COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1775

COMMONWEALTH

vs.

JOHN SHEEHAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

On a July afternoon in 2012, the defendant and his friend Lorri Kimball were riding in a Jeep Cherokee on Route 495 when the Jeep rolled over several times down into the median strip, coming to rest upright. A disinterested witness observed the defendant getting out of the driver's side door. Kimball was found in the floor well on the front passenger side, bleeding from injuries to her left hand that included the traumatic amputation of parts of three fingers. The defendant was charged with operating under the influence of narcotics (OUI), fifth offense, G. L. c. 90, § 24 (1) (a) (1); reckless or negligent OUI causing serious bodily injury (OUI-SBI), G. L. c. 90, § 24L (1); and assault and battery by means of a dangerous weapon (ABDW), G. L. c. 265, § 15A (b). At trial, his defense was that Kimball, not he, had been driving.

A jury returned guilty verdicts on all three charges,[1] and the defendant appealed. He then moved for a new trial on the ground that counsel had been ineffective in not placing in evidence certain hospital and ambulance records -- records which reported that Kimball stated to first responders that she had been "driving the vehicle and was restrained." The motion for new trial was denied by a judge other than the trial judge. The defendant appealed from the denial, and the appeals were consolidated in this court. The defendant now argues that the evidence was insufficient to support his convictions, and that the motion judge erred in ruling that counsel's performance, although deficient, did not prejudice the defendant. We affirm.

Background. We describe the Commonwealth's and the defendant's cases at the 2014 trial, reserving for later discussion the facts presented in the 2017 motion for a new trial.

1. The Commonwealth's case. On the afternoon of July 15, 2012, Michael Brophy and his girlfriend were headed north on Route 495 near the New Hampshire border when Brophy saw a Jeep Cherokee rolling over on the road ahead of him and then down

[1] The defendant later pleaded guilty to the subsequent-offense portion of the OUI charge. On June 3, 2014, he was sentenced to a term of five to six years in State prison on the OUI-SBI charge, a concurrent prison term of four to five years on the OUI charge, and five years of probation from-and-after the State sentences on the ABDW charge.

into the median strip. Brophy thought the Jeep might have been in the center or right lanes because, by the time he saw it, it appeared to have rolled over either "a couple times" or "quite a few times." The Jeep landed upright, with "debris all over the highway and down the hill." The couple pulled over, and Brophy's girlfriend, who had medical training, went to assist. Brophy observed that the driver's side door was open, and an individual later identified as the defendant was getting out of it. When a State trooper arrived, Brophy told the trooper what he had observed.

The trooper, John Moran, reached the scene within minutes of the crash, at about 7 P.M. He saw that the top and sides of the Jeep were damaged. It appeared to be the only vehicle involved. The driver's side door was open and the passenger door was closed. A woman, later identified as Lorri Kimball, was inside the Jeep; "her entire body was in the floor well" on the passenger side. Kimball was bleeding and "appeared to be . . . rather seriously injured." She was being tended by a woman while they awaited the arrival of an emergency medical unit. Kimball was not wearing a seatbelt.

The defendant was not bleeding, but Moran observed that the defendant's eyes were glassy and unable to focus, and the defendant's speech was slow and deliberate. Moran became concerned that the defendant might be "under the influence of

something." Once Kimball and the defendant had been transported to a hospital, Moran found a spoon on the ground outside the Jeep with some burnt residue on it. A later laboratory test confirmed that the residue contained heroin. Moran also found a hypodermic needle in the driver's side foot well. He was unable to conduct a thorough search of the passenger side because there was too much blood there. He saw no blood in the interior on the driver's side.

Moran then went to the hospital where Kimball and the defendant had been taken. He tried to speak to Kimball but was told she was unable to communicate with anyone. He observed the defendant in a darkened room and noted that, despite the darkness, the defendant's pupils were very constricted, which indicated to Moran the use of narcotics. Moran formed the opinion that the defendant was under the influence of drugs at the time of the crash.

At trial, Kimball testified that she and the defendant were friends, and that they met when she bought a car from a dealership where he was a mechanic. Kimball would sometimes give the defendant a ride home after work if he needed one. She had very little memory of the day of the accident. Sometime that afternoon, the defendant, driving the Jeep, had shown up at her house and asked if she wanted to take a ride with him. She remembered walking toward the Jeep, but she had no memory of

getting into it, or of the accident, or of who was driving at the time of the accident. Asked if she had been using heroin on that day, she replied that she could not remember. Her next memory was of waking up in the hospital five days later.

As a result of the accident, Kimball "lost three fingers" on her left hand, and her "pinky" and thumb were "mangled." She had also "split both sides of [her] head open," but the doctors "just gave [her] staples and that's it." She testified that, shortly after she got out of the hospital, the defendant asked "if I took the blame because I would get in less trouble."

A State Police chemist testified that she had tested a blood sample taken from the defendant at the hospital, and found that his blood alcohol level was 0.036 percent. The sample also contained various benzodiazepines (including Clonazepam and Diazepam), the effect of which is "similar . . . to alcohol" in that they "slow your reaction speed" and "decrease your ability to pay attention." She also detected codeine and morphine, which can be ingested in their own right but also are rapid metabolites of heroin. She testified that all of the drugs she found, including the alcohol, were central nervous system depressants that "slow everything down" in the body and have an "additive effect."[2]

[2] As to Kimball, the medical records at issue in this case (presented at the motion for new trial, but not admitted at

2. The defense case. The defense was that Kimball, not the defendant, had been driving the Jeep. The defendant presented two witnesses in support of this contention, Wayne Reynolds and Ronald Pynn. Both testified that the defendant was a friend, and characterized Kimball as an acquaintance. Reynolds testified that he owned the Jeep, that he loaned the Jeep to Kimball earlier on the day of the crash, and that he watched Kimball drive away in it. Pynn testified that at approximately 6 P.M. the day of the crash, he was driving on Route 495 and saw Kimball driving the Jeep, with the defendant asleep in the passenger seat. Pynn testified that the Jeep was "wandering" all over the road, so Pynn pulled up alongside and tried, unsuccessfully, to get Kimball's attention. Pynn eventually got off the highway, and called Reynolds.[3] Finally, both Reynolds and Pynn testified that they separately spoke to

---

trial) indicate that she also tested positive for opiates and benzodiazepines, among other substances, at the hospital. Additionally, the records indicate that her condition prompted hospital staff to administer Narcan treatment after she arrived at Lawrence General Hospital.

[3] On cross-examination the Commonwealth sought to impeach Pynn by, among other things, establishing that about three months before the trial, Pynn had talked to an investigator about the case and had said that he saw Kimball driving the Jeep at 4 P.M., rather than at about 6 P.M. as he testified on direct examination. The cross-examination also highlighted Pynn's failure, once he learned of the charges against the defendant, to come forward and tell police of his observation that Kimball had been driving.

Kimball after she was released from the hospital, and that among other things Kimball admitted that she had been driving, and had "screwed up."

In closing, defense counsel attempted to marshal the evidence that Kimball had been driving the Jeep. Notably, in doing so he did not rely solely on the testimony of Reynolds and Pynn; rather, he argued, as he needed to, that the physical evidence could be squared with Kimball operating the vehicle. To do this counsel leaned heavily on officer Moran's testimony that when Moran found her, Kimball was not wearing a seatbelt -- that is, that she was not restrained. He posited that Kimball and the defendant had essentially switched positions in the car during the rollover. As noted, the jury returned guilty verdicts on all charges, and the defendant appealed.

Discussion. 1. Sufficiency of the evidence. In his direct appeal, the defendant argues for several reasons that the evidence was insufficient to support the convictions. We consider the evidence and inferences therefrom in the light most favorable to the Commonwealth, to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979).

