COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1144

COMMONWEALTH

vs.

PETER CHAMBERLIN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A Superior Court jury found the defendant guilty of armed robbery while masked, kidnapping with intent to extort, and armed assault with intent to murder in connection with a 2007 robbery where the victim was bound, threatened, and shot. The defendant's convictions were affirmed on direct appeal. See Commonwealth v. Chamberlin, 473 Mass. 653 (2016).

The defendant now appeals from the orders denying his motion to vacate his convictions and his related motion for postconviction fees and costs. He argues that his convictions must be set aside because he was denied two peremptory challenges during jury selection and his prior appellate counsel was ineffective for failing to raise that issue on direct appeal. He also argues that his conviction of armed assault with intent to murder must be vacated for the additional reasons

that newly discovered evidence suggests that the defendant was not the shooter and that his trial counsel was ineffective for failing to move to exclude the victim's identification of the defendant as the shooter on the basis that the identification was unreliable. We affirm.

Background. 1. The robbery.[1] In September 2007, the victim and an employee of his real estate business fielded telephone calls from a potential customer who identified himself as "Marco." Marco and the victim arranged to meet after hours on September 24 at the victim's office to review real estate listings. That evening, when the victim answered a knock on his office door, three men entered the office and one held a handgun to the victim's forehead. All three men wore masks that covered their noses and mouths. The man with the handgun said, among other things, "Give me the fucking money. You're going to die because of the fucking money." The victim recognized that assailant's voice as belonging to Marco. During the encounter, the victim began to pray and Marco stated that the Christian prayers did not matter to him because he was Jewish.

The men bound the victim's hands with wire ties and Marco remained in the basement with the victim while the other men

[1] The following facts are drawn from the trial testimony. For a more complete recitation of the facts, see Chamberlin, 473 Mass. at 655.

searched the office. Right before the assailants left, Marco shot the victim in the back of the head. Marco then instructed one of the other men to "plug [him] some more," and the other man responded, "Let's go." After the men left, the victim was able to telephone 911 and was taken to the hospital for treatment.

During the ensuing investigation, the police identified the phone number used by Marco as belonging to the defendant. The police also obtained a recording of a voicemail message left by Marco from the victim's phone. Two witnesses who each knew the defendant for approximately twenty years identified the voice on the voicemail message as belonging to the defendant.[2] At trial, one of those witnesses also testified that in the middle of September 2007, the defendant told her that he was planning a robbery with other people, and that near the end of September 2007, he asked her to pick him up around 3:00 A.M. because he was in "some kind of trouble." The other witness testified that four days after the incident, the defendant told her that he had participated in a robbery, that one of the other robbers shot the victim, and that he planned to turn himself into police.

[2] The lead detective eventually came into contact with the defendant and also recognized his voice from the voicemail message.

A search of the defendant's residence in Roslindale was conducted pursuant to a warrant. That search yielded wire ties, a real estate listing sheet for properties handled by the victim's agency, and a computer. A forensic analysis of the computer revealed that a search was conducted for directions from Roslindale to the victim's office three days before the robbery, an e-mail address associated with the name "Mark" or "Marko" was accessed from that computer, and a newspaper article about the robbery was retrieved after the fact.

2. Victim's identification of defendant. Two days after the robbery, police showed the victim a photographic array. He indicated that a photograph of the defendant taken a few years prior resembled Marco but noted that his face appeared heavier in the photograph; the victim also put aside a photograph of another individual. The following day, police showed the victim a second photographic array that included a more recent photograph of the defendant. The victim identified the defendant as his assailant from the array. During trial, the victim made an in-court identification of the defendant as the man whom he knew as Marco.

3. Jury selection. At the outset of jury selection, the trial judge expressed an intent to empanel fourteen jurors and noted that each side would receive fourteen peremptory challenges. The defense counsel exhausted those challenges.

After the judge excused a previously selected juror, the judge afforded defense counsel an additional challenge. The judge then explained, "I'm going to continue to impanel until I can at least get fourteen. I may go to fifteen. I may go to sixteen."

Voir dire continued and the defense counsel used her last peremptory challenge. After selecting fourteen qualified and indifferent jurors, the judge stated, "I am going to continue because I do not know if there will be new issues raised," and noted his concern about a previously selected juror who had a conflict on Thursday.

After the prosecutor indicated that he did not challenge a prospective fifteenth juror, juror no. 92, the judge explained, "We're going to continue. I want to get to sixteen, because I'm not going to be surprised if someone has a new problem." The judge then conducted individual voir dire of juror no. 93, and the prosecutor did not challenge that juror. The following exchange then occurred:

> Defense counsel: "Judge, I think if we're picking sixteen, I would submit that I should have two additional challenges."
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> The judge: "I'm not going to sixteen unless I have problems. This is the way I'm going to proceed. I'm going to see if the first fourteen contain anyone else who has a problem that we haven't been alerted to. As to the one juror who has a Thursday problem, it seems to me that it would be prudent to take fifteen and put that juror in the place of the juror with the Thursday problem . . . ."

The judge then instructed the court officer to seat juror no. 92 and juror no. 93 in the "two seats apart from the jury box." After further discussion with the juror who had the scheduling conflict, the judge excused her and replaced her with juror no. 92. Defense counsel did not object. The judge then indicated, "The juror in 16 [i.e., juror no. 93], unless otherwise decided, will be free to go as soon as I conclude the proceedings today."

After the prosecutor raised an issue with another prospective juror, the judge decided to conduct an inquiry. The judge explained, "We're going to bring [the prospective juror] over. If there's any -- [defense counsel], I alert you to this. If there's any uncertainty in my mind, I'm going to excuse him." Defense counsel did not object. After a short inquiry, the judge indicated that he was going to replace that juror with juror no. 93. Again, defense counsel did not object or raise a concern about juror nos. 92 or 93. The panel of fourteen jurors, including juror no. 92 and juror no. 93, were sworn in the following day. Both juror no. 92 and juror no. 93 deliberated.

Discussion. A judge may allow a motion to vacate conviction pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), only "if it appears that justice may not have been done" (citation omitted). Commonwealth v. Masonoff, 70 Mass. App. Ct. 162, 165-166 (2007). "The judge may rule on

[such] a motion . . . without an evidentiary hearing where the motion and supporting materials do not raise a 'substantial issue.'" Commonwealth v. Denis, 442 Mass. 617, 628 (2004), quoting Mass. R. Crim. P. 30 (c) (3). Because the motion judge here did not preside over trial or conduct an evidentiary hearing, our review is de novo. See Commonwealth v. Mazza, 484 Mass. 539, 547 (2020).

1. Peremptory challenges. The defendant first argues that his prior appellate counsel rendered ineffective assistance by failing to raise on direct appeal the issue whether the trial judge improperly denied the defendant two peremptory challenges to which he was entitled during jury selection.

To establish ineffective assistance of counsel, a defendant must show first that the attorney's conduct fell "measurably below that which might be expected from an ordinary fallible lawyer" and that counsel's shortcoming "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "When assessing whether appellate counsel's behavior fell below the standard of an ordinary, fallible lawyer, we focus on whether appellate counsel 'failed to raise a significant and obvious issue . