a certificate of appealability (COA), because Mr. Whittaker has failed to make a substantial showing of the denial of a constitutional right as to any claim, as required by 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

All Citations

516 F.Supp.3d 179

Footnotes

1 As discussed below, both Mr. Whitaker and his confederate were armed. Although it appears that the confederate, Brandon Robinson, fired the fatal shot, there was some evidence that it may have been Mr. Whitaker himself. The habeas petition before the Court is predicated on the jury's finding of aiding and abetting liability, not liability as a principal.

2 This claim is confusing. Mr. Whitaker complains that his counsel did not challenge the failure of the jury verdict form, in permitting conviction under a felony murder theory, to instruct "on aiding and abetting as grounds for convicting on that charge." (ECF No. 10, ¶ 11). This claim seems to also depend on Mr. Whitaker's assertion that "[t]he Supreme Court of the United States announced a new constitution [sic] holding which applied retroactively in Rosemond v. United States ... with regard to aiding and abetting instructions ..." *Id.* (citation omitted). The State claims it is unexhausted. (ECF No. 12, p. 15). I read this Count as simply another way of asserting the same argument that has been well-exhausted in the state court proceedings: that *Rosemond* is constitutional, and its holding should have governed in all respects at Mr. Whitaker's trial.

3 Noticeably absent from Mr. Whitaker's formulation is a direct claim that conviction and punishment of aiding and abetting without advance knowledge of the principal's possession of a gun denies him a fair trial. That claim finds nothing in *Rosemond* to support it, and so Mr. Whitaker has devised four "back-door" arguments heading down the same hallway.

4 The petitioner filed a 58-page Memorandum in opposition to the Motion to Dismiss. While the Court greatly appreciates the effort, the Memorandum does not directly address the distinction between a rule of federal constitutionality and a rule of substantive federal criminal procedure.

5 In the First Circuit, which has long adhered to the reasoning of *Rosemond*, the decision has not been given retroactive effect. *See e.g., Cover v. United States,* CR No. 08-091-ML, 2016 WL 323607 at *3 (D.R.I. Jan. 26, 2016); *Cordero v. Tatum,* 15-cv-501-LM, 2016 WL 3511555, at *2, n. 4 (D.N.H. May 20, 2016). *Compare, Steiner v. United States,* 940 F.3d 1282, 1290-91 (11th Cir.

2019) (because Eleventh Circuit had followed "natural and probable consequence rule" instead of actual advance knowledge, *Rosemond* constituted a new rule and given retroactive effect).

APPENDIX E

UNITED STATES COURT OF APPEALS JUDGMENT – DECEMBER 9, 2021

United States Court of Appeals
For the First Circuit

No. 21-1167

KENDALL WHITAKER,

Petitioner - Appellant,

v.

PATRICIA A. COYNE-FAGUE, Director/Warden, Adult Correctional Institution,

Defendant - Appellee.

Before

Howard, Chief Judge,
Thompson and Gelpí, Circuit Judges.

JUDGMENT

Entered: December 9, 2021

Petitioner Kendall Whitaker seeks a certificate of appealability in order to challenge the district court's denial of his petition under 28 U.S.C. §2254, through which he challenged his convictions under Rhode Island state law for aiding and abetting murder and firearms offenses. Each of petitioner's claims hinges on the Supreme Court's decision in Rosemond v. United States, 572 U.S. 65 (2014) (in order to prove aiding and abetting in a prosecution under 18 U.S.C. §§924(c) and 2, the government must prove that "the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission").

The district court rejected each of petitioner's claims on the ground that the prior denial of the claims by the Rhode Island Supreme Court was not "contrary to, or . . . an unreasonable application of, clearly established Federal law." 28 U.S.C. §2254(d)(1). After careful consideration of petitioner's submissions and of the record below, we conclude that the district court's ruling was neither debatable nor wrong, and that petitioner therefore has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2); see Slack v. McDaniel, 529 U.S. 473, 484 (2000) (debatable-or-wrong standard).

The application for a certificate of appealability is denied. The appeal is terminated.

By the Court:

Maria R. Hamilton, Clerk

cc:
George Joseph West
Kendall Whitaker
Christopher Robinson Bush

APPENDIX F

RHODE ISLAND SUPREME COURT APPEAL – NOVEMBER 13, 2013

State v. Whitaker

Supreme Court of Rhode Island. | November 13, 2013 | 79 A.3d 795 | 2013 WL 6001893

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Outline

79 A.3d 795
Supreme Court of Rhode Island.

STATE
v.
Kendall WHITAKER.

No. 2007–145–C.A.
|
Nov. 13, 2013.

Synopsis

Background: Defendant was convicted in the Superior Court, Providence County, Patricia A. Hurst, J., of murder, robbery, assault with a dangerous weapon, carrying a pistol without a license, using a firearm in the commission of a crime of violence, and committing a crime of violence while armed with a firearm, and he appealed.

Holdings: The Supreme Court, Flaherty, J., held that:

[1] trial justice was not clearly wrong when she denied defendant's motion for new trial based on weight of the evidence;

[2] it was not improper for the trial justice to instruct the jury on aiding and abetting;

[3] no reversible error occurred as a result of the trial justice's sua sponte custody instruction, stating that defendant was in custody and that jury was to disregard defendant being escorted to and from the building with state marshals; and

[4] use of leading questions in murder case did not warrant a new trial.

Affirmed.

West Headnotes (48)

[1] **Criminal Law** Weight and sufficiency of evidence in general

When a motion for new trial is founded on the weight of the evidence, a trial justice sits as a thirteenth juror and exercises his or her own independent judgment, assessing the credibility of the witnesses and other evidence, and must choose which conflicting testimony and evidence to accept and which to reject.

[2] **Criminal Law** Weight and sufficiency of evidence in general

When trial judge entertains motion for new trial, the trial justice should (1) consider the evidence in light of the jury charge, (2) independently assess the credibility of the witnesses and the weight of the evidence, and then (3) determine whether he or she would have reached a result different from that reached by the jury.

1 Cases that cite this headnote

[3] **Criminal Law** Weight and sufficiency of evidence in general

If the trial justice determines that he or she agrees with the jury's verdict or that reasonable minds could differ as to the result, then the motion for new trial should be denied; however, if the trial justice finds that the state has failed to prove the defendant's guilt beyond a reasonable doubt, a new trial must be ordered.

[4] **Criminal Law** Weight and sufficiency of evidence in general

There is a distinction between a criminal defendant's motion for a new trial that attacks the sufficiency of the evidence supporting the guilty verdict and a new-trial motion that contends that the verdict is against the weight of the evidence.

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

When confronted with a motion for new trial based on insufficient evidence, a trial justice must examine the evidence in the light most favorable to the prosecution, without assessing the weight of the evidence or the credibility of witnesses.

[6] **Criminal Law** Weight and sufficiency of evidence in general

When confronted with a motion for new trial based on insufficient evidence, if the trial justice determines that any rational trier of fact could have found that the prosecution established the elements of the crime beyond a reasonable doubt, then the motion must be denied.

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

Supreme Court accords great deference to a trial justice's ruling on a motion for a new trial if he or she has set forth sufficient reasoning in support of the ruling.

3 Cases that cite this headnote

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

Supreme Court will not overturn a trial justice's ruling on a motion for a new trial unless he was clearly wrong or overlooked or misconceived material and relevant evidence that related to a critical issue in the case.

3 Cases that cite this headnote

[9] **Criminal Law** Weight and sufficiency of evidence in general

In murder case that involved conflicting evidence and inconsistent testimony, trial justice was not clearly wrong when she denied defendant's motion for new trial based on weight of the evidence nor did she overlook or misconceive material evidence relating to a critical trial issue; trial justice recognized the inherent difficulties that arose because the witnesses' testimony was rife with so many inconsistencies, trial justice explained what testimony she accepted and where she found that the testimony was supported by circumstantial evidence, and trial justice determined which testimony was credible, and she ultimately concluded that she would have reached the same result as the jury.

1 Cases that cite this headnote

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

Supreme Court accords great deference when Supreme Court reviews the decision of a trial justice on a motion for new trial because a trial justice, being present during all phases of the trial, is in an especially good position to evaluate the facts and to judge the credibility of the witnesses.

5 Cases that cite this headnote

[11] **Criminal Law** Motion for new trial or in arrest

Defendant's claim that trial justice erred by denying his motion for new trial based on insufficient evidence was waived for appeal because at no point before the trial justice did defendant cite the sufficiency of the evidence as a basis for a new trial.

4 Cases that cite this headnote

[12] **Criminal Law** Motion for new trial or in arrest

Irrespective of the grounds that a defendant employs to support his motion for new trial, for Supreme Court to review the propriety of the denial of such a motion, those grounds must have been preserved in the Superior Court.

[13] **Criminal Law** Motion for new trial or in arrest

Defendant's claim that he was entitled to a new trial because the jury's verdicts on two particular counts were legally inconsistent was waived for appeal; defendant did not cite legal inconsistency as a basis for granting a new trial in his motion for new trial, nor did he argue it when the motion was heard.

1 Cases that cite this headnote

[14] **Criminal Law** Inconsistent findings

Because a jury has broad power to compromise, Supreme Court will uphold logically inconsistent jury verdicts provided that the verdicts are legally consistent.

1 Cases that cite this headnote

[15] **Criminal Law** Motion for new trial or in arrest

To pursue his argument before Supreme Court that he was entitled to a new trial because the jury's verdicts on two particular counts were legally inconsistent, defendant must have raised the issue in the Superior Court.

1 Cases that cite this headnote

[16] **Criminal Law** Review De Novo

Supreme Court reviews jury instructions de novo.

[17] **Criminal Law** Duty of judge in general

When instructing the jury, the trial justice should reasonably set forth all of the salient and essential propositions of law that relate to material issues of fact which the evidence tends to support.

[18] **Criminal Law** Evidence justifying instructions in general

To justify directing the jury's attention to a proposition of law by means of an instruction, the record must contain evidence that supports it.

[19] **Criminal Law** Instructions

Supreme Court assesses jury instructions to determine how a jury of ordinary intelligent lay people would have understood them.

[20] **Criminal Law** Construction and Effect of Charge as a Whole

Criminal Law Instructions

Rather than isolating challenged portion from the instructions as a whole, Supreme Court scrutinizes the jury instructions in their entirety in order to ascertain whether or not a particular instruction misled or confused the jury.

[21] **Criminal Law** Objections in General

Supreme Court applies the raise-or-waive rule to objections to the jury charge that are raised for the first time on appeal.

1 Cases that cite this headnote

[22] **Criminal Law** Evidence justifying or requiring instructions

Based on the evidence presented during the trial, it was not improper for the trial justice to instruct the jury on aiding and abetting; there was testimony that defendant arrived at the apartment armed, that before re-entering the apartment he expressed an interest in taking victim's chain, that he and his companion then re-entered the apartment, and that companion actually took victim's chain.

1 Cases that cite this headnote

[23] **Criminal Law** Sufficiency of instructions as to presumption of innocence

Criminal Law Shifting burden of proof

Criminal Law Presumptions and burden of proof

Jury charge sufficiently and accurately described the state's burden of proof, and viewing the jury charge in its entirety, the instructions were not likely to mislead the jury about the burden the state had to prove each of the offenses beyond a reasonable doubt; although the trial justice, early in the charge, informed the jury that its task was to determine what happened, rather than to determine whether the state proved the elements of the offenses beyond a reasonable doubt, the instructions, viewed in their entirety, did not shift the burden of proof to defendant.

[24] **Criminal Law** Time for, and form of, objection

Because it was incumbent upon defendant to object to the instructions before the jury began its deliberations, so that the trial justice might have the opportunity to correct any errors, the failure to raise these objections at the appropriate time meant that they were not preserved for appellate review.

[25] **Assault and Battery** Firearms; Shooting

Weapons Use or Possession in Commission of Crime

Evidence was sufficient to support defendant's convictions for assault with a dangerous weapon, using a firearm in the commission of a crime of violence, and discharging a firearm in the commission of a crime of violence; witnesses testified that defendant had a firearm at the apartment, witness testified that defendant's gun was a .22–caliber long-nosed revolver and that it was he who suggested taking victim's chain, expert testified that all of the bullets retrieved from the victims that night were consistent with a .22–caliber weapon, and all of the other party guests who testified said that they were unarmed and that they did not see anyone else with a gun that night.

[26] **Criminal Law** Nature of Decision Appealed from as Affecting Scope of Review

Criminal Law Construction in favor of government, state, or prosecution

Criminal Law Inferences or deductions from evidence

When Supreme Court reviews the denial of a motion for judgment of acquittal on appeal, Supreme Court uses the same standard used by the trial justice: that is, Supreme Court views the evidence in the light most favorable to the state, according full credibility to its witnesses, and draws all reasonable inferences consistent with guilt.

1 Cases that cite this headnote

[27] **Criminal Law** Suspicion or conjecture; reasonable doubt

If the evidence, construed in the light most favorable to the prosecution, is insufficient to establish the defendant's guilt beyond a reasonable doubt, a motion for a judgment of acquittal should be granted, but if a reasonable juror could find the defendant guilty beyond a reasonable doubt, the motion should be denied.

[28] **Criminal Law** Inferences from evidence

It is only when the initial inference in the pyramid rests upon an ambiguous fact that is equally capable of supporting other reasonable inferences clearly inconsistent with guilt, that the pyramiding of inferences becomes speculative and, thus, insufficient to prove guilt beyond a reasonable doubt.

[29] **Criminal Law** Particular Instructions

No reversible error occurred as a result of the trial justice's sua sponte custody instruction, stating that murder defendant was in custody and that jury was to disregard defendant being escorted to and from the building with state marshals; once the ill-advised sua sponte instruction was given, defendant neither objected to the fact that it was imparted or to its content, nor did he move to pass the case, and custody instruction informed the jury that the fact that defendant was being escorted by state marshals "for security reasons" had nothing to do with his guilt or innocence and was to be regarded by them as neutral, and the instruction was not so inherently inflammatory or prejudicial as to render the jurors incapable of following it.

[30] **Criminal Law** Review De Novo

Supreme Court will review de novo questions of law and mixed questions of law and fact involving constitutional issues.

[31] **Criminal Law** Review De Novo

Supreme Court would review de novo custody instruction, stating that murder defendant was in custody and jury was to disregard defendant being escorted to and from the building with state marshals.

[32] **Constitutional Law** Sixth Amendment

Criminal Law Fair and impartial trial in general

Jury Competence for Trial of Cause

Right to a fair trial by an impartial jury is guaranteed by the Sixth Amendment, applicable to the states through the due process clause of the Fourteenth Amendment, and Rhode Island Constitution. U.S.C.A. Const.Amends. 6, 14; Const. Art. 1, § 10.

[33] **Criminal Law** Innocence

Presumption of innocence is a part of the right to a fair trial, so courts are under a duty to apply close judicial scrutiny to evaluate the likely effects of particular procedures that may diminish a defendant's presumption of innocence.

[34] **Criminal Law** Instructions

Jury may not need to be informed in every case that a defendant is in custody.

[35] **Criminal Law** Instructions

Justices of the Superior Court should avoid notifying the jury that a defendant is in custody without first making clear on the record that the *Fenner* procedure has been followed, and *Fenner* instructs trial justices on the procedure they should use when contemplating giving custody instruction: under *Fenner*, it should be the obligation of a trial justice to notify counsel prior to informing the jury that a defendant is in custody, and, if counsel objects, then the trial justice should not give the instruction, and if a defendant objects and the instruction is not given,

then that defendant "assumes the risk" that jurors may see him or her being transported in custody.

[36] **Witnesses** What are leading questions in general

Leading question is most generally defined as a question that suggests the desired answer.

1 Cases that cite this headnote

[37] **Witnesses** In general; right to use

Danger of a leading question is that it may suggest to the witness the specific tenor of the reply desired by counsel and such a reply may be given irrespective of actual memory.

1 Cases that cite this headnote

[38] **Witnesses** Discretion of court

While, as a general rule, leading questions are prohibited on direct examination, a trial justice has considerable latitude in sustaining or overruling objections to leading questions.

1 Cases that cite this headnote

[39] **Criminal Law** Examination

Similar to other decisions focusing on how evidence is received at trial, a trial justice's decision regarding the use of leading questions will be overturned only upon an abuse of discretion or where there is substantial injury to the defendant.

[40] **Criminal Law** Pretrial conference or hearing; order

Criminal Law Appointment and services of stenographer

Bench conferences frequently serve to permit the court and counsel to resolve some nonevidentiary matter, such as housekeeping problems with exhibits or difficulties with witness availability or other rather inconsequential procedural questions, and stenographic recording is not necessary for bench conferences dealing with such matters.

[41] **Criminal Law** Pretrial conference or hearing; order

Criminal Law Hearing, ruling, and objections

Occasionally the court may resolve serious matters at the side bar, such as evidentiary objections or objections to the judge's jury instructions.

[42] **Criminal Law** Pretrial conference or hearing; order

Criminal Law Appointment and services of stenographer

Although it is within the discretion of the trial justice to allow or not to allow counsel to raise material matters at bench conferences, when convenience and efficiency are served thereby, such conferences may be allowed and should be recorded.

[43] **Criminal Law** Conduct of Trial in General

For a party to persuade Supreme Court that the failure to record bench conferences justifies relief, a party must at least set forth the matters allegedly raised and the manner in which he was prejudiced by the fact that the bench conferences were not recorded; without that information about the error that went unrecorded or prejudice that may have been created, Supreme Court has no basis on which to grant relief.

[44] **Criminal Law** Presentation of questions in general

Party who fails to assert his specific objections is deemed to have waived his rights on appeal.

[45] **Criminal Law** Rulings on evidence

Use of leading questions in murder case did not warrant a new trial; conduct of a trial and the admission of evidence therein were within the trial justice's discretion, substantial injury did not occur when a question merely reiterated testimony already in evidence or oriented the courtroom to previously given testimony, leading questions did not amount to "coaching" of the witnesses, and trial justice's conduct of the interrogation was within the bounds of her discretion.

[46] **Criminal Law** Errors and Irregularities in Conduct of Trial

Defendant was not entitled to a new trial because certain bench conferences were not placed on the record; there were approximately fifteen unrecorded bench conferences, and defendant himself requested five of those, and defendant failed to explain what was said during the bench conferences and how he was prejudiced by the lack of recording.

1 Cases that cite this headnote

[47] **Criminal Law** Necessity of specific objection

It was defendant's duty to lodge specific objections on the record if he wished to preserve them for appeal. Rules of Evid., Rule 103(a)(1).

2 Cases that cite this headnote

[48] **Criminal Law** Particular Instructions

Criminal Law Grounds in general

Failure of the trial justice to follow the procedure set forth in *Fenner* before disclosing to the jury that the defendant was in custody was not enough on its own to warrant reversal and it could not be combined with judge's other rulings, which were not erroneous, to occasion the vacating of the judgment of conviction.

Attorneys and Law Firms

***800** Virginia M. McGinn, Department of the Attorney General, for State.

Randy Olen, Esq., for Defendant.

Present: SUTTELL, C.J., GOLDBERG, FLAHERTY, ROBINSON, and INDEGLIA, JJ.

OPINION

Justice FLAHERTY, for the Court.

On the evening of December 4, 2002, a group of friends gathered to celebrate the birthday of Tammy Kennedy at her apartment. However, the intended festivities soon took a tragic turn, and, before the night was over, three people at the party suffered gunshot wounds and one of them, nineteen-year-old Joel Jackson, was dead. The defendant, **Kendall Whitaker**, eventually was charged, tried, and convicted on multiple counts, including murder, robbery, assault with a dangerous weapon, carrying a pistol without a license, using a firearm in the commission of a crime of violence, and committing a crime of violence while armed with a firearm. The defendant timely appealed to this Court. In his appeal, the defendant argues that his trial was infected by a host of errors that require that his convictions be vacated. We have examined the record, the briefs submitted by the defendant and the state, and have listened to the arguments advanced by the parties. For the reasons set forth in this opinion, we affirm the judgment of conviction.

I

Facts and Travel

On the night of December 4, 2002, a group gathered to celebrate a birthday in the apartment of Tammy Kennedy in Providence. George Toby, who was Kennedy's friend and was Kennedy's older son's football coach, was present, as were Kennedy's sister Maryann Godfrey, who had previously dated defendant, and Kennedy's neighbor Candida Morillo.

To enhance the festivities, Godfrey, Morillo, and Toby, along with the older of Kennedy's sons, drove to a supermarket to purchase a birthday cake. When they returned to the apartment, they spoke to Joel Jackson and Corissa Richardson, who were sitting in a car in the parking lot of Kennedy's apartment building. Toby invited Jackson and Richardson to join them in Kennedy's apartment.

A short time later, defendant, accompanied by Brandon Robinson and Richard Isom, arrived at Kennedy's apartment. Robinson and Isom had known each other for many years, and they had become acquainted with defendant late in 2002. The trio had congregated earlier in the evening at Robinson's home. They then decided to go to Kennedy's apartment to see some of the women whom they expected to be there. [1]

***801** After **Whitaker**, Robinson, and Isom arrived at Kennedy's apartment, Toby engaged them in conversation about mutual acquaintances and the respective areas of Providence where they resided. For some reason, defendant, Robinson, Isom, and Toby withdrew to the hallway outside the apartment. While he was in the hallway, Toby was asked whether he was there to see one of the women present at the party; he replied that he was there to see Kennedy, who was sleeping in a back bedroom at that time. Toby then returned to the apartment alone, leaving **Whitaker**, Robinson, and Isom in the hallway. At trial, Robinson and Isom testified that defendant said that he wanted to steal a gold chain that Jackson was wearing.

Robinson and **Whitaker** then re-entered the apartment, and, according to multiple witnesses, a scuffle soon ensued. Toby, who had emerged from Kennedy's back bedroom, testified that he saw Robinson and Jackson struggling. Toby testified that he entered the fray himself and attempted to separate the men. As he did, he noticed a gun, and he grabbed Robinson's hand in an effort to control the weapon. Suddenly, the sounds of gunfire resounded throughout the apartment.

Robinson testified that his weapon never discharged and that his gun never left his hand. Toby, who had a hand on Robinson's gun from the time that he engaged Robinson, also said that the weapon never left Robinson's hand and that it was never positioned behind Robinson's back. [2] Toby also testified that when he heard the gunshots, he did not feel any motion from Robinson's gun.

Corissa Richardson [3] testified that she saw defendant remove a handgun from his coat pocket during the struggle for Robinson's gun and that she watched him point it in the direction of the scuffle. Robinson also testified that **Whitaker** drew his gun after he came back into the apartment, but no other witness testified that **Whitaker** was armed during the brawl. [4]

Robinson further testified at trial that as Jackson collapsed onto him after being shot, he relieved Jackson of the gold chain and medallion that Jackson had been wearing. He put the chain in his pocket and carried the medallion in his hand. Isom testified that he later removed the chain from the pocket of Robinson's jacket. Robinson said that he held the medallion until he arrived home, but he left it on the trunk of his car while defendant drove him to the hospital. Providence Police later confiscated the medallion from Robinson's sister.

As soon as he regrouped with Isom, Robinson reported that he had been shot by **Whitaker**, and he asked Isom to bring him to the hospital. However, Isom declined to do so because he had criminal charges pending against him. Instead, he drove Robinson to Robinson's home. After arriving at his house, Robinson and defendant squabbled about the shooting; **Whitaker** said that it had been an accident. The defendant then drove the wounded Robinson to Rhode Island Hospital, where defendant was subsequently apprehended by law enforcement.

Whitaker eventually was charged with (1) murdering Jackson, (2) robbing Jackson, (3) conspiring to rob Jackson, (4) assaulting ***802** Toby with a dangerous weapon, (5) assaulting Robinson with a dangerous weapon, (6) carrying a handgun without a license, (7) using a firearm in the commission of a crime of violence, (8) discharging a firearm in the commission of a crime of violence, and (9) committing a crime of violence while armed and having available a firearm. After trial before a jury, **Whitaker** was acquitted on the conspiracy count and the charge of assaulting Toby, but he was convicted on the remaining counts.

Before this Court, defendant argues that the trial justice erred when she denied his motion for a new trial, gave confusing or unwarranted instructions in the jury, denied his motion for a judgment of acquittal, improperly told the jury that defendant was in custody, permitted the excessive use of leading questions during the direct examination of the state's witnesses, and failed to record bench conferences. We will provide additional facts in our discussion where necessary.

II

Motion for New Trial

Whitaker first argues on appeal that the trial justice erred when she denied his motion for new trial because the trial justice commented with disdain about the lack of credibility of the witnesses, at one point describing them as "competing liars." Therefore, he contends that she erred when she said she agreed with the jury's verdict. The defendant further argues that he should have been granted a new trial because there was insufficient evidence on aiding and abetting to warrant a guilty verdict for that crime. Finally, defendant maintains that he should be entitled to a new trial because the guilty verdict for aiding and abetting Robinson in stealing Jackson's chain is legally inconsistent with the guilty verdict for assaulting Robinson.

A

Standard of Review

[1] **[2]** **[3]** When a motion for new trial is founded on the weight of the evidence, "a trial justice sits as a thirteenth juror and exercises his or her own independent judgment, assessing the credibility of the witnesses and other evidence, and must 'choose which conflicting testimony and evidence to accept and which to reject.' " *State v. Abdullah,* 967 A.2d 469, 479 (R.I.2009) (quoting *State v. Banach,* 648 A.2d 1363, 1367 (R.I.1994)). When he or she entertains the motion, the trial justice should "(1) consider the evidence in light of the jury charge, (2) independently assess the credibility of the witnesses and the weight of the evidence, and then (3) determine whether he or she would have reached a result different from that reached by the jury." *State v. St. Michel,* 37 A.3d 95, 102 (R.I.2012) (quoting *State v. Cerda,* 957 A.2d 382, 385 (R.I.2008)). If the trial justice determines that he or she agrees with the jury's verdict or that reasonable minds could differ as to the result, then the motion should be denied. *Id.* "If, however, the trial justice finds that the state has failed to prove the defendant's guilt beyond a reasonable doubt, a new trial must be ordered." *Id.* (quoting *Cerda,* 957 A.2d at 385).

[4] **[5]** **[6]** There is, however, a "distinction between a criminal defendant's motion for a new trial that attacks the sufficiency of the evidence supporting the guilty verdict and a new-trial motion that contends that the verdict is against the weight of the evidence." *State v. Karngar,* 29 A.3d 1232, 1235 (R.I.2011) (quoting *State v. Clark,* 974 A.2d 558, 569 (R.I.2009)). When confronted with a motion for new trial based on insufficient evidence, "a trial justice must examine the evidence in the ***803** light most favorable to the prosecution, without assessing the weight of the evidence or the credibility of witnesses." *Id.* (citing *Clark,* 974 A.2d at 570). "If the trial justice determines that any rational trier of fact could have found that the prosecution established the elements of the crime beyond a reasonable doubt, then the motion must be denied * * *." *Id.* (citing *Clark,* 974 A.2d at 569, 571).

[7] **[8]** "This Court accords great deference to a trial justice's ruling on a motion for a new trial 'if he or

she has set forth sufficient reasoning in support of the ruling.' " *Abdullah,* 967 A.2d at 479 (quoting *State v. Imbruglia,* 913 A.2d 1022, 1028 (R.I.2007)). We "will not overturn a trial justice's ruling on a motion for a new trial unless he was 'clearly wrong' or 'overlooked or misconceived material and relevant evidence that related to a critical issue in the case.' " *St. Michel,* 37 A.3d at 102 (quoting *Cerda,* 957 A.2d at 386).

B

Discussion

1

Weight of the Evidence

[9] The defendant argues that the trial justice found the testimony of the witnesses who were present at the crime scene to be incredible, commenting that she did not think that any of the civilian witnesses told the truth. He maintains that, in light of her comments, she could not have determined that the state was able to satisfy its burden of proof and, when she exercised her independent judgment, she should have granted the motion for new trial. We disagree.

In *Cerda,* 957 A.2d at 386, we affirmed the denial of a motion for new trial based on the weight of the evidence in a case in which the trial justice noted that key witnesses initially had lied about what had occurred. Despite that fact, this Court was satisfied that the trial justice properly discharged his duty in ruling on a motion for new trial; that is, he "appropriately assessed the witnesses' credibility and determined that the evidence could cause reasonable minds to differ as to the outcome of the case." *Id.* (citing *State v. Schloesser,* 940 A.2d 637, 639 (R.I.2007)).

We similarly affirmed the denial of a motion for new trial in *State v. Rosario,* 35 A.3d 938, 948–49 (R.I.2012). There, the trial justice relied on *Cerda* in explaining that, although inconsistencies existed in the testimony of two witnesses, he nonetheless found that the testimony was believable. *Id.* The trial justice concluded that despite inconsistencies in the testimony of prosecution witnesses, "the thrust or the nub" of their testimony was believable and, conversely, the defendant's testimony was not believable. *Id.* at 948. We held that "not only did [the trial justice] conclude that reasonable minds could differ as to what the verdict should be, but he also expressly stated that he 'would have concurred in the unanimous verdict.' " *Id.* at 949.

Here, there can be no disputing that the record reveals a substantial number of inconsistencies in the testimony of the various witnesses. For example, Isom was confronted with the fact that his testimony in front of the grand jury and his trial testimony were inconsistent regarding the size of defendant's gun, whether there were two guns under defendant's bed when the trio was at defendant's home prior to the night in question, and the caliber of defendant's gun. In his grand jury testimony, Isom also denied having heard defendant mention stealing Jackson's chain. Cross-examination at trial also confirmed that Isom omitted some details from his grand jury testimony but ***804** included them in his testimony at defendant's bail hearing, such as whether he had seen defendant's gun and Robinson's gun at the same time.

Robinson similarly was confronted with inconsistencies, such as when he first said that defendant's gun was .22 caliber.[5] Also, Robinson swore that he had noticed that the bullets to defendant's pistol were stamped with the notation that they were .22 caliber, although an expert witness testified that a .22–caliber bullet would not carry such a marking.

In her bench decision denying the motion for new trial, the trial justice specifically said that, sitting as the thirteenth juror, she was certain that there were two guns in the apartment that fatal night. She also found that, before defendant arrived with his friends, no one at the apartment was armed. With respect to who was armed among **Whitaker**, Robinson, and Isom, the trial justice found that the evidence did not support the conclusion that Isom had the second gun. Even though she commented that Robinson and Isom lacked credibility on many points, the trial justice noted that they both testified that defendant's gun appeared to be .22 caliber. The trial justice further relied on Richardson's testimony that she saw defendant with a gun, concluding that although that witness's

credibility was marginal, the circumstantial evidence undergirded and provided support to her testimony. Significantly, the trial justice "accepted as true the accounts of Brandon Robinson's * * * exclamations that **Whitaker** shot him," and she "believe[d] that Robinson shouted[,] 'Stop shooting.' " Ultimately, the trial justice found that she would have reached the same result as the jury and that reasonable minds could have differed as to the outcome.

The trial justice clearly recognized the inherent difficulties that arose because the witnesses' testimony was rife with so many inconsistencies, commenting during the hearing on the motion for new trial that she did not "think there was anybody who told the truth in th[e] trial" and that the circumstantial evidence was needed to "sift through and see which of these competing liars [wa]s telling the truth." The trial justice went on, however, to explain what testimony she accepted and where she found that the testimony was supported by circumstantial evidence. *See Rosario,* 35 A.3d at 948–49; *Cerda,* 957 A.2d at 385–86. As was the case in *Rosario,* 35 A.3d at 948–49, where inconsistencies did not preclude a trial justice from accepting some of a witness's testimony and denying a new-trial motion based on the weight of the evidence, here the trial justice determined which testimony was credible, and she ultimately concluded that she would have reached the same result as the jury.

[10] We accord great deference when we review the decision of a trial justice on a motion for new trial "because a trial justice, being present during all phases of the trial, is in an especially good position to evaluate the facts and to judge the credibility of the witnesses." *Rosario,* 35 A.3d at 948 (quoting *State v. Guerra,* 12 A.3d 759, 766 (R.I.2011)); *see also State v. Paola,* 59 A.3d 99, 106 (R.I.2013) (explaining that our review is limited to a cold record, so we defer "to the factual determinations and credibility assessments made by the judicial officer who has actually observed the human drama that is part and parcel of every trial" (quoting *State v. DiCarlo,* 987 A.2d 867, 872 (R.I.2010))). ***805** The trial justice's perhaps poorly chosen comments regarding the witnesses' general credibility notwithstanding, we are of the opinion that she found credible the testimony that there were two firearms in the apartment, that no one was armed except Robinson and **Whitaker**, that Robinson yelled, "Stop shooting," and he did say that **Whitaker** shot him, and that the evidence showed that defendant's weapon was .22 caliber.

In a case such as this that involves conflicting evidence and inconsistent testimony, we cannot say, from our review of a cold record, that the trial justice was clearly wrong when she denied the motion for new trial or that she overlooked or misconceived material evidence relating to a critical trial issue.

2

Sufficiency of the Evidence

[11] The defendant contends that there was insufficient evidence for the jury to convict him under an aiding-and-abetting theory because the jury found that there was no conspiracy, and the only evidence that supported aiding and abetting was the same evidence that supported the conspiracy count, on which defendant was acquitted. However, our review of the record reveals that this issue was not raised before the trial justice and that therefore this argument must fail in accordance with our well-settled waiver rule. *See State v. Price,* 66 A.3d 406, 416 (R.I.2013); *State v. Moten,* 64 A.3d 1232, 1238–39 (R.I.2013); *State v. Figuereo,* 31 A.3d 1283, 1289 (R.I.2011).

[12] As we said in *Karngar,* 29 A.3d at 1235, there is a difference between a motion for new trial that is based on the weight of the evidence and one that is based on the sufficiency of the evidence. However, irrespective of the grounds that a defendant employs to support his motion for new trial, for us to review the propriety of the denial of such a motion, those grounds must have been preserved in the Superior Court. *See id.* at 1235–36 (citing *State v. Storey,* 8 A.3d 454, 460 n. 7 (R.I.2010)). In *Karngar,* a defendant's request for a new trial based only on the weight of the evidence did not preserve for appellate review the ground that a new trial was warranted based on insufficient evidence. *Id.*

The defendant's written motion for new trial merely set forth that he moved, pursuant to Rule 33 of the Superior Court Rules of Criminal Procedure, that the trial justice order a new trial; it provided no grounds. At the March 17, 2006 hearing on the motion, defendant

asked the trial justice to function as the thirteenth juror and assess the evidence and credibility of witnesses. At no point before the Superior Court did defendant cite the sufficiency of the evidence as a basis for a new trial. We thus reach the same conclusion that we reached in *Karngar* and hold that the denial of a motion for new trial based on insufficient evidence is not properly before us. *See Karngar,* 29 A.3d at 1235–36 (citing *Storey.* 8 A.3d at 460 n. 7).

3

Legal Inconsistency

[13] **Whitaker** also maintains that he is entitled to a new trial because the jury's guilty verdict for aiding and abetting Robinson in the robbery is legally inconsistent with its guilty verdict for assaulting Robinson.

[14] Because a jury has broad power to compromise, "this Court will uphold logically inconsistent jury verdicts provided that the verdicts are legally consistent." *State v. Arroyo,* 844 A.2d 163, 170 (R.I.2004) (citing *State v. Romano,* 456 A.2d 746, 764 (R.I.1983)). We have explained ***806** that legal inconsistency exists where "the essential elements of the count[s] of which the defendant is acquitted are identical and necessary to prove the count of which the defendant is convicted." *Id.* at 171 (quoting *State v. Allessio,* 762 A.2d 1190, 1192 (R.I.2000)).

[15] However, to pursue his argument before this Court that he is entitled to a new trial because the jury's verdicts on two particular counts are legally inconsistent, defendant also must have raised the issue in the Superior Court. *See State v. Bido,* 941 A.2d 822, 828–29 (R.I.2008) ("It is well settled that a litigant cannot raise an objection or advance a new theory on appeal if it was not raised before the trial court."). The defendant did not cite legal inconsistency as a basis for granting a new trial in his motion for new trial, nor did he argue it when the motion was heard. We are, therefore, of the opinion that the issue is not properly before us and that there is nothing for this Court to review.

III

Jury Instructions

The defendant contends that the instructions provided by the trial justice to the jury were deficient in multiple ways: first, that there was insufficient evidence to warrant an instruction on aiding and abetting; second, that the trial justice failed to instruct the jury on intent; and third, that the instructions were confusing to the jury.

A

Standard of Review

[16] **[17]** **[18]** We review jury instructions *de novo. Imbruglia,* 913 A.2d at 1031. "[W]hen instructing the jury, the trial justice 'should reasonably set forth all of the salient and essential propositions of law that relate to material issues of fact which the evidence tends to support.' " *State v. Fisher,* 844 A.2d 112, 116 (R.I.2004) (quoting *State v. LaRoche,* 683 A.2d 989, 996–97 (R.I.1996)). To justify directing the jury's attention to a proposition of law, the record must contain evidence that supports it. *Id.* (citing *LaRoche,* 683 A.2d at 997); *see also State v. Garcia,* 883 A.2d 1131, 1137 (R.I.2005) ("It is incumbent upon a trial justice to instruct the jury on the law that applies to each issue that the parties raise at trial." (citing *State v. McGuy,* 841 A.2d 1109, 1112 (R.I.2003))).

[19] **[20]** This Court assesses jury instructions "to determine how a 'jury of ordinary intelligent lay people would have understood them.' " *Imbruglia,* 913 A.2d at 1031 (quoting *State v. John,* 881 A.2d 920, 929 (R.I.2005)). Rather than "isolat[ing] a challenged portion from the instructions as a whole," "[w]e scrutinize the jury instructions in their entirety in order to ascertain whether or not a particular instruction misled or confused the jury." *Id.* (citing *John,* 881 A.2d at 929; *State v. Ibrahim,* 862 A.2d 787, 796 (R.I.2004)).

[21] According to Rule 30 of the Superior Court Rules of Criminal Procedure, "[n]o party may assign as error any portion of the charge or omission therefrom

unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the party's objection." This constraint allows the trial justice "to cure the alleged deficiencies before the jury retires for deliberations." *State v. Palmer,* 962 A.2d 758, 766 (R.I.2009) (quoting *State v. Crow,* 871 A.2d 930, 935 (R.I.2005)). We therefore apply the raise-or-waive rule to objections to the jury charge that are raised for the first time on appeal. *Id.*

***807 B**

Discussion

1

Aiding–and–Abetting Instruction

[22] In *State v. Long,* 61 A.3d 439, 447 (R.I.2013), we had the opportunity to consider what evidence justified an instruction on aiding and abetting. In that case, one participant in a marijuana-growing operation agreed to testify against another, and that testimony established that the defendant was present at the initial meeting where the operation was planned and that she suggested that a proper water supply be ensured. *Id.* This Court held that the "testimony that defendant was at [the site of the growing operation] on a number of occasions was sufficient to support the jury charge with respect to aiding and abetting." *Id.*

Here, **Whitaker** maintains that there was insufficient evidence in the record to support an aiding-and-abetting instruction because there is no evidence in the record to establish an action consistent with his supposed criminal intent. The defendant overlooks, however, that the testimony of Isom and Robinson includes their statements that he arrived at the apartment armed, that before re-entering the apartment he expressed an interest in taking Jackson's chain, that he and Robinson then re-entered the apartment, and that Robinson actually took Jackson's chain. Further, Richardson testified that during the struggle over Robinson's gun, she observed defendant draw a gun and aim it towards the scrum.

We are of the firm opinion that, based on the evidence presented during the trial, it was not improper for the trial justice to instruct the jury on aiding and abetting. *See Long,* 61 A.3d at 447–48; *Fisher,* 844 A.2d at 116–17.

2

Instruction on the Jury's Role

[23] In her charge to the jury, the trial justice informed the panel that its "function [wa]s to determine from the evidence what's the truth about the events in question, what happened, what the people involved did or did not do and what were the surrounding circumstances." The defendant objected to that portion of the charge, arguing that it improperly relieved the state of its burden to prove the elements of the offenses beyond a reasonable doubt because the jury might believe that it was first to decide what happened and only then consider the state's burden.

We considered a similar argument in *State v. Perry,* 770 A.2d 882, 886 (R.I.2001), where a defendant argued that an instruction that the jury should acquit if it found that there was " 'a real possibility' that he was not guilty." This Court said that "[d]efining for a jury when doubt is reasonable, while an inexact science, does not shift the burden of proof to the defendant when no part of the definition contradicts the court's plain instruction that the burden is entirely the [s]tate's." *Id.* at 886 (quoting *State v. Castle,* 86 Wash.App. 48, 935 P.2d 656, 661 (1997)). We also explained that although an instruction may " 'engender some confusion as to the burden of proof if it stood by itself,' * * * the overall charge is 'sufficient to dispel any possible confusion or misunderstanding arising from the reasonable doubt definition' " if it accurately describes the burden of proof. *Id.* (quoting *State v. Saluter,* 715 A.2d 1250, 1257 (R.I.1998)).

We are convinced that the jury charge in this case sufficiently and accurately described the state's burden of proof. Although the trial justice, early in the charge, informed the jury that its task was to determine what happened rather than ***808** to determine whether the state proved the elements of the offenses beyond

a reasonable doubt, the instructions, viewed in their entirety, did not shift the burden of proof to defendant. *See Perry,* 770 A.2d at 886. For example, the trial justice explained that

> "[i]n all criminal cases, the [s]tate or the prosecution has the burden of producing evidence sufficient to prove the defendant's guilt. The [s]tate must produce evidence to support each and every one of the elements or components of the crimes charged. The [s]tate also carries the burden of producing enough evidence so that in the minds of the jurors, the defendant's guilt has been proved beyond a reasonable doubt as to each element or component of the crimes charged."

The trial justice then instructed the jury on the individual offenses with which **Whitaker** was charged, including the elements for each and informing the jury that if the state failed to prove any of the elements beyond a reasonable doubt, then the jury should acquit defendant.

Viewing the jury charge in its entirety, we conclude that the instructions were not likely to mislead the jury about the burden the state had to prove each of the offenses beyond a reasonable doubt.

3

Remaining Instructions

Whitaker also argues that the trial justice erred because she failed to include a separate instruction on intent. He maintains that the jury must not have understood the instructions because it illogically convicted defendant of assaulting the very person whom he was convicted of aiding and abetting. **Whitaker** similarly argues that the jury was confused by the instructions, confusion that he argues is evidenced by verdicts of guilty of aiding and abetting but of not guilty of conspiracy.

Neither this argument nor the objection, however, was brought to the attention of the trial justice at the appropriate time.[6] **Whitaker's** written exceptions to the jury instructions were separated into objections, requests for written edits, and requests for oral instructions; none of them suggests that the jury charge inadequately outlined the law regarding intent. There simply was no objection that the charge lacked clarity or that it was confusing. Indeed, after she instructed the jury and received defendant's objections, the trial justice discussed those objections with counsel on the record; defendant made no additional objections.

[24] Because it was incumbent upon defendant to object to the instructions before the jury began its deliberations so that the trial justice might have the opportunity to correct any errors, the failure to raise these objections at the appropriate time constrains us to conclude that they were not preserved for our review.

IV

Motion for Judgment of Acquittal

[25] At trial, defendant made a motion for judgment of acquittal on counts five, seven, and eight, which were for assaulting Robinson with a dangerous weapon, using a firearm in the commission of a crime of violence, and discharging a firearm in the ***809** commission of a crime of violence. He maintains that those counts require the impermissible pyramiding of inferences. The motion was denied, and defendant argues that that denial was error.

A

Standard of Review

[26] **[27]** When we review the denial of a motion for judgment of acquittal on appeal, we use the same standard used by the trial justice. *Abdullah,* 967 A.2d

at 474 (citing *State v. Day,* 925 A.2d 962, 974 (R.I.2007)). That is, "we view the evidence in the light most favorable to the state, according full credibility to its witnesses, and we draw 'all reasonable inferences consistent with guilt.' " *Id.* (quoting *Day,* 925 A.2d at 974). "If the evidence, construed in the light most favorable to the prosecution, is insufficient to establish the defendant's guilt beyond a reasonable doubt, a motion for a judgment of acquittal should be granted." *State v. Texieira,* 944 A.2d 132, 140 (R.I.2008) (citing *Day,* 925 A.2d at 974). "If, however, a reasonable juror could find the defendant guilty beyond a reasonable doubt, the motion should be denied." *Id.* (citing *Day,* 925 A.2d at 974).

B

Discussion

[28] This Court "previously ha[s] held that 'it is possible for the state to prove guilt by a process of logical deduction, reasoning from an established circumstantial fact through a series of inferences to the ultimate conclusion of guilt.' " *State v. Vargas,* 21 A.3d 347, 353 (R.I.2011) (quoting *State v. Caruolo,* 524 A.2d 575, 581–82 (R.I.1987)). "It is only when, during this deduction process, 'the initial inference in the pyramid rests upon an ambiguous fact that is equally capable of supporting other reasonable inferences clearly inconsistent with guilt,' that '[t]he pyramiding of inferences * * * becomes speculative * * * and thus insufficient to prove guilt beyond a reasonable doubt.' " *Id.* (quoting *Caruolo,* 524 A.2d at 582).

In *Vargas,* 21 A.3d at 349, 352, a defendant was charged with delivery of a controlled substance and argued in a motion for judgment of acquittal that the prosecution's evidence required pyramiding inferences because a detective who witnessed the exchange did not actually see exactly what was delivered. However, we affirmed the denial of the motion by the trial justice because there was corroborating circumstantial evidence, so " 'rather than deducing guilt from an ambiguous circumstantial fact, the state established a pattern of corroborating circumstances' sufficient to justify a reasonable juror in finding defendant guilty beyond a reasonable doubt." *Id.* at 354 (quoting *Caruolo,* 524 A.2d at 582).

According to defendant, the state's theory in this case is dependent on an inference that no other guest at the party had a gun in his or her possession, which relies on the lack of evidence showing that anyone else was armed. From that, he contends, the jury must infer that Robinson's gun was not fired, that some other gun was fired, and that, therefore, **Whitaker** must have fired that weapon. We disagree with defendant's contention that this impermissibly pyramids inferences.

Robinson, Isom, and Richardson all testified that defendant had a firearm at the apartment. Robinson and Isom both testified that **Whitaker's** gun was a .22–caliber long-nosed revolver and that it was he who suggested taking Jackson's chain. An expert testified that all of the bullets retrieved from the victims that night were consistent with a .22–caliber weapon. Toby testified that he did not feel Robinson's ***810** gun discharge as he held it during the fracas, and Robinson testified that his weapon was a .357–caliber short-nosed revolver that was not fired that night. All of the other guests who testified said that they were unarmed and that they did not see anyone else with a gun that night. In our opinion, the inferences that defendant attempts to challenge are based on the direct and circumstantial evidence, rather than pyramided on an ambiguous fact. *See Vargas,* 21 A.3d at 354.

To the extent that defendant suggests that, despite the consistent testimony of the witnesses that no one saw a gun in the hands of any partygoer other than Robinson and **Whitaker**, the lack of explicit testimony that no one else had a gun renders the evidence insufficient, we observe that such direct evidence is not necessary because circumstantial evidence is sufficient. *See State v. Robat,* 49 A.3d 58, 74 (R.I.2012) ("[T]he prosecution may rely entirely on circumstantial evidence 'without disproving every possible speculation or inference of innocence as long as the totality of the circumstantial evidence offered constitutes proof of guilt beyond a reasonable doubt.' " (quoting *Caruolo,* 524 A.2d at 581)).

Given the prism through which the trial justice and this Court view a motion for judgment of acquittal, that is, taking the evidence and reasonable inferences in the light most favorable to the state, we hold that the trial justice did not err when she denied the motion for judgment of acquittal.

V

Custody Instruction

[29] After the jury entered the courtroom on the morning of the fourth day of the trial, the trial justice asked the jurors whether they had seen defendant being led from the building by state marshals. The trial transcript discloses that the jurors shook their heads negatively. Nonetheless, the trial justice imparted the following instruction to them:

> "No? Okay. The fact is that when someone—when any defendant is facing these kinds of charges, we do have them escorted to and from the building with state marshals, so I just wanted to make sure if you did notice that, just ignore it. I mean, the fact that someone is being escorted in and out of the building for security reasons by marshals really has nothing to do with whether or not he's guilty or innocent. So, if you did spot that, just ignore it. Okay? Don't let it have any influence on you either way. You can see that we have marshals here in the courtroom, and that is just part of the legal process. It doesn't mean one way or the other that he's more likely to be guilty or not. And, if you happen to see that some night going out when you're getting on the bus, just ignore it."

The record is devoid of any indication that the trial justice informed defendant that she intended to impart this instruction. The defendant now asserts before this Court that the trial justice committed reversible error when she did so.

A

Standard of Review

[30] **[31]** This Court will review *de novo* "questions of law and mixed questions of law and fact involving constitutional issues." *State v. Snell,* 892 A.2d 108, 115 (R.I.2006) (citing *State v. Campbell,* 691 A.2d 564, 569 (R.I.1997)). In previous cases, we have said that informing the jury that a defendant is in custody may impair the presumption of innocence that "is a basic component of a fair trial under our system of criminal justice." *See id.* (quoting ***811** *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)); *see also State v. Moosey,* 504 A.2d 1001, 1004–06 (R.I.1986); *State v. Fenner,* 503 A.2d 518, 521–23 (R.I.1986). We accordingly will review the instruction in this case *de novo.*

B

Discussion

[32] **[33]** "The right to a fair trial by an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, and by article 1, section 10, of the Rhode Island Constitution." *Snell,* 892 A.2d at 115 (citing *State v. Ordway,* 619 A.2d 819, 826 (R.I.1992)). The presumption of innocence is a part of the right to a fair trial, so "courts are under a duty to apply 'close judicial scrutiny' to evaluate the likely effects of particular procedures that may diminish a defendant's presumption of innocence." *Id.* (quoting *Estelle,* 425 U.S. at 504, 96 S.Ct. 1691).

In *Fenner,* 503 A.2d at 521–22, we considered the effect of an instruction to the jury that a criminal defendant was in custody. In that case, a trial justice notified counsel that she intended to disclose to the jury that the defendant was in custody and, hearing no objection, then informed the jury that defendant was in custody, that often people are in custody because they cannot post bail, and that it was important that the jury regard the defendant's custodial status as a neutral fact. *Id.* at 521. No objection was lodged immediately after the instruction was given, although, after a recess, counsel objected and moved to pass the case. *Id.* The trial justice denied the motion and the issue eventually was considered by this Court on appeal. *Id.* Based on the content of the instruction, we said that "the entire rationale underlying the structure of jury trials and the lyrical deference that is paid to jury findings rests upon the proposition that jurors will obey the admonitions of the trial justice and will apply the law as given to them by the justice presiding." *Id.* at 522. Because the trial justice's comments "were not so inherently inflammatory or prejudicial as to render the jurors incapable of following the instruction," and because there had been no objection interposed by the defendant, we held that the comments did not amount to reversible error. *Id.* at 522–23. [7]

Our opinion in *Fenner,* however, instructed trial justices of the procedure they should use in the future when contemplating such an instruction. *Fenner,* 503 A.2d at 522. We said that "it should be the obligation of a trial justice" to notify counsel prior to informing the jury that a defendant is in custody, and, if counsel objects, then the trial justice should not give the instruction. *Id.* If a defendant objects and the instruction is not given, we noted, then that defendant "assumes the risk" that jurors may see him or her being transported in custody. *Id; see also State v. Bleau,* 649 A.2d 215, 219 (R.I.1994) (affirming the denial of a motion to pass after a defendant had declined a custody instruction at the start of trial, jurors had seen him in handcuffs, and the trial justice gave a cautionary instruction). We also admonished that the trial justice should be prepared to give a cautionary instruction if a defendant is seen in custody and then ***812** requests such an instruction. *See Fenner,* 503 A.2d at 522; *see also Bleau,* 649 A.2d at 219. We made clear in *Fenner,* 503 A.2d at 522, however, that the choice of whether a custody instruction is given should be the defendant's and "should be exercised before the admonition is given, not afterward." [8]

Unfortunately, the trial justice in this case did not follow the clearly outlined procedure that was set forth by this Court in *Fenner,* 503 A.2d at 522. That being said, we must now determine if reversible error has occurred as a result of the trial justice's *sua sponte* admonition to the jury. After a thorough review of the record and serious consideration of this issue, it is our opinion that reversible error has not occurred.

It is of course true that the failure of the trial justice to follow the course prescribed in *Fenner* deprived defendant of the opportunity to object to anything being said at all. *See Fenner,* 503 A.2d at 522. However, the record also reveals that once the ill-advised *sua sponte* instruction was given, defendant neither objected to the fact that it was imparted or to its content, nor did he move to pass the case. *See State v. Burke,* 529 A.2d 621, 627 (R.I.1987).

The instruction in this case informed the jury that the fact that defendant was being escorted by state marshals "for security reasons" had nothing to do with his guilt or innocence and was to be regarded by them as neutral. In our opinion, the instruction was "not so inherently inflammatory or prejudicial as to render the jurors incapable of following [it]." *Fenner,* 503 A.2d at 522. We therefore hold, as we did in *Fenner,* and without retreating in any way from our holding in that case, that despite the trial justice's apparent decision to give the instruction without warning, because of the particular instruction, the facts of the case, and defendant's failure to protest in any way, the trial justice did not commit reversible error. *See id.*

[34] **[35]** We will reiterate that the jury may not need to be informed in every case that a defendant is in custody. *See Moosey,* 504 A.2d at 1005. We also caution the justices of the Superior Court that they should avoid notifying the jury that a defendant is in custody without first making clear on the record that the *Fenner* procedure has been followed. *See Fenner,* 503 A.2d at 522.

VI

Evidentiary Objections

Leading questions, defendant argues, were used so pervasively by the state that witnesses were effectively "coached," which should cause this Court to grant him a new trial. Indeed, according to defendant, leading questions were so numerous that it would not be possible to list them all for this Court. The defendant further argues that the trial justice's failure to record several bench conferences warrants a new trial.

*813 A

Standard of Review

[36] **[37]** **[38]** **[39]** "A leading question is most generally defined as a question that suggests the desired answer." *State v. Gomes,* 764 A.2d 125, 137 (R.I.2001) (quoting *State v. Girouard,* 561 A.2d 882, 888 (R.I.1989)). "The danger of a leading question is that it may suggest to the witness the specific tenor of the reply desired by counsel and such a reply may be given irrespective of actual memory." *Girouard,* 561 A.2d at 888 (citing *Urbani v. Razza,* 103 R.I. 445, 448, 238 A.2d 383, 385 (1968)). "While it is true that as a general rule leading questions are prohibited on direct examination, a trial justice has considerable latitude in sustaining or overruling objections to leading questions." *Gomes,* 764 A.2d at 137 (quoting *Girouard,* 561 A.2d at 888). Similar to other decisions focusing on how evidence is received at trial, a trial justice's decision regarding the use of leading questions "will be overturned only upon an abuse of discretion or where there is substantial injury to the defendant." *Id.* (quoting *Girouard,* 561 A.2d at 888).

[40] **[41]** **[42]** **[43]** "Bench conferences frequently serve to permit the court and counsel to resolve some nonevidentiary matter, such as housekeeping problems with exhibits or difficulties with witness availability or other rather inconsequential procedural questions." *State v. D'Alo,* 435 A.2d 317, 321 (R.I.1981). Stenographic recording is not necessary for bench conferences dealing with such matters. *Id.* "Occasionally, however, the court may also resolve more serious matters at the side bar, such as evidentiary objections or objections to the judge's jury instructions." *Id.* "Although it is within the discretion of the trial justice to allow or not to allow counsel to raise such material matters at bench conferences, when convenience and efficiency are served thereby, such conferences may be allowed and should be recorded." *Id.* For a party to persuade this Court that the failure to record bench conferences justifies relief, a party "must at least set forth the matters allegedly raised and the manner in which he was prejudiced by the fact that the bench conferences were not recorded." *Id.* Without that information about the error that went unrecorded or prejudice that may have been created, we have no basis on which to grant relief. *See id.* (citing *State v. Mastracchio,* 112 R.I. 487, 497, 312 A.2d 190, 196 (1973)).

[44] Our cases and rules require that a party make an objection on the record in the trial court, "stating the specific ground of objection, if the specific ground was not apparent from the context." *State v. Reyes,* 984 A.2d 606, 613 (R.I.2009) (quoting R.I. R. Evid. 103(a)(1)). "A party who fails to assert his specific objections is deemed to have waived his rights on appeal." *Id.* (quoting *State v. Long,* 488 A.2d 427, 432 (R.I.1985)).

B

Discussion

1

Leading Questions

[45] As stated above, a leading question is one that suggests a desired answer. *Gomes,* 764 A.2d at 137. In *Gomes,* we considered objections to purportedly leading questions posed during redirect, and, even though the questions "clearly were leading and improper, the facts elicited by those questions already

were in evidence." *Id.* We therefore held that "there was no substantial injury to defendant" and it was not an abuse of discretion to allow the questions. *Id.* (quoting *Girouard,* 561 A.2d at 888). In *Girouard,* we similarly ***814** held that certain questions were leading but that they did not substantially injure the objecting party, either because the question reiterated or was based on testimony that had just been given or because the witness refused to be led. *Girouard,* 561 A.2d at 888–89; *see also* *State v. Toole,* 640 A.2d 965, 975 (R.I.1994) (determining that there was no substantial injury because the first part of a question "was intended to orient those in the courtroom to the point reached prior to the recess").

Despite defendant's assertion that examples of leading questions were too numerous to list, we have examined the record and have been unable to discern the asserted abundance of leading questions to which defendant lodged specific objections that were then overruled. We point out that the trial justice sustained numerous of defendant's objections and admonished the prosecutor to stop leading the witnesses.[9] Because the conduct of a trial and the admission of evidence therein are within the trial justice's discretion, and because we have held that a "substantial injury" does not occur when a question merely reiterates testimony already in evidence or orients the courtroom to previously given testimony, it is our opinion that the use of leading questions in this case does not warrant a new trial. *See Gomes,* 764 A.2d at 137; *Toole,* 640 A.2d at 975; *Girouard,* 561 A.2d at 888–89. We are not convinced that the leading questions employed in this matter amounted to "coaching" of the witnesses, as defendant asserts; we instead have determined that the trial justice's conduct of the interrogation was within the bounds of her discretion.

2

Bench Conferences

[46] **[47]** We also are not persuaded that defendant is entitled to a new trial because certain bench conferences were not placed on the record. In the record, there appears to have been approximately fifteen unrecorded bench conferences, and defendant himself requested five of those. **Whitaker** takes issue with certain bench conferences that went unrecorded but during which, he argues, the trial justice made evidentiary rulings. The defendant points to several specific unrecorded bench conferences in the record, and he argues that it is impossible to know either the basis for the objection interposed or the reason for the trial justice's disposition of the objection. However, defendant overlooks the ***815** fact that it is his duty to lodge specific objections on the record if he wishes to preserve them for appeal. *See* Rule 103(a)(1); *Reyes,* 984 A.2d at 613.

In *D'Alo,* 435 A.2d at 321, the defendant requested many bench conferences during trial and asked that they all be placed on the record; the trial justice declined, reasoning that it was not necessary. On appeal, the defendant was unable to "set forth the matters allegedly raised and the manner in which he was prejudiced by the fact that the bench conferences were not recorded." *Id.* Because we had no "representations of facts that would establish error or prejudice, there [wa]s no basis for granting relief to the defendant * * *." *Id.* Here, defendant similarly argues that unrecorded bench conferences warrant a new trial not because of any specific error made during those bench conferences, but rather by the mere fact that they went unrecorded. *See id.* But, defendant fails to explain what was said during the bench conferences and how he was prejudiced by the lack of recording, as he is required to explain according to *D'Alo. See id.* Thus, there is nothing for us to review.

Although we reiterate that bench conferences during which evidentiary rulings are made should be recorded, this requirement does not excuse counsel from setting forth on the record the specific grounds for his or her objections, *see* Rule 103(a)(1); *Reyes,* 984 A.2d at 613, nor does it absolve a party from providing a record to this Court of what went unrecorded and how it prejudiced defendant, *see D'Alo,* 435 A.2d at 321.

VII

Aggregate Errors

[48] The defendant contends that the errors in this case, considered in the aggregate, warrant reversal. We do not agree. In *State v. Ashness,* 461 A.2d 659, 672 (R.I.1983), we declined a defendant's invitation to aggregate purported errors and hold that the defendant had been denied a fair trial. Although we had determined that the trial justice there had erred, that single error alone was not sufficient to warrant reversal, and the same result was no more obtainable by combining the single error with other rulings that were not erroneous. *Id.* at 666–67, 672. Here, the failure of the trial justice to follow the procedure set forth in *Fenner,* 503 A.2d at 522, before disclosing to the jury that the defendant was in custody is not enough on its own to warrant reversal and it cannot be combined with her other rulings, which were not erroneous, to occasion the vacating of the judgment of conviction. *See Ashness,* 461 A.2d at 672.

VIII

Conclusion

For the preceding reasons, we affirm the judgment of conviction. The papers shall be returned to the Superior Court.

All Citations

79 A.3d 795

Footnotes

1 Robinson and Isom would later agree to testify against **Whitaker** in exchange for charging and sentencing considerations.

2 The evidence disclosed that Robinson was shot in his back.

3 Richardson was thirteen years old at the time of this incident but was sixteen at the time of the trial.

4 Isom testified that **Whitaker** had brought a weapon to the apartment.

5 On redirect examination, he verified that he had mentioned that fact in his initial statement to police in December of 2002.

6 Although defendant did mention the confusing nature of the jury instructions during the hearing on his motion for new trial, he did so only as a reminder to the trial justice that her analysis as the thirteenth juror required her to consider the evidence in light of the jury instructions. He specifically said that he stood by his earlier objections to the instructions.

7 More recently, in *State v. Snell,* 892 A.2d 108 (R.I.2006), we considered whether a defendant's right to a fair trial was undermined by his appearance in prison attire, and we "recognized that a trial justice's reference to a defendant's incarceration may not be reversible error when a cautionary instruction is sufficient to negate any potential prejudice." *Id.* at 116 (citing *State v. Fenner,* 503 A.2d 518, 522 (R.I.1986)).

8 We declined to apply the *Fenner* standard in *State v. Moosey,* 504 A.2d 1001, 1004–05 (R.I.1986), a case in which the trial justice notified the jury over a defendant's objection that the defendant was in custody. Because *Fenner* had not been decided when the trial took place, we declined to apply the procedure outlined in that case, and, based on the facts of *Moosey,* we held that the instruction was not reversible error. Id at 1005. Even while holding that there was no reversible error, "[w]e seriously question[ed] the necessity for and the advisability of informing a jury in every case that a defendant is in custody" because "[o]ur time-honored practice has been not to mention incarceration to the jury unless it is done as a curative instruction when [the] defendant has been seen in custody by jurors." *Id.*

9 After an objection to the prosecutor's question was sustained on leading grounds, the prosecutor asked to be heard at sidebar. There, he explained that his understanding of the definition of a

leading question did not encompass the questions to which objections had been raised. The trial justice then said:

> "Part of the problem is that I've had to sustain a number of objections. I've had to admonish you a number of times. I've done that on the record. I have done that at bench conferences. Unfortunately, I'm now at the point where I'm assuming the wors[t]. You've been leading throughout the course of the trial. Granted some of it has been on minor background problems. I don't think anybody cares much about that. But, there have been areas and times when you've sent out a definite cue to the witness. It's hard for me to tell at this point whether that's what's happening or whether this is a minor issue. That's one of the reasons I've been asking you all along to stop leading, but you keep doing it.
>
> " * * *
>
> "We'll all do better if counsel accepts my guidance. I don't like to interfere with what attorneys do. Sometimes attorneys don't want to raise objections for whatever reason. But, on the other hand, when I see a situation where I feel that counsel feels hamstrung on making an objection because of the problem that the objection underscores, I feel like I have to say something. I think we're all better if we just stick to the rules and then we don't have to worry about these kinds of discussions."