The defendant first argues that there was insufficient evidence that he was the person operating the Jeep. We disagree. Brophy, an eyewitness, testified that the defendant got out of the driver's side of the Jeep immediately after the crash. The defendant was not bleeding, and there was no blood on the driver's side of the Jeep's interior. On the other hand, Kimball was in the passenger-side floor well, bleeding, and there was considerable blood in that location. Furthermore, Kimball testified that the defendant, driving the Jeep, had shown up at her house on the day of the accident and asked her to come for a ride with him. Kimball also testified that the defendant had later asked her to take the blame for the accident, because she would get in "less trouble" than he would. We have no difficulty concluding that the evidence of operation was sufficient.[4]

The defendant fares no better in challenging the sufficiency of the evidence that he was under the influence of drugs. The defendant states that although there was "little reason to doubt that [he] consumed drugs and alcohol at some

[4] It does not avail the defendant to cite OUI decisions in which, he asserts, the evidence of operation was stronger than what was offered here. The issue is whether the evidence here met the familiar Latimore standard, not whether it was as strong as in other cases.

time before the accident, there was no proof that it impaired his ability to drive."

To the contrary, there was ample evidence of the defendant's "diminished capacity to operate safely," Commonwealth v. Morse, 468 Mass. 360, 377 (2014), quoting Commonwealth v. Daniel, 464 Mass. 746, 756 (2013), starting with the fact that the defendant rolled the car over, and onto the median strip, while driving on an interstate highway. See Commonwealth v. Johnson, 59 Mass. App. Ct. 164, 165, 172 (2003) (that "defendant drove his motor vehicle off Route 495 for no apparent reason" contributed to inference that his operation was impaired). Beyond that, Trooper Moran observed that the defendant's eyes were glassy and unable to focus, his speech was slow, there was paraphernalia for using heroin in and around the Jeep, and at the hospital the defendant's pupils were constricted despite his being in a darkened room. Moreover, the defendant's blood contained alcohol and benzodiazepines, which slow the body's reaction time and decrease the ability to pay attention, as well as morphine and codeine, which are metabolites of heroin. These substances are central nervous system depressants that slow everything in the body down.[5]

[5] The defendant argues that because the Commonwealth offered evidence of blood tests showing the presence of drugs, it was also required to, but did not, offer expert testimony on the relationship between the levels of drugs detected and "the

Finally, we are unpersuaded by the defendant's argument that there was insufficient evidence of causation -- that is, insufficient evidence that his driving caused Kimball's injuries. See G. L. c. 90, § 24L (1) (prescribing punishment for OUI where operation is reckless or negligent and "causes serious bodily injury"). The jury could use their common sense and life experience to conclude that a vehicle does not ordinarily roll over without either some error by the driver or some other cause, such as mechanical malfunction, actions of other vehicles, or adverse driving conditions. There was no evidence of any such other cause here. The jury could reasonably infer that the defendant's manner of driving caused the accident and Kimball's injuries. See Commonwealth v. Beckett, 373 Mass. 329, 341 (1977) (inference need only be reasonable and possible and need not be necessary or inescapable).

2. Motion for new trial. a. Factual basis. In 2017, the defendant moved for a new trial. The gist of his argument was that trial counsel had been ineffective because counsel had

---

diminished capacity to operate a motor vehicle safely." Commonwealth v. Filoma, 79 Mass. App. Ct. 16, 21 (2011). We disagree that the showing here was insufficient. Among other things, the State Police chemist testified, without objection, that benzodiazepines were present in the defendant's bloodstream at levels indicating "therapeutic doses," and that those drugs slow the body's reaction speed and decrease the ability to pay attention.

failed to introduce certain notes from Kimball's hospital records. The most significant of these notes, made by an emergency room nurse, recorded that Kimball "states she was driving the vehicle and was restrained."[6,7] The motion for new trial attached an affidavit from trial counsel, which stated that trial counsel knew of the hospital record and that the record would be "very helpful" if admitted, but that he did not believe Kimball's statements were admissible and thus did not attempt to admit them. The motion for new trial argued that this conclusion of trial counsel was incorrect on the law and manifestly unreasonable, because Kimball's statements were admissible under several different rules of evidence, including that Kimball's statements constituted sufficiently reliable "third party culprit" evidence to overcome the hearsay exclusion.

b. Decision on motion for new trial. The motion judge, who was not the trial judge, held a nonevidentiary hearing and issued a careful and thorough decision denying the motion.

---

[6] The hospital records further noted: "The patient states she was restrained but EMS found her in the passenger seat. She was reported to have used heroin prior to the accident."

[7] As a result of discovery sought in connection with the motion for new trial, defense counsel also obtained the EMT records, which contained essentially the same statement: "[Patient] states she was restrained driver that lost control of vehicle." Our analysis herein applies to both documents, and assumes that both were available to be offered in evidence.

Applying the familiar Saferian standard, he concluded that Kimball's statements that she had been driving, as reported in the hospital and EMT records, would have been admissible at trial as third-party culprit evidence, and so counsel performed deficiently by failing to offer them. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). The judge nevertheless concluded that the defendant had suffered no resulting prejudice, because admission of Kimball's statements "would not have altered the outcome." In so ruling he pointed to the Commonwealth's "strong combination of direct and circumstantial evidence" that the defendant had been operating the Jeep, and he noted that despite the defendant's evidence and argument, the jury had not credited the testimony of Reynolds and Pynn. The judge reasoned that under the circumstances the jury would not likely have been swayed by the statements in the medical records. This was particularly so, in the judge's view, because of Kimball's physical and mental condition at the time she made the statements, and because of Kimball's trial testimony that, once she got out of the hospital, the defendant asked her to take the blame for the crash.

c. Discussion. We review the judge's ruling for "a significant error of law or other abuse of discretion." Commonwealth v. Grace, 397 Mass. 303, 307 (1986). To demonstrate ineffective assistance of counsel, the defendant

needs to show (1) that counsel's performance fell "measurably below that which might be expected from an ordinary fallible lawyer," and (2) prejudice -- that is, that counsel's failures "likely deprived the defendant of an otherwise available, substantial ground of defence." Saferian, 366 Mass. at 96.

The judge "assume[d]" that the first prong of the above test, the performance prong, was satisfied here. For present purposes we need not quarrel with the conclusion that trial counsel's performance was deficient. We are inclined to agree that the records with Kimball's statements should have been admitted in evidence, had trial counsel sought to present them. Kimball's statements, if credited, contained an admission that she, and not the defendant, was the responsible party. Although those out-of-court statements were hearsay, they would have been admissible, at least, under the hearsay exception for third-

party culprit evidence. See Commonwealth v. Drayton, 473 Mass. 23, 33-36 (2015).[8,9]

We also agree with the motion judge, however, that the defendant's ineffective assistance claim founders on the prejudice prong. As noted, the defendant needs to show that he was deprived of an "otherwise available, substantial ground of defence." Saferian, 366 Mass. at 96. More recently, the Supreme Judicial Court has clarified that a "defense is

---

[8] The cases the Commonwealth cites as examples of the proper exclusion of third-party culprit evidence are easily distinguishable. See Commonwealth v. Moore, 480 Mass. 799, 807 (2018) ("unidentified police officers stating for the purpose of identifying the perpetrators what an unidentified person or persons said the perpetrators looked like"); Commonwealth v. Bizanowicz, 459 Mass. 400, 418-419 (2011) ("highly speculative" evidence "based on rumor").

Because the statements would have been admissible as third-party culprit evidence, we need not resolve the defendant's arguments that the statements would also have been admissible under the hospital records statute itself, G. L. c. 233, § 79, or under the hearsay exception for statements against penal interest, see Commonwealth v. Charles, 428 Mass. 672, 677 (1999).

[9] The judge reached his decision that trial counsel's performance was deficient based upon trial counsel's affidavit, filed years after trial, which stated that counsel did not try to introduce the medical records because he thought them inadmissible. Assuming that was the entirety of counsel's reasoning at the time of trial, it was incorrect. We note, however, as we discuss herein, that while Kimball's statements that she was driving were consistent with the defense case, the other half of those same statements -- that she was "restrained" -- flatly contradicted the defense case. Because Kimball's statements also harmed the defense case, one might question whether the decision not to present the statements was tactical. The judge did not hold an evidentiary hearing, and there was no finding as to this issue.

