

No. _____

In the Supreme Court of the United States

CRISTIAN SANTA,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

**Petition for Writ of Certiorari
to the Massachusetts Appeals Court**

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Question Presented

1. Has Massachusetts jurisprudence, particularly the expansion of *Commonwealth v. Kolenovic*, 471 Mass. 664 (2015), run afoul of the Sixth Amendment by rubberstamping as manifestly reasonable the decisions made by trial counsel absent a complete factual investigation, which may necessitate the opinion of a qualified expert, to determine the merits of a defense before it is foregone.

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Petition for a Writ of Certiorari

Petitioner Cristian Santa respectfully prays for a writ of certiorari to review the judgment of the Massachusetts Appeals Court.

Opinions Below

The opinion of the Massachusetts Appeals Court (Pet. App. A) is unpublished but available at 101 Mass. App. Ct. 1118, 195 N.E.3d 950 (Table), 2022 WL 4542125. The decision of the Suffolk County Superior Court denying Mr. Santa's Motion for New Trial, pursuant to Mass. R. Crim. P. 30(b), is reproduced herein at Pet. App. B. The order of the Mass. Supreme Judicial Court denying discretionary review is reported at 490 Mass. 1108 and entered on October 28, 2022. (Pet. App. C)

Statement of Jurisdiction

The Massachusetts Appeals Court entered judgment on September 29, 2022, affirming the trial court's denial of Mr. Santa's Motion for New Trial and the jury's verdict of conviction on the offense of voluntary manslaughter. The jury acquitted Mr. Santa of first- and second-degree murder. The Mass. Supreme Judicial Court denied further appellate review on October 28, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Relevant Constitutional Provisions

The Sixth Amendment provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ... and to have the Assistance of Counsel for his defence.”

The Fourteenth Amendment provides in pertinent part: “No State shall... deprive any person of life, liberty... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Introduction

Miscarriages of justice undermine the foundation of our criminal legal system. How a case is handled by attorneys may lead to a corruption of, or lack of confidence in, the integrity of the process that results in a conviction. The right to counsel and reliance upon his advice is protected by the Sixth Amendment, which safeguards against representation below the standard of an ordinarily fallible attorney. Trial counsel's role as an effective advocate requires a thorough investigation of facts to determine which defenses are available. Today, this regularly requires the use of specialized experts who can opine on various topics to a reasonable degree of certainty based upon their education, training and experience in a field. Mr. Santa's petition comes before this Court because trial counsel conducted an insufficient investigation by failing to obtain the opinion of a qualified expert on whether rape trauma affected his criminal responsibility for the killing of his rapist. This error does not square with the expectations placed upon a criminal defense attorney and his reliance upon an incomplete investigation should be deemed averse to the Sixth Amendment.

Concise Statement of the Case

A. Commonwealth's Case at Trial

On May 4, 2012, Jhon Barrientos was found dead outside of 220 Chelsea Street in East Boston, Massachusetts. Inside the basement, where Mr. Barrientos resided with others, it appeared a bad struggle had taken place as there were large amounts of blood present, particularly in the boiler room. The Commonwealth theorized that Mr. Barrientos was killed inside there and then dragged outside based upon blood patterns and screams heard that morning by a neighbor. The Commonwealth's medical examiner testified that Mr. Barrientos had been struck in the head multiple times with a blunt object and stabbed over 70 times with a single-edged knife, which was never recovered. No eyewitness observed the alleged assailant at the scene.

However, the police learned that a vehicle, belonging to Luis Enrique Pacheco, picked up a man covered in blood in East Boston early that morning. Mr. Pacheco testified that Mr. Santa contacted him because he needed a ride, he regularly provided ride services in the area and had driven Mr. Santa previously. He stated that Mr. Santa was not injured but said that he was involved in an altercation that had left him bloodied. DNA testing of stains on the seat of Mr. Pacheco's vehicle matched Mr. Barrientos. Bloody fingerprints and footwear impressions taken from 220 Chelsea Street

matched Mr. Santa and shoes recovered from his home. A bloodied sock was also recovered from inside Mr. Santa's residence.

B. Trial Defense

Mr. Santa did not deny being present at 220 Chelsea Street with Mr. Barrientos but testified that he was not aware that he killed him. Earlier in the evening, Mr. Santa had been drinking with friends after work and, after departing their company, met Mr. Barrientos around 2:00 a.m. outside a restaurant in East Boston. The men had never met but Mr. Barrientos approached Mr. Santa and told him that he knew his grandfather from Columbia, striking up a conversation. Ultimately, Mr. Barrientos invited Mr. Santa back to his home where they could drink more liquor and he stated that he would invite over women who would have sex with him. Mr. Santa contacted his own friends to invite them out to party at various times during the evening as Mr. Barrientos provided him Tequila in the basement and he also used Mr. Barrientos's computer and played music as he waited.

Mr. Santa testified that he became more impaired as the evening progressed. He lost the ability to control his balance, felt dizzy and couldn't stand up. Mr. Barrientos helped him to stand up, grabbed him like an embrace and was pulling him in one direction before he lost consciousness. He regained consciousness and was laying on a bed unable to move whatsoever. He had only his shirt on as his pants had been removed and Mr.

Barrientos was actively sodomizing him. Mr. Santa testified that he blacked out and, when he awoke, he still was being raped, couldn't move, cried and begged for him to stop. Mr. Barrientos ejaculated inside him before he passed out again. When he regained consciousness, he could feel his hands and a strong pain in his anus. He now could move and pulled his pants back up. He entered the room where Mr. Barrientos was present and Mr. Barrientos told him everything was fine and tried to hug him. Mr. Santa tried to leave but Mr. Barrientos would not allow him. Mr. Barrientos struggled with him, grabbing at him and, while trying to pull off his clothes, Mr. Santa began hitting him to defend himself. Mr. Santa testified that he can't remember all the details of the altercation because he blacked out during the struggle. When he regained consciousness, he was on top of Mr. Barrientos, covered in blood and they were no longer fighting. He cried and left the apartment feeling dizzy, in pain and in an altered mental state like an "insomniac." He was later driven home by Mr. Pacheco but too ash ashamed to tell him what occurred or go to the hospital.

Mr. Santa never told the police that he was Mr. Barrientos's rape victim when they interviewed him. He was too ashamed that he was raped and, as a result, lied to the police, and tried to conceal what happened from his family and friends, even his mother. The morning following the incident, his mother testified that he seemed unusual and took an extremely long

shower. Mr. Santa testified he tried to wash himself over and over feeling physically and mentally dirty, less of a man than before and ashamed and dishonored. The Commonwealth alleges that Mr. Santa attempted to hide his shirt on the roof the morning of the incident, deleted his phone calls, lied to the police and repeatedly checked stories on the internet for ones about the killing in its aftermath as evidence of his intent to commit murder. Mr. Santa testified he was humiliated and in fear of telling the police about being raped because of how they would respond, believing it would be similar to in Columbia where he could be beaten.

C. Unraised Defense of Lack of Criminal Responsibility

Despite the facts set forth above, trial counsel, Attorney Peter Marano, did not formally present a defense that Mr. Santa was not guilty by reason of insanity (“NGI defense”). Trial counsel was aware of these facts and the rape but did not request a jury instruction on this defense which prompted the following inquiry from the trial judge.

THE COURT: ... I did read the docket and the file, of course, but I don't think we've discussed at trial the fact that a year or so ago, you were considering pursuing an NGI defense, correct?

MR. MARANO: Yes.

THE COURT: And you engaged an expert and you did your due diligence on that and you have made a decision not to do that, correct?

MR. MARANO: Based upon what my expert replied to me from her examination that that would not be a prudent course and I would not be able to sustain my burden, ethically, by doing that.

THE COURT: Understood. That's what I thought you had alluded to pretrial, but I thought it would be helpful to have it on the trial record.

MR. MARANO: I wouldn't be able to meet the burden that the defendant has to show, although there's a close area to it, but I would not be able to do it and my expert would not be able to do it. **For the record, the issue with the expert, it was difficult to find an expert to do a thorough psychoanalysis type of examination due to some of the contributing factors that we learned today probably on cross examination**, it would be safe to say, and I think both my brother and the Court would probably take notice of that.

In this exchange, trial counsel references the fact that he obtained funds from the court to retain Dr. Maria Masotta, a forensic psychologist, who conducted an evaluation for competence to stand trial and criminal responsibility. Dr. Masotta averred that trial counsel did not ask her to opine on the issue of Mr. Santa's state of mind at the time of the alleged offense as a result of the trauma from being raped. She further indicated that had he done so, she would have referred him to other experts as it would have been outside her expertise. Indeed, corroborating this statement, Dr. Masotta's website does not set forth an expertise in the effects of extreme trauma on one's mental capacity; rather, it denotes an expertise in the unrelated fields of "correctional mental health, vicarious traumatization, forensic evaluation, assessment and treatment of substance abuse and assessment and treatment

of mental illness.”¹ Trial counsel has ignored all requests by undersigned counsel to discuss this matter and why he did not retain an expert specific to the circumstances of this case, which he elicited through his client's testimony at trial, and the motion judge refused Mr. Santa's request for an evidentiary hearing to summons him and Dr. Masotta.

Despite indicating that he did not want the NGI instruction, trial counsel, nevertheless, raised its substance without an expert or instruction as part of his summation when he argued as follows:

Yes, he remembers being raped. Yes, he remembers fighting with Jhon Barrientos, fighting for what's left of his dignity. What he says, what's left of his manhood. As much as Mr. Iannini shows you this picture, shows it to you and shows it to you, and asks him, “Isn't that humiliating? Isn't that -- that's what you did, isn't that humiliating? Why didn't you call 9-1-1 when that man was raping you? That's not the face that Christian Santa saw. That's a medical examiner shaving a head, that's a medical examiner highlighting wounds, that's not the picture of the man that was raping him. That's not the picture of the man who was trying to pull his pants off when he was trying to leave. Look at it. It's horrible, it's horrific.

Christian Santa didn't do that, cutting his hair off to make this picture that. Christian Santa was in a fight to get away from his life. His life. **He doesn't remember every detail about being raped, neither does he remember every detail about his struggle and his violent interaction with Jhon Barrientos.**

Now we've got to wonder, was it the alcohol? Was it something in the alcohol or was it just the drama of that, that waking up with someone inside you you didn't give

¹ Screenshots of this website were provided as an exhibit in support of Mr. Santa's motion for new trial. (<http://www.drmariamasotta.com/About.html>).

permission to be inside you, doing things that are unspeakable to you and, you know what, maybe somewhere in your mind you lock that down in a box and you lock down other things in a box because life is a series of boxes and some of those boxes we don't want to open, even when we put you up there and we bear the worst night of your life to a room full of strangers all around, of you who have to make a judging. Do you think he can unlock every one of those boxes? I can't. I don't know if I could do what this 20-year-old did.

Only after conviction was Jose Hidalgo, M.D., a forensic psychiatrist who specializes in disorders associated with trauma and extreme stress, retained. Dr. Hidalgo opined as follows:

1. Mr. Santa currently suffers from Chronic post-traumatic stress disorder (“PTSD”);
2. Mr. Santa’s PTSD is consistent with his allegations that he was raped by Mr. Barrientos, as evidenced by: Mr. Santa’s consistent report that Mr. Barrientos sexually assaulted him during his trial and during all the different parts of this assessment, e.g., open ended interview and structured part of the interview; and the coherence between the alleged assault by Mr. Barrientos and the expected PTSD symptoms from such an assault, e.g., mental images of Mr. Barrientos’s face, memories of the assault with associated emotional distress
3. Mr. Santa suffered from clinically significant peritraumatic dissociation² at the time of the alleged sexual assault by Mr. Barrientos and at the time of Mr.

² Peritraumatic dissociation is a clinical phenomenon recognized in the psychiatric literature and the DSM-5. Dissociation refers to a disruption in the normally integrated functions of memory and consciousness and it can occur in response to extreme stress. According to the DSM-5, the following are examples of dissociative symptoms: (1) an altered sense of the reality of one’s surroundings or oneself, e.g., being in a daze, seeing oneself from another’s perspective; and (2) inability to remember an important aspect of the traumatic event (typically due to dissociative amnesia and not to other factors such as head injury or alcohol, or drugs)

Barrientos's killing, as evidenced by the following symptoms.

4. Mr. Santa lacked the capacity to appreciate the wrongfulness of his actions and conform his behavior to the requirements of the law because he suffered from severe peritraumatic dissociation because of the trauma of being raped and could not appreciate reality.

These clinical opinions were not presented to the jury; however, their impact would have been substantial for a defense of lack of criminal responsibility as described *infra*.

Reasons for Granting the Writ

- I. **This Petition should be granted because an attorney should not be deemed effective under the Sixth Amendment merely by retaining an expert; rather, he is required to conduct a thorough investigation of the law and facts to determine his client's available defenses, which includes becoming adequately informed by necessary expert opinion.**

Mr. Santa moved for a new trial, pursuant to Sixth Amendment to the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights, on the grounds that his trial counsel was ineffective by foregoing a mental health base defense without conducting a thorough investigation to determine his client's state of mind at the time that he killed his rapist. See *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). Trial counsel was aware that Mr. Santa was raped, and his altered state of mind was part of his defense at trial to the

charge of murder in the first degree.³ However, counsel did not obtain the expert opinion of a psychiatrist on the effect of rape trauma to determine whether it would form a viable defense at trial. A postconviction examination by such a trained expert determined that a defense of lack of criminal responsibility (“NGI defense”) was viable where Mr. Santa suffered peritraumatic dissociation incident to being raped, which distorted his reality and left him unable to appreciate the wrongfulness of his actions and be able to conform his behavior to the requirements of the law. However, Massachusetts courts have erroneously denied Mr. Santa relief, ruling too broadly, that counsel was not ineffective by failing to utilize the services of an expert in the requisite field and he could reasonably rely on an unqualified expert even though he was never informed as to the effect of rape trauma on his client’s state of mind at the time of the killing.

A. Trial counsel is manifestly unreasonable when he relies upon an expert unfamiliar with rape trauma and, thus, cannot be fully informed by such a limited investigation to determine the available defenses stemming from his client’s state of mind at the time of the alleged incident.

Trial counsel’s performance should have been held ineffective because this is not the case, as the Appeals Court characterizes, where counsel is “expected to be more expert than the experts they retain[;]” (Pet. App. A),

³ A jury acquitted Mr. Santa of first- and second-degree murder but found him guilty of voluntary manslaughter.

rather, it is about his complete failure to obtain an expert opinion on Mr. Santa's state of mind at the time of the killing vis-à-vis rape trauma. Indeed, trial counsel was aware that his client was raped prior to retaining Dr. Maria Masotta. However, Dr. Masotta avers that he did not ask her to perform her evaluation related to rape trauma and, had he done so, she would have referred him to another expert as it was outside her field of expertise. See *Commonwealth v. Frangipane*, 433 Mass. 527, 535 (2001). Dr. Masotta's evaluation was apparently limited to whether Mr. Santa had any prior or current evidence of mental illness as Mr. Santa avers that he answered the questions that she posed but she never asked him about his mental state during and after being raped or the trauma that it caused him.

Mr. Santa does not argue that a better expert in the same field could have achieved a better result. See *Hinton v. Alabama*, 134 S.Ct. 1081, 1089 (2014). Rather, trial counsel chose to terminate his inquiry without ever obtaining an expert opinion on whether rape trauma could form a meritorious defense. Thus, this case presents an instance "where the judgment of fully informed counsel [is] so manifestly unreasonable as to be unprotected by the labels of 'trial strategy' or 'trial tactics...'" because "[d]efense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a criminal defendant the effective assistance of counsel, if some other action would have better protected a defendant and

was reasonably foreseeable as such before trial[.]" *Commonwealth v. Adams*, 374 Mass. 722, 728-729 (1978); quoting *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974). Counsel's error, therefore, cannot be said to meet the standard of an ordinarily fallible attorney's "thorough investigation of [the] law and facts," *Strickland*, 466 U.S. at 690.

The lower courts have too broadly interpreted *Commonwealth v. Kolenovic*, 471 Mass. 664, 667-669 (2015), to hold trial counsel's actions reasonable. There, the defendant moved for a new trial on the grounds "that trial counsel was ineffective in failing to fully investigate, present and argue evidence of the defendant's severe neuropsychiatric disorders" to negate the element of intent on the charge of first-degree murder on the theory of extreme atrocity or cruelty. 471 Mass. at 669. Relief was denied because even though trial counsel arranged a preliminary psychiatric evaluation, he made an informed strategic decision not to pursue the matter further and present another defense. The court noted that "[t]he adequacy of counsel's performance is supported by [the psychiatrist's] agreement to testify at trial in accordance with counsel's strategy to defend against the indictment... [as] counsel likely would have assumed that his approach was acceptable from a medical point of view." *Id.* at 676.

Unlike the case at bar, at the heart of *Kolenovic* is trial's counsel's consultation with an appropriate expert and informed decision-making. *Id.* In

Commonwealth v. Lang, Justice Lenk, writing for three justices of the *quorem*, cautioned against its overexpansion and an overly broad interpretation of "the highly deferential 'manifestly unreasonable' standard beyond our evaluation of strategic decisions that counsel actually made[,"] noting:

The deference involved in the "manifestly unreasonable" standard only makes sense if we are assessing the strategic choice *actually made by "fully informed [defense] counsel."* *Commonwealth v. Adams*, [374 Mass. 722, 728 (1978)]. Had defense counsel here adequately investigated the defendant's psychiatric history and then decided to forgo a lack of criminal responsibility defense in favor of a self-defense theory, we would be hard pressed to find that strategic decision manifestly unreasonable. But that is not what happened. Instead, the choice that defense counsel actually made was to elect a defense without even investigating a lack of criminal responsibility defense. That strategic decision was manifestly unreasonable, and I see no reason why our assessment of its reasonableness should be any different simply because we can imagine a different lawyer who, after completing an adequate investigation into a lack of criminal responsibility defense, might have opted against it.

473 Mass. 1, 20, 22 (2015). In the case at bar, trial counsel's investigation was not fully informed where there was no expert opinion on Mr. Santa's state of mind vis-à-vis rape trauma and Dr. Masotta, by her own admission, was not such an expert who could even testify at trial. Counsel was not in the same position as Kolenovic's attorney and, thus, this case is more similar to *Commonwealth v. Epps*, where the Supreme Judicial Court held that when "a strategic decision is made to conduct something less than a complete

investigation of a potentially substantial defense, either because defense counsel decided to forgo that defense or to present it at trial without complete investigation, we ask whether it was manifestly unreasonable to conduct so limited an investigation." 474 Mass. 743, 757 (2016).

This Court should accept this case to make clear that *uninformed* decisions are *unprotected* by the labels of trial strategy or trial tactics because "[d]efense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a criminal defendant the effective assistance of counsel, if some other action would have better protected a defendant and was reasonably foreseeable as such before trial[.]"

Adams, 374 Mass. at 728-729. This is commensurate with the *Strickland* court's conclusion that the proper standard for constitutionally adequate representation is "reasonably effective assistance," and that to prevail on a claim of constitutional ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 687-688. In the case at bar, a probe into "whether, *in light of all the circumstances*, the identified acts or omissions were outside the *wide range* of professionally competent assistance[.]" *Id.* at 690 (emphasis supplied), should turn in favor of a finding that trial counsel's performance was deficient.

Accordingly, the allowance of this petition is vital to undo the rubberstamping of trial counsel's performance effective simply because he

retained an expert because the Sixth Amendment, guided by today's professional norms, imposes a duty to conduct a thorough investigation.

B. The lower court decisions minimize the true impact of mental illness/defect against the public interest.

Dissociation generally and, specifically, peritraumatic dissociation,⁴ are topics of little discussion in our jurisprudence but are extremely relevant in the field of criminal forensic psychiatry, especially criminal responsibility. See Bourget, Dominique et al, Dissociation: Defining the Concept in Criminal Forensic Psychiatry, *J Am Acad Psychiatry Law* 45:147-160 (2017). Public policy is aligned with Massachusetts law that dictates that conviction should not occur if, because of mental defect, an individual is unable to appreciate the wrongfulness of their actions and conform to the rule of law. See *Commonwealth v. McHoul*, 352 Mass. 544, 546-547 (1967). Trial counsel is likely not alone in his failure to recognize the severity of the trauma experienced by Mr. Santa, its physical and mental toll, and its potential for a strong NGI defense. A final determination by this Court would provide important recognition on the need for expert consultation in conjunction with ascertaining all the facts relevant for a trial preparation.

⁴ See Thompson, Hollands, Johanna, et al, The Association Between Peritraumatic Dissociation and PTSD Symptoms: The Mediating Role of Negative Beliefs about the Self, *J Trauma Stress*, 30(2): 190-194 (April 2017); see also *supra* at Fn. 2.

Relief for Mr. Santa is in the interest of justice, pursuant to Mass. R. Crim. P. 30(b), because he was prejudiced by trial counsel's shortcoming where he experienced severe peritraumatic dissociation at the time of Mr. Barrientos's killing. Dr. Hidalgo's opinion merited a defense of lack of criminal responsibility and “[a] jury that believed [this] expert likely would have been influenced to return a verdict of not guilty by reason of insanity.” *Commonwealth v. Roberio*, 428 Mass. 278, 281 (1998). Its absence should be held prejudicial because it “affect[ed] the fairness of the trial.” *Kolenovic*, 471 Mass. at 673. Specifically, Mr. Santa's account of his rape to the jury was central to trial counsel's defense. He portrayed Mr. Santa as Mr. Barrientos's victim and that any force inflicted by Mr. Santa was in self-defense as he sought freedom and/or the rape mitigated the indictment. He argued at summation that Mr. Santa's trauma may have impacted his mental faculties, stating “was it just the drama of that, that waking up with someone inside you you didn't give permission to be inside you, doing things that are unspeakable to you.” He acknowledged Mr. Santa's lapses in memory, the fact that he lied to the police and behaved in an inculpatory manner afterward. Dr. Hidalgo observed that peritraumatic dissociation explained much of Mr. Santa's account of his encounter with Barrientos, which included: feelings of extreme fear, rage, shame, helplessness, loss of conscious awareness, gaps in his memory of the events of being raped and the physical

struggle, alterations in his sense of his body, loss of motor function, feeling confused and in a daze, being unable to process what was happening to him and an altered sense of reality. Dr. Hidalgo's ability to explain to the jury Mr. Santa's state of mind at the time of the altercation through psychiatric opinion would have bolstered the defense so greatly it would have been unreasonable to forgo. His diagnosis of PTSD would also have corroborated the rape and explained his behavior afterward in which Mr. Santa searched for information online about Mr. Barrientos and, later, lied to the police and avoided being truthful to his family and friends about what occurred. Moreover, the prosecutor's timeline of the events supports Dr. Hidalgo's opinion as it notes that Mr. Santa was having fun and calling friends earlier in the night to come out while at Barrientos's home before a period of time passed and the killing was believed to have occurred. Trauma and the resulting peritraumatic dissociation would onset suddenly and resolve by the time Mr. Santa began to gain consciousness and contact Mr. Pacheco for a ride home. His inability to conform his conduct to the requirements of law also explained the excessive violence used in his self-defense so that it could have been excused by the jury rather than lead to a conviction for manslaughter for a voluntary unjustified killing. The jury, who acquitted Mr. Santa of the greater offenses, had no choice but to convict on manslaughter absent the presentation of an NGI defense as his conduct was not shown to be

involuntary. In choosing only mitigation, trial counsel's incomplete investigation prejudiced Mr. Santa and the denial of postconviction relief evinces the minimization of mental illness.

Accordingly, a grant of certiorari supports the public policy ensuring that only constitutional convictions occur while alerting criminal defense attorneys, as well as courts, to the impact of mental health disorders vis-à-vis the Sixth Amendment and community/practice standards as set required by *Strickland, supra*.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,



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Dated: January 13, 2023

101 Mass.App.Ct. 1118

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass.

App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address

the facts of the case or the panel's decisional rationale.

Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

Appeals Court of Massachusetts.

COMMONWEALTH

v.

Cristian SANTA.

22-P-137

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Entered: September 29, 2022

By the Court (Green, C.J., Lemire & Englander, JJ.¹)

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

*1 On appeal from his conviction of voluntary manslaughter,² G. L. c. 265, § 13, the defendant claims error in the denial of his motion for a new trial based on ineffective assistance of counsel, as well as error in the prosecutor's opening statement and closing argument. We discern no error, and affirm.

1. Ineffective assistance of counsel. We review a judge's denial of a motion for a new trial for abuse of discretion or other error of law. See Commonwealth v. Grace, 397 Mass. 303, 307 (1986). Further, "[w]e afford particular deference to a decision on a motion for a new trial based on claims of ineffective assistance where the motion judge was, as here, the trial judge." Commonwealth v.

Martin, 467 Mass. 291, 316 (2014). To establish a claim of ineffective assistance of counsel, a defendant must show that trial counsel's behavior fell "measurably below that which might be expected from an ordinary fallible lawyer." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). A strategic or tactical decision by defense counsel will not be considered ineffective assistance unless it was "manifestly unreasonable when made" (quotation and citation omitted). Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006).

We discern no abuse of discretion here. Defense counsel retained a forensic psychologist to evaluate the defendant for competence to stand trial and criminal responsibility and decided not to pursue an insanity defense based on the psychologist's evaluation. Despite the defendant's claim that a different expert may have reached a different conclusion about the viability of an insanity defense, defense counsel's investigation was not so inadequate as to fall below the standard of an "ordinary fallible lawyer." Saferian, 366 Mass. at 96. Defense counsel made a tactical decision about which expert to retain, and it was not manifestly unreasonable to rely on that expert's opinion. See Commonwealth v. Kolenovic, 471 Mass. 664, 676 (2015). Defense counsel are not expected to be more expert than the experts they retain; that would impose a higher burden on defense counsel than is either reasonable or required by law.

Nor was defense counsel's decision to forgo an insanity defense manifestly unreasonable. Defense counsel presented multiple other reasonable defenses, including third-party culprit, self-defense, and diminished capacity. Additionally, the jury heard the defendant testify about the rape and its effects on his mental state. Moreover, there is no indication that the defendant was prejudiced by defense counsel's trial strategy; indeed, despite some damaging evidence against the defendant, the jury acquitted the defendant of first-degree murder and instead convicted him of the lesser included charge of voluntary manslaughter. The judge therefore did not abuse her discretion in denying the defendant's motion for a new trial.³

*2 2. Prosecutor's opening statement and closing argument. The defendant did not object during either the prosecutor's opening statement or closing argument to the statements he now challenges, so we review his claims for a substantial risk of a miscarriage of justice. See Commonwealth v. Ferreira, 460 Mass. 781, 788 (2011). "A prosecutor is permitted to argue the evidence and the reasonable inferences that may be drawn from that evidence." Commonwealth v. Miles,

APPENDIX A

[46 Mass. App. Ct. 216, 219 \(1999\)](#). A claim of improper argument is “judged in light of the entire argument, the judge's instructions to the jury, and the evidence actually introduced at trial.” [Commonwealth v. Thomas](#), 429 Mass. 146, 158 (1999).

In his opening statement, the prosecutor told the jury that the victim was “viciously murdered”; that the defendant “turned that boiler room into a grisly horror chamber”; and that the upstairs neighbor would only later learn “the nightmare that was going on below him.” Similarly, in closing, the prosecutor described the victim as being “butchered so mercilessly” and “killed … without pity, without mercy, without sympathy.” These statements were not improper since they were supported by the evidence presented at trial and relevant to the charge of first-degree murder under the theory of extreme atrocity and cruelty. See [Commonwealth v. Mejia](#), 463 Mass. 243, 254 (2012). Nor do these statements “rise past the level of excusable hyperbole.” [Commonwealth v. Alemany](#), 488 Mass. 499, 512 (2021). In fact, defense counsel described the crime scene as “horrific,” “horrible,” “vicious,” and “violent” in his opening statement.

The defendant also challenges the prosecutor's characterization of the defendant's testimony of the rape as a “colossal outrageous lie,” “nonsense,” and a “total lie.” While a prosecutor may not express personal belief in the defendant's guilt, he may challenge the defendant's credibility, and argue all reasonable inferences from the evidence. See [Commonwealth v. Yesilciman](#), 406 Mass. 736, 746 (1990). Additionally, the judge cured any potential prejudice by instructing the jury that opening statements and closing arguments were not evidence. Finally, there is no indication the jury were improperly inflamed since they acquitted the defendant of first-degree murder, returning a verdict of guilt instead on the lesser included offense of voluntary manslaughter. We discern no substantial risk of a miscarriage of justice.

Judgment affirmed.

Order denying motion for new trial affirmed.

All Citations

101 Mass.App.Ct. 1118, 195 N.E.3d 950 (Table), 2022 WL 4542125

Footnotes

- 1 The panelists are listed in order of seniority.
- 2 The defendant was indicted for murder in the first degree in violation of [G. L. c. 265, § 1](#), but was acquitted of this charge by the jury.
- 3 To the extent that the defendant presents a distinct claim of error in the motion judge's denial of an evidentiary hearing, we discern no abuse of discretion. The motion judge was familiar with the evidence since she had presided over the trial and was therefore in the best position to assess defense counsel's performance. See [Martin](#), 467 Mass. at 316. Additionally, the relevant issues were clearly framed in the submitted written materials and the record.

101
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
No. 1284 CR 10542

following review, motion Denied.

Please see

Memo and Order of this

Date.

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff



v. Roach, J. 8/27/21

CRISTIAN SANTA,
Defendant

2021 JAN-1
PM
E-24

DEFENDANT'S MOTION FOR NEW TRIAL,
PURSUANT TO MASS. R. CRIM. P. 30(b)

Now comes the defendant, Cristian Santa, and respectfully requests that this Court, (Roach, J., presiding), vacate his manslaughter conviction in the above-captioned matter and order a new trial, pursuant to Mass. R. Crim. P. 30(b), because trial counsel was unconstitutionally ineffective in violation of his rights under the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. See Strickland v. Washington, 466 U.S. 668, 685-86 (1984); Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). In sum, Mr. Santa sets forth the following grounds for relief.

1. Trial counsel, Attorney Peter T. Marano, provided ineffective assistance by failing to retain a forensic psychiatrist with the requisite qualifications, training and experience to opine on Mr. Santa's mental state after being raped and at the time of the altercation with Jhon Barrientos for which the Commonwealth alleges resulted in Mr. Barrientos's death.
2. Had he done so, he would have learned that Mr. Santa suffered from peritraumatic dissociation from the trauma of being raped at the time of Mr. Barrientos's alleged killing and it substantiated a defense that met the

WJC
SUFFOLK, ss

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT
DOCKET NO. 1284CR10542
COMMONWEALTH

v.

CRISTIAN SANTA

MEMORANDUM AND ORDER ON DEFENDANT'S
MOTION FOR NEW TRIAL

Procedural Background

Mr. Santa was indicted for first degree murder in June, 2012, for the stabbing and bludgeoning death of John Barrientos on May 4, 2012, in Mr. Barrientos' East Boston apartment. Mr. Santa's defense was that he was responding to having been raped by Mr. Barrientos in that same apartment that same evening, having blacked out, and then attempting to make his escape. Following trial beginning in November, 2016 before me, the jury convicted Santa of voluntary manslaughter on December 13, 2016. As trial judge I sentenced Santa to ten to twelve years imprisonment. Defendant immediately filed a notice of appeal (Paper 89), but the docket suggests that appeal has yet to be perfected.

On January 4, 2021, Santa filed a Motion for New Trial (Paper 100), along with a motion to stay execution of his sentence (Paper 99). Santa claimed ineffective assistance of counsel, for failure to present an "NGI defense, and in rejecting an instruction of lack of criminal responsibility." Stay Motion, at page 4. Santa claims these decisions by his trial counsel "depriv[ed] the jury of facts necessary for a full acquittal and this Court of mitigating facts for sentencing." Id. Santa makes these claims based on a putative expert witness who would now opine on the subjects of "the psychiatry of trauma," and "peritraumatic dissociation." Id. He claims that his trial counsel erred by "failing to retain a forensic psychiatrist with the requisite

qualifications, training and experience,” to “substantiat[e] a defense that met the requirements of” not guilty by reason of insanity. Paper 100, at pages 1-2. In short, Santa claims his counsel retained and consulted with the wrong expert. Paper 109, at page 9 (“[I]n determining the proper expert to retain, it would have been proper for trial counsel to explain to her that his client may have been affected by being raped shortly before the killing rather than allowing her assessment to focus on unsupported possibility of a preexisting mental illness.”).¹ Accordingly he argues justice was not done either by the jury verdict or by his sentence. Id., at page 2.

The Stay Motion was denied February 26, 2021, for that preliminary and limited purpose. Paper 106, at page 5. Briefing on the Motion for New Trial extended to mid-May, 2021, with the filing of Defendant’s Supplemental Memorandum (Paper 109). Having now conducted a full review of all record materials,² the Motion for New Trial is **DENIED**, without evidentiary hearing. Commonwealth v. Barry, 481 Mass. 388, 394, 401 (2019)(pleadings of record sufficient to allow motion judge to reach informed decision on the question of “substantial issue”), and cases cited; Commonwealth v. Rosado, 408 Mass. 561, 568 (1990)(“Almost every ground asserted for a new trial was one available for appellate consideration on the record.”).

Applicable Legal Standards

New Trial

A court may grant a new trial “at any time if it appears that justice may not have been done.” Mass. R. Crim. P. 30(b); Commonwealth v. Lane, 462 Mass. 591, 597 (2012). The standard under Rule 30(b) is intentionally broad, and the disposition of the motion for new trial

¹ See also, Paper 109 at page 11 (“[T]his Court should find that the failure to retain a trauma expert was an error and below the standard of care deemed appropriate for an ordinary, fallible lawyer where he was aware of Mr. Santa’s rape and his account of how he felt differently thereafter.”)(emphasis supplied).

² The court’s review has included trial transcripts where applicable, referenced as Record, Vol. ____ at ____.

is left to the discretion of the motion judge. However, a strong policy of finality limits the grant of new trial motions to exceptional situations, and such motions should not be allowed lightly. A court is “to apply the standard set forth in Rule 30(b) rigorously and should only grant such a motion if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth.” Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635-636 (2001), citing Commonwealth v. Fanelli, 412 Mass. 497, 504 (1992).

A defendant bears the burden of proof on a motion for new trial. Commonwealth v. Marinho, 466 Mass. 115, 123 (2013); Wheeler, 52 Mass.App.Ct. at 637, citing Commonwealth v. Lopez, 426 Mass. 657, 661 (1998). A court has discretion to deny a new trial motion on the affidavits and other papers, where no substantial issue is raised. Mass.R.Crim.P. 30(c)(3); Commonwealth v. Stewart, 383 Mass. 253, 257 (1981). “A judge is required to grant a defendant an evidentiary hearing on a motion for a new trial ‘only if a substantial issue is raised by the motion or affidavits. . . . [A] judge considers the seriousness of the issues raised and the adequacy of the defendant’s showing on those issues.’” Commonwealth v. Pina, 481 Mass. 413, 435 (2019), quoting Commonwealth v. Torres, 469 Mass. 398, 402-403 (2014), and Commonwealth v. Shuman, 445 Mass. 268, 278 (2005); Commonwealth v. Goodreau, 442 Mass. at 341, 348 (2004) (“A judge may also consider whether holding a hearing will add anything to the information that has been presented in the motion and affidavits”).

Ineffective Assistance

A claim of ineffective assistance of counsel may be a substantial issue. Commonwealth v. Candelario, 446 Mass. 847, 858-859 (2006)(failure to pursue a defense of lack of criminal responsibility or mental impairment would, if substantiated, raise a serious issue). The question in this case is the adequacy of Santa’s showing on the issue he attempts to raise.

To succeed on a claim of ineffective assistance, a defendant is required to demonstrate that the “behavior of counsel [fell] measurably below that which might be expected from an ordinary fallible lawyer” and that this deficiency deprived the defendant of a “substantial ground of defense.” Commonwealth v. Saferian, 366 Mass. 89, 96 (1974); Commonwealth v. Holland, 476 Mass. 801, 806 (2017)(burden of proving ineffectiveness rests with the defendant); Commonwealth v. Seino, 479 Mass. 463, 472-473 (2018)(in G.L. c. 278 section 33E review of a first degree murder conviction, defendant’s burden to demonstrate “both error and harm”); Commonwealth v. Watson, 455 Mass. 246, 256 (2009)(mere speculation, without more, is insufficient).

The Supreme Judicial Court has recently reiterated the appropriate outline of standards to be applied to a claim of ineffective assistance, albeit when a defendant is convicted of first degree murder.³ That outline is nonetheless instructive here, where Santos was tried for first degree murder, but convicted of and sentenced for the lesser offense of manslaughter:

“In reviewing a claim of ineffective assistance of counsel in a case of murder in the first degree, we generally review under the more favorable standard of review of a substantial likelihood of a miscarriage of justice. See Commonwealth v. Vargas, 475 Mass. 338, 358 (2016); G.L. c. 278, section 33E. Under this standard, ‘[w]e consider whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury’s conclusion.’ Vargas, *supra*, quoting Commonwealth v. Lessieur, 472 Mass. 317, 327, cert. denied, 577 U.S. 963 (2015). When the challenged behavior involves strategic decisions, those decisions ‘do not amount to ineffective assistance of counsel unless they are “manifestly unreasonable.”’ Commonwealth v. Bousquet, 407 Mass. 854, 863-864 (1990), quoting Commonwealth v. Rondeau, 378 Mass. 408, 413 (1979).

Where, as here, however, the defendant’s claim of ineffective assistance is based on a tactical or strategic decision, we apply the more rigorous standard that, to be ineffective, the attorney’s decision must have been manifestly unreasonable when made. Commonwealth v. Lang, 473 Mass. 1, 14 (2015). Two principles guide the manifestly

³ As explained in Commonwealth v. Almeida, 452 Mass. 601, 611-612 (2008), the G.L. c. 278, section 33E standard for considering ineffectiveness claims (substantial likelihood of miscarriage of justice) is more favorable to a defendant than the constitutional standard. Citing Commonwealth v. Wright, 411 Mass. 678, 682 (1992).

unreasonable test. First, ‘we evaluate the [strategic or tactical] decision at the time it was made, and make every effort . . . to eliminate the distorting effects of hindsight. . . . Second, ‘[s]ubstantively, [o]nly strategy and tactics which lawyers of ordinary training and skill in criminal law would not consider competent are manifestly unreasonable.’” (quotations and citations omitted). Commonwealth v. Holland, 476 Mass. 801, 812 (2017). See Commonwealth v. Kolenovic, 471 Mass. 664, 674-675 (2015), S.C., 478 189 (2017)(describing manifestly unreasonable test as ‘search for rationality in counsel’s strategic decision’ as opposed to ‘whether counsel could have made alternative choices’).”

Commonwealth v. Velez, 487 Mass. 533, 539-540 (2021).⁴

Evaluation of a trial counsel’s performance involves weighing the strength of an asserted defense “relative to the availability and strength of other potential defenses.” Velez, 487 Mass. at 546, citing Epps, 474 Mass. at 758. Counsel’s decisions are evaluated based on the circumstances at the time the strategic or tactical decision was made, not with the benefit of hindsight. Velez, at 540; Holland, 476 Mass. at 812; Commonwealth v. Epps, 474 Mass. 743, 757 (2016); Commonwealth v. Glover, 459 Mass. 836, 843 (2011); Commonwealth v. LaCava, 438 Mass. 708, 713 (2003)(“Unless a tactical decision of trial counsel was ‘manifestly unreasonable when made’ we will not find ineffectiveness.”). A defendant must demonstrate that “better work might have accomplished something material for the defense.” Commonwealth v. Pope, 392 Mass. 493, 499 (1984), quoting Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977).

The NGI Defense and Mental Impairment

“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.” Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967)(emphasis supplied). “[Successful]

⁴

This SJC decision issued May 25, 2021, after all of the parties’ briefs had been filed in this case.

[i]nsanity defenses are rare, even when . . . there is strong evidence of mental illness or bizarre human conduct.” Commonwealth v. Walker, 443 Mass. 213, 226 & n. 2 (2005); Commonwealth v. Kolenovic, 471 Mass. 664, 676 (2015) (“extreme difficulty in successfully defending a murder case based on a lack of criminal responsibility defense,” even with expert testimony).

Only if a defendant “asserts a defense of lack of criminal responsibility at trial, and there is evidence at trial that . . . would permit a reasonable finder of fact to have a reasonable doubt about whether the defendant was criminally responsible’ does the prosecution ‘bear[] the burden of proving beyond a reasonable doubt that the defendant was criminally responsible.”

Commonwealth v. Wright, 479 Mass. 124, 138, n. 17 (2018), citing Commonwealth v. Lawson, 475 Mass. 806, 811 (2016). In that event the Commonwealth must prove both the defendant’s substantial capacity to appreciate the wrongfulness of his conduct, and his substantial capacity to conform his conduct to the requirements of the law. Commonwealth v. Goudreau, 422 Mass. 731, 735 (1996). A defendant’s success with a jury on this issue automatically results in acquittal, thus the nomenclature not guilty by reason of insanity, or NGI.

“[F]ailure to investigate an insanity defense [falls] below the level of competence demanded of attorneys, if facts known to, or accessible to, trial counsel raised a reasonable doubt as to the defendant’s mental condition.” Commonwealth v. Roberio, 428 Mass. 278, 279-280 (1998), quoting Commonwealth v. Doucette, 391 Mass. 443, 458-459 (1984); Commonwealth v. Holland, 476 Mass. 801, 806-807 (2017). This means a duty to investigate an insanity defense arises when counsel is aware of information suggesting at least the viability of a theory for lack of criminal responsibility. “The decision regarding the best defense or combination of defenses to pursue at trial is a tactical decision for which trial counsel is largely, although not always

exclusively, responsible. . . . Consequently we look to whether counsel's decision to forego the defense of insanity was manifestly unreasonable. LaCava, 483 Mass. at 714.

The defense correctly points out that strategic decisions by trial counsel may potentially, under appropriate circumstances, be distinguished from "some other claimed inadequacy such as lack of appropriate investigation," (Paper 109 at page 9), relying on the concurring opinion in Lang, 473 Mass. at 20 (Lenk, J.). Santa argues that distinction here, that is, that trial counsel failed appropriately to investigate NGI, by failing to locate and retain a "trauma expert." Paper 109, at page 11.

There is no diminished capacity defense in Massachusetts. Velez, 487 Mass. at 538, n. 6, citing Commonwealth v. Hardy, 426 Mass. 725, 729 n. 5 (1998). Nonetheless, a jury may consider credible evidence of mental impairment in deciding whether the Commonwealth has met its burden of proving the defendant's required state of mind beyond a reasonable doubt on each offense charged. Commonwealth v. Santiago, 485 Mass. 416, 421-422 (2020)(the two defenses are similar but distinct). Thus acceptance of this evidence by a jury may reduce a defendant's degree of guilt. As discussed below, the jury in this case was presented with both evidence and argument on the subject of mental impairment, and did in fact return a verdict substantially reducing Santa's level of guilt for the killing of Barrientos, from first degree murder to voluntary manslaughter.

The Trial Evidence

On May 4, 2012, John Barrientos was found dead in the alley outside his apartment at 220 Chelsea Street in East Boston, a multi-family building. He was 50 years old. Mr. Barrientos lived in a basement unit with two other men. When police arrived the victim's body was shirtless, and a bloody coat was found in a recycling bin nearby. Barrientos had massive blunt

force trauma to his head, as well as seventy stab wounds to his neck, chest, and abdomen. A large amount of blood was pooled near the body, and a trail of blood lead to the open basement door, down the stairs into the apartment, along the walls and throughout the floors of the apartment, to the boiler room on the street side. A sweater and shirt covered in blood, each containing over fifty cut marks, were also found near the apartment entrance. Many fingerprints, patent and latent, were recovered from the apartment, as well as bloody footprints. Criminalists matched four of the bloody fingerprints to Santa.

A neighbor who lived at 220 Chelsea Street in the apartment above the basement testified to hearing screams coming from the basement at about 4:50 a.m. that morning. The neighbor recognized the screaming to be Barrientos' voice. Approximately one-half hour later, at 5:20 a.m. the same witness heard repeated banging noises coming from the area of the basement apartment housing the boiler room, just under the front entryway to the first floor apartment. Record, Vol. 8 at 101-110, 122, 131-134; Trial Exhibit 20.

On that same morning, of May 4, 2012, at around 6:00 a.m., another witness received a call from the defendant, stating that he had an "accident" and needed a ride. The witness gave people he knew rides in exchange for money, and had given the defendant rides in the past. He picked the defendant up near 220 Chelsea Street, at the corner of Marion and Bennington Streets in East Boston. That driver observed Santa's clothes to be covered in blood. He offered to take Santa to the hospital. Santa declined, lifting his shirt to show that he was not injured, and stating that he had a problem at a party. Record, Vol. 16 at 67-70; Vol. 9 at 150-161. When the driver dropped Santa at Santa's home in Revere, the driver observed Santa throw his bloody shirt onto the roof of a commercial building next to his house. Vol. 9 at 164-165. The driver later

identified Santa from a photo array; blood found in his car as well as from Santa's home matched Barrientos' DNA.

Police interviewed Santa the next day, on May 5, 2012. He was 21 years old at the time, and weighed approximately 210 pounds. Record. Vol. 16 at 23, 125. Santa denied any knowledge of the East Boston address or the victim, and gave police a detailed chronology of his locations the night before, beginning with the timeframe of approximately 11:00 p.m. on May 3 (when he got off work in downtown Boston) through 11:00 a.m. on May 4, the morning of the killing. All of Santa's information quickly proved to be untrue, based on the police investigation and thereafter his own admissions at trial. Record, Vol. 16 at 104-118.

Santa testified (through a Spanish interpreter) to the following at trial. On the evening of May 3, 2012, Santa had been drinking with friends after work, including tequila and whiskey shots. Record, Vol. 16 at 36. He met Mr. Barrientos around 2:00 a.m. outside a restaurant in East Boston. Although they had not previously met, Barrientos approached Santa, striking up a conversation by saying that he (Barrientos) knew Santa's grandfather from Columbia. Barrientos invited Santos back to his apartment a short walk from where they met, to drink and to invite women to join them for sex. Santa was already feeling a little dizzy at that time. Record, Vol. 16 at 32-46; 120-121, 123. It is undisputed Santos spent approximately four hours inside Barrientos' apartment on the early morning of May 4, 2012, from around 2:00 a.m. to around 6:00 a.m.

Santa testified that once he arrived at Barrientos' apartment in the basement he drank tequila, used Barrientos' computer, and waited for women to arrive. Record, Vol. 16 at 47-50. Santa became increasingly impaired throughout the early morning hours and after multiple drinks provided to him by Barrientos. Santa lost his ability to control his balance, felt dizzy and

couldn't stand up. Id., at 50-52. It was at this point according to Santa's testimony that Barrientos' assault began. Santa testified to losing consciousness, "blacking out," and/or being unable to move his limbs several times during what he described as three sequential events of anal rape by Barrientos. Id., at 52-59, 126-127. When he regained consciousness and the ability to move, Santa tried to leave the apartment, but Barrientos would not allow Santos to do so, and began a physical struggle with Santa. Id. at 59-63.

Santa recalls he began hitting Barrientos to defend himself. However, he remembers few other details and reports "blacking out" again. The next thing he remembers is being on top of Barrientos, covered in blood in the boiler room area, with no more hitting. Id. at 63-64; 98-99. He walked out of the apartment onto the sidewalk, "like an insomniac." Id. at 65-66. Santa testified that he did not tell the police or anyone else what had happened in the apartment because he was ashamed of being raped, feeling physically and mentally dirty, less of a man than before, and dishonored. Id. at 71-73. He also stated he was in fear of police due to growing up in Columbia. Id. at 24-25, 86-90.

Other aspects of the police investigation revealed that Santa had contacted multiple friends with social calls or texts from his phone in the Barrientos basement apartment throughout the early morning hours (including four calls between 3:30 a.m. and 4:30 a.m.), later deleted phone calls, Record, Vol. 16 at 115, and repeatedly checked stories on the internet in the following days for reports of Barrientos' killing. No one (not the driver, the police officer who interviewed Santa on May 5, or Santa's own mother) observed any injuries on Santa in the days following the killing. Record, Vol. 19 at 15; Vol. 20 at 150-161.

Discussion and Rulings on Legal Argument

Pre-Trial and Trial Decisions of Counsel

What trial counsel knew from his client during trial preparation is that Santa claimed to have blacked out at various points during and after killing Barrientos, because he stated that Barrientos raped him in the apartment. However, trial counsel was also aware of abundant other evidence available through discovery and outlined above of Santa's behaviors before and after the killing which potentially conflicted with this self-report. Commonwealth v. Amaral, 389 Mass. 184, 192 (1983) ("the jury had the right to infer mental competency from the defendant's activities before and after the crime").

Santa had been drinking alcohol throughout the night before the killing, including tequila and whiskey shots, long before arriving at Barrientos' apartment at approximately 2:00 a.m. Santos then continued drinking with Barrientos in the hours before the killing, although he admitted being unable to stand or walk without assistance during this same time period. Santa's cell phone call logs demonstrate that he was calling friends (male and female) during this same time period, and trial witnesses confirmed they received calls from Santa. One witness testified Santa invited his friend to join him at Barrientos'. None of these communications suggested apprehension or discomfort by Santa during any of the period of approximately four hours he was inside the apartment, including within one half hour of Barrientos' reported screams.

Barrientos' body appeared to have been dragged from the boiler room through the apartment out into the alley. Within forty minutes of the neighbor's hearing the "banging" in the boiler room (which the police investigation and medical evidence strongly supported was the time and location Barrientos' head was experiencing the blunt force trauma admissible in evidence), Santa placed the call to the driver and engaged in the series of rational (though false)

statements, and immediately thereafter disposed of his own shirt covered in blood.

Notwithstanding Santa's report of his desperate struggle to escape the apartment and the condition of the victim's body, Santa's body bore no injuries. During his police interview on May 5, 2012, Santa was able to offer detailed and rational alibis. He was also able to seek out and follow media coverage of the killing.

The record of what experienced trial counsel did in response to this conflicting information is undisputed. First, there is no dispute that trial counsel investigated both competency and a lack of criminal responsibility defense, to explore the defendant's mental state at the time of the crime. The docket reflects that counsel alerted the Commonwealth and the court as early January, 2014, to the possibility of these defenses. In December, 2014, counsel requested funds to retain an independent psychologist "to examine the defendant regarding his competence to stand trial and . . . criminal responsibility regarding the pending charges," reporting that "[t]he defendant has communicated to counsel episodes of blackouts," and arguing that "[t]he defense of not guilty by reason of insanity is, at this juncture, very viable." Paper 40.⁵ Funds were granted, and the examination proceeded. Throughout the next two years the docket reflects ongoing consideration of that possibility. None of this was in the least manifestly unreasonable. Lang, 473 Mass. at 14-18 (Hines, J. concurring)(failure to investigate known psychiatric history for defense of either NGI or other mental impairment not manifestly unreasonable, notwithstanding post-trial expert opinion); Kolenovic, 471 Mass. at 677-678 ("Where counsel's performance is 'in all other respects exemplary' [a] measure of deference [is] generally accorded to counsel's strategic choices.").

⁵ Counsel represented at the sentencing hearing that the defendant would not agree to speak to him for over a year after counsel's appearance in the case in June, 2012 (Paper 4), which reluctance counsel attributed to Santa's shame about reporting having been a victim of rape. Record, Vol. 19, at pages 35-36.

As an ultimate result of the evaluation, trial counsel made a considered judgment that “he had no intention of going down that road of capacity.” As reported to the court at the charge conference:

“Mr. Iannini [Commonwealth counsel] and I have had numerous discussions about capacity, as you can see in the record, and we had them before Judge Locke [prior supervisor of the homicide session]. . . . Based on what my expert replied to me from her examination that that would not be a prudent course and I would not be able to sustain my burden, ethically, by doing that. . . . I wouldn’t be able to meet the burden that the defense has to show, although there’s a close area to it, but I would not be able to do it and my expert would not be able to do it. For the record, the issue with the expert, it was difficult to find an expert to do a thorough psychoanalysis type of examination due to some of the contributing factors that we learned today probably on cross examination [of the defendant], it would be safe to say.”

Record, Vol. 16, at 131-134. In other words, following investigation, trial counsel determined the information available to him was not of sufficient clarity or certainty to create reasonable doubt as to his client’s sanity and ability to form the intent to kill Barrientos, that is, the information did not meet the Roberio standard. Holland, 476 Mass. at 897 (“what counsel knew from the defendant and others he consulted during his preparation for trial [self-reporting, and medical evidence from seventeen years prior of “recurrent experience of depersonalization . . . bordering on psychotic decompensation”] was not of sufficient clarity or certainty to create required ‘reasonable doubt as to the defendant’s mental state.’”). As the next step in his decision making, counsel chose to pursue the possibility of a reduced verdict, on all of the theories of self-defense, mitigation, and diminished capacity due to alcohol and drugs, and properly requested jury instructions on each, which were given. Commonwealth v. Glover, 459 Mass. 836, 841-844 (2011).

This analysis and decision making is entirely supported by applicable legal authority. First, this is not a case where there was no investigation, removing it from the realm of failure to investigate, and returning the matter to the standard for strategic decisions. Second, it is not a

case where the court could not determine the thought process of counsel. As is clear from the above counsel was quite forthright with the court about his thought process, similarly to counsel in Holland, who told that trial judge: “I deliberately stayed as far away from the issue of insanity as I could,” because “I do not know if I have it.” 476 Mass. at 812 (where, “although there was little evidence that the defendant suffered from a mental illness at the time of the murder, there was substantial evidence of the defendant’s alcohol and drug use.”). Third, effective assistance does not require identification of every potential angle of possible mental illness. Kolenovic, 471 Mass. at 675-676 (trial counsel’s decision to forego further investigation of the defendant’s mental state, and “exhaustively to explore and identify the constellation of mental diseases later identified in the posttrial examinations” was an informed exercise of his prerogative; choice not to pursue expert’s PTSD opinion, in favor of an extreme intoxication defense was reasonable, since the possible alternative approach was “fraught with difficulty”).

I am not persuaded by the argument that this case represents a failure properly to investigate. Justice Lenk’s concurrence in Lang, criticizing the acceptance of “a hypothetical strategic decision, which defense counsel never actually made,” 473 Mass. at 18, is inapplicable here. Trial counsel made a strategic decision about the expert to consult and the analysis to pursue. Santa’s argument is that counsel chose the wrong expert, and pursued the wrong analysis. By my reading this does not amount to a “constitutionally inadequate investigation,” because “reasonable professional judgments support the [purported] limitation on investigation.” Id., at 19; Kolenovic, 471 Mass. at 673-674 (“Although a claim of ineffective assistance of counsel may not prevail unless counsel’s performance affects the fairness of the trial, we need not reach that analysis if we determine that counsel’s representation did not fall measurably

below that which might be expected from an ordinary fallible lawyer . . . “reasonableness does not demand perfection”).

Here there was substantial evidence of Santa’s voluntary consumption of significant amounts of alcohol for many hours prior to the killing. Holland, 476 Mass. at 812-813. Counsel also pursued other reasonable defenses such as inadequacy of the police investigation, and the possibility that others known to have gone in or out of the apartment during those early morning hours committed the killing, notwithstanding Santa’s undisputed presence and participation in a physical struggle. In support of these defenses counsel requested, and received, both a third-party culprit and a Commonwealth v. Bowden, 379 Mass. 472 (1980) jury instruction. As the Commonwealth points out in its Opposition, these defenses would not have been available had a lack of criminal responsibility defense been chosen. Paper 107, at pages 17-20. Compare, Commonwealth v. Spray, 467 Mass. 456 at 472-473 (2014)(“failure to investigate an insanity defense is especially unreasonable where it is the only viable defense available to a defendant”).

The trial jury heard testimony from the defendant himself through detailed questioning by his counsel about his reported rape, and his reaction to that experience on that evening, as well as thereafter. Trial counsel’s closing (which occurred directly following the defendant’s second day of testimony), built vigorously upon that testimony, reasonably to incorporate all of the alternative defenses, but primarily aimed at mitigation. Record, Vol. 17, at 37-58. There can be little doubt that the claim of rape impacted the jury’s verdict of finding Santa not guilty on first (or second) degree murder, but instead finding that he was guilty of voluntary manslaughter. That said, I agree with the Commonwealth that the jury could also “have reached its decision based on the overwhelming evidence that the defendant had been excessively drinking the night of the killing and was extremely intoxicated, rendering him incapable of forming the necessary

mental state for murder.” Paper 107, at page 18. In other words, the combination of theories supporting counsel’s trial strategy alternative to the NGI defense succeeded here.

The New Expert Opinion

Appellate counsel has retained a different expert, aimed at exploring the trauma which may be experienced by a rape victim at the time of the crime, which trauma reportedly may include “peritraumatic dissociation.” Dr. Jose A. Hidalgo is a forensic psychiatrist with specialized training in traumatic stress disorders, and clinical experience in treating various forms of trauma. Memorandum in Support, Exhibit 5B, Forensic Evaluation, at page 13. I have carefully considered all of the information submitted by the proffered trauma expert⁶ along with other supporting material submitted,⁷ and have considered his opinions in these Rulings. I respect Dr. Hidalgo’s descriptions to the court of factors within his field of expertise. However, I am not persuaded that this showing creates a substantial issue of ineffective assistance of counsel, or that Santa was deprived of a viable and substantial ground of defense warranting a new trial as a matter of law.

Based on multiple hours of interviews with Mr. Santa, review of certain trial transcripts the defense deemed relevant, and the witness’s professional experience and training, Dr. Hidalgo has presented a thirteen-page Forensic Evaluation with supportive material. Id., at Exhibits 5-7. Dr. Hidalgo offers the opinions with a reasonable degree of medical certainty that: Mr. Santa is currently suffering from PTSD, “consistent with Mr. Santa’s allegations that he was raped by Mr. Barrientos”; Mr. Santa “experienced severe peritraumatic dissociation at the time of Mr.

⁶ The Second Affidavit of the expert, dated April 29, 2021, was submitted in part because the witness believed “this Court . . . appear[s] to be equating the requisite mental illness necessary to form a lack of criminal responsibility defense from trauma with conditions which are perhaps more familiar, such as bi-polar disorder and schizophrenia.” Paper 109, Exhibit 9, at para. 5. Such is not the case.

⁷ I note the academic journal article submitted by counsel as Exhibit 6 to the Memorandum in Support is dated November, 2017, approximately one year after the trial in this case.

Barrientos' killing;" and that therefore he "lacked the capacity to appreciate the wrongfulness of his actions and conform his behavior to the requirements of the law." Forensic Evaluation, at pages 11-13.

The new information seeks to reconcile Mr. Santa's subjective reports of "blacking out," at various points during the relevant chronology, being unable to move his limbs, and feeling "like an insomniac" with the other evidence of his seemingly rational and self-protective behaviors before and after the killing. Counsel argues, for example, that "[t]rauma and resulting peritraumatic dissociation would onset suddenly and resolve by the time Mr. Santa began to gain consciousness and contact Mr. Pacheco for a ride home." Paper 109, at page 13, and Second Affidavit of Jose A. Hidalgo M.D., at paragraph 8 ("The change in mental status occurred at and around the time of the killing").

Dr. Hidalgo also takes issue with the Commonwealth's view of the role of intoxication in the case. In his Second Affidavit he reiterates from his Forensic Evaluation that "'Mr. Santa's peritraumatic dissociation was likely made worse by his intoxication. However, intoxication alone would not explain his behavior, or current clinical presentation of chronic PTSD.'" Dr. Hidalgo goes on to state that, in his opinion, "[i]ntoxication by liquor, even in the allegedly large quantity consumed, played a secondary role and would not be consistent with the extreme nature of the killing alone. . . . Had Mr. Santa not been raped, the reaction/events would not have been so extreme based upon intoxication." Second Affidavit, at para. 11. Compare the Commonwealth's Memorandum in Opposition, Paper 107, at page 14, arguing that the symptoms attributed to peritraumatic dissociation are also consistent with drinking a high volume of alcohol, thus rendering an insanity defense "factually weak in the particular circumstances of this case," citing Glover and Walker.

There is no support in this record or the caselaw for Santa's theory that, had the jury heard the proffered evidence about peritraumatic dissociation, they would have found the defendant not guilty. As discussed, the jury heard directly from the defendant who described compellingly and at length his subjective experiences of that fatal morning. They then heard from counsel who organized and drove these points home in his closing. Under the legal standards described above, it is not for an expert witness, appellate counsel, or this court to second-guess in hindsight the investigation and strategic choices of counsel which led to this presentation. Nor is it for us to presume that an expert's presentation of these symptoms would have been more persuasive. Kolenovic, 471 Mass. at 678 ("[D]espite the substantive appeal of the new information, the issue should not be resolved by giving undue weight to facts unearthed during counsel's posttrial research. Rather, the issue is whether counsel was under a duty to make that same inquiry based on what he knew or should have known at the time of his trial preparation."); Glover, 459 Mass. at 843 ("The deference we give to counsel's strategic judgement in determining whether it was manifestly unreasonable reflects the strong presumption that counsel knows how best to defend a client.").

For all of these reasons, the defendant has not met his burden for a new trial based on trial counsel's decision not to pursue a defense of lack of criminal responsibility.

Sentencing

The jury convicted Santa of voluntary manslaughter on December 13, 2016. Sentencing took place on December 16, 2021. Defendant appealed the sentence to the Appellate Division of the Superior Court pursuant to Superior Court Rule 64 (Paper 86), but that appeal was later withdrawn. Docket Entry 5/10/2017. The transcript of the sentencing hearing, including the court's reasoning in fashioning the sentence, speaks for itself. Record, Vol. 19.

Santa argues he is entitled to a new trial because the new expert opinion suggests “justice was not done” by his sentence of ten to twelve years in prison. Motion, Paper 100, at para. 5. His theory in this regard is that: “[e]ven if the jury convicted Mr. Santa of manslaughter, evidence of his altered state, trauma and PTSD would still have been relevant as mitigating factors at sentencing, which escaped consideration due to trial counsel’s deficient performance in not presented evidence of mental impairment in such proceeding.” Memorandum in Support, at page 28. I cannot agree. Mr. Santa’s reported altered state of mind at no point escaped the court’s consideration, and contrary to this argument, “information related to his state of mind was . . . presented” at sentencing. Id., at page 12.

The Commonwealth filed a Sentencing Memorandum on that date⁸ accurately reporting that the defendant “face[d] a potential sentence of up to twenty years in State Prison.” Paper 83, at page 3. The Commonwealth sought the maximum penalty, acknowledging that it “significantly exceed[ed] the proposed but not binding Massachusetts Sentencing Guidelines for voluntary manslaughter (categorized as a Level 8 crime).”

The Commonwealth did so because it argued: “It is difficult, if not impossible to envision a more egregious case of a defendant committing voluntary manslaughter by means of a battery. . . . In the case at bar, the level of defendant’s behavior was extreme, . . . [in that] the defendant killed the victim in a prolonged and brutal manner . . . over approximately 30 minute period . . . by two separate weapons.” Id., at pages 5-6. In contrast, it noted, medical evidence indicated the victim had a blood alcohol level between .32 and .28 at the time he was killed, and there was no evidence the victim possessed a weapon at the time of the killing. Id., at page 6.

⁸ The court also received and considered a written pre-sentencing probation report which contained input from the defense but is not a pleading of record. Record, Vol. 19 at pages 37 and 42.

The Commonwealth characterized the defense's sentencing proposal in its Memorandum as "essentially be sentenced to time served with probation after . . . based on his claims of a multitude of alleged mitigating circumstances [,] [t]he most prominent of those [being] that he was raped repeatedly by the victim." Id., at 7. In short, the Commonwealth argued "the defendant's allegation of rape was not credible and should not be considered as part of his sentencing." Id. In particular with respect to mitigation the Commonwealth argued that, based on the evidence at trial, "the jury did not have to accept that argument [of rape] to reach the verdict they reached. . . . the mitigating factor they [the jury] found was intoxication, not necessarily rape. . . . I think the thrust of the defendant's argument is, this is the mitigating circumstances that the Court should consider, the alleged rape. What I'm suggesting is there are any number of mitigating circumstances that could be found." Record, Vol. 19, at pages 27-28.

Defendant in contrast sought a ten-year sentence, with credit for the four and three-quarter years already served, and the remainder suspended on probation. Vol. 19 at 37. The basis for this recommendation was clearly and repeatedly that Santa was not a violent person, but had been driven to kill Barrientos because "something terrible went on and that terrible thing was the rape and his [Santa] being sodomized." "This was personal. . . . That's where it's from, the nature of the injuries, the extent of the injuries." Id. at 33-34. Counsel also addressed the Commonwealth's theory about the jury verdict: "And the assertion and the argument that the Commonwealth brings forward, that the jury found intoxication as the mitigating factor is utterly preposterous." Id. at 33. Finally, defense counsel referenced consulting with his expert about the sentencing recommendation, and Santa's need for ongoing therapeutic counseling to address the "horror" the "anger" the "rage" and "the change that has occurred to him from being raped." Id. at 37.

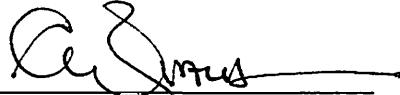
The court's reasoning about the sentence explained in open court also speaks for itself. Record, Vol. 19 at 30-32; 40-45. In my view as trial judge, Mr. Santa received all the sentencing consideration due him under the totality of the circumstances presented in this case. The court heard "evidence of his altered state, trauma and PTSD" directly from Mr. Santa himself, and heard argument on those points from counsel's closing and at sentencing. No additional mitigation would have been forthcoming from the court based on the expert witness opinions now presented. Thus, this theory about the sentence also fails to support the motion for new trial.

Conclusion

For all of the reasons stated, the Motion for New Trial is respectfully **DENIED**.

SO ORDERED.

Dated: August 27, 2021


Christine M. Roach

**SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket**

**COMMONWEALTH vs. CRISTIAN SANTA
FAR-29062**

CASE HEADER

Case Status	FAR denied
Status Date	10/28/2022
Nature	Manslaughter
Entry Date	10/06/2022
Appeals Ct Number	2022-P-0137
Response Date	10/20/2022
Appellant	Defendant
Applicant	Defendant
Citation	490 Mass. 1108
Case Type	Criminal
Full Ct Number	
TC Number	
Lower Court	Suffolk Superior Court
Lower Ct Judge	Christine M. Roach, J.

INVOLVED PARTY

Commonwealth
Plaintiff/Appellee

Cristian Santa
Defendant/Appellant

ATTORNEY APPEARANCE

[Cailin M. Campbell, A.D.A.](#)
[Darcy A. Jordan, A.D.A.](#)
[Craig Iannini, Esquire](#)

[Michael A. Waryasz, Esquire](#)

DOCKET ENTRIES

Entry Date **Paper** **Entry Text**

10/06/2022		Docket opened.
10/06/2022	#1	FAR APPLICATION filed for Cristian Santa by Attorney Michael Waryasz.
10/06/2022	#2	MOTION to expedite review of Application for FAR filed for Cristian Santa by Attorney Michael Waryasz. (10/28/2022) The motion to expedite is Allowed.
10/28/2022	#3	DENIAL of FAR application.

As of 11/02/2022 11:20am

APPENDIX C



Michael Waryasz <mwaryasz@gmail.com>

FAR-29062 - Notice: FAR denied

SJC Full Court Clerk <SJCCommClerk@sjc.state.ma.us>
To: mwaryasz@gmail.com

Fri, Oct 28, 2022 at 3:15 PM

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-29062

COMMONWEALTH
vs.
CRISTIAN SANTA

Suffolk Superior Court No. 1284CR10542
A.C. No. 2022-P-0137

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on October 28, 2022, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: October 28, 2022

To: Cailin M. Campbell, A.D.A.
Darcy A. Jordan, A.D.A.
Craig Iannini, Esquire
Michael A. Waryasz, Esquire