'substantial' for Saferian purposes where we have serious doubt whether the jury verdict would have been the same had the defense been presented." Commonwealth v. Millien, 474 Mass. 417, 432 (2016). In conducting this review, the judge considers the trial record as a whole. See id. at 432 n.13 (second prong of Saferian essentially identical to substantial risk of miscarriage of justice analysis); Commonwealth v. Azar, 435 Mass. 675, 686-687 (2002).

After review of the entire record, we have no such serious doubt; we are confident that introduction of the medical records would not have changed the result here. As discussed above, the evidence that the defendant was driving the vehicle was very strong. See Commonwealth v. Montrond, 477 Mass. 127, 135 (2017) (defendant not deprived of substantial defense where Commonwealth had strong case and other evidence at trial undercut unoffered evidence). A disinterested eyewitness saw him exiting the driver's side door, immediately after the crash. Moreover, the physical evidence pointed entirely and completely at the defendant. Kimball was badly injured, and bleeding profusely. Kimball, and all the blood, was found on the passenger side of the vehicle. For the defense theory to be correct, Kimball would have had to begin the crash in the driver's seat, and she would have had to, in essence, switch sides of the car with the defendant during the rollover.

Moreover, this switch would have had to occur without Kimball leaving a drop of blood on the driver's side of the car, or on the defendant. One of the great values of juries is their collective common sense. The defense theory likely ran afoul of that common sense.

In addition to the strength of the Commonwealth's case, however, we do not consider the unoffered evidence -- the hospital and EMT records -- to be particularly powerful additional evidence for the defense, under the circumstances. For present purposes we will assume that the records themselves were accurate; that is, we assume that the jury would believe that Kimball made the statements that were recorded,[10] and assess whether "we have a serious doubt [that] the jury verdict would have been the same had the [evidence] been presented." Millien, 474 Mass. at 432. Here, we think the jury would not likely have been influenced by Kimball's statement that she was driving, for at least three reasons. The first and most important reason is the eyewitness and physical evidence to the contrary, discussed above. The second reason is that at least part of Kimball's statement -- that she "was restrained" -- almost certainly would

[10] At oral argument, the question arose whether a standard more favorable to the defendant should be applied, based on Commonwealth v. Roberio, 428 Mass. 278, 281 (1998), S.C., 440 Mass. 245 (2003). However, the argument was neither made to the motion judge nor briefed on appeal, thus we do not address Roberio further.

have been viewed by the jury as false. The evidence at trial showed that Kimball was not restrained; indeed, the defense theory depended on convincing the jury that Kimball was not restrained, and defense counsel made a point of establishing that Kimball was not restrained in cross-examination of Trooper Moran, and returned to the point in closing. Thus, had defense counsel relied upon Kimball's statements in the medical records, he would have been exposed to some withering rebuttal for trying to convince the jury to accept half of what Kimball said, while rejecting the rest -- that Kimball was correct that she was driving, but incorrect that she was restrained. See Commonwealth v. White, 409 Mass. 266, 276-277 (1991) ("any benefits that the defendant would have realized from [the evidence not offered] could not have risen to the level of a 'substantial ground of defence' because they would have been largely offset by the harm that other aspects of the testimony would have done to his case").

The third reason we do not believe the jury would have been swayed by the recorded statements is that when they were made, Kimball had just been involved in a serious car accident, had suffered traumatic injuries including traumatic head injury, and apparently was under the influence of heroin.

In short, where Kimball's statement was at odds with objective testimony and the physical evidence, where at least

part of Kimball's statement almost certainly would have been viewed as false, and where Kimball's mental state provided a ready explanation for why she would be mistaken, we are confident the jury's verdict would not have been altered had the statements been introduced. Our conclusion is bolstered by the fact that the defendant did present the defense that Kimball was driving, supported by two purported eyewitnesses who placed Kimball at the wheel of the Jeep earlier on the day of the accident. In convicting, the jury squarely rejected those defense arguments and testimony. The introduction of Kimball's recorded statements would not have substantially bolstered the narrative presented by the defendant under the circumstances.

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Henry, Sacks & Englander, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: February 22, 2021.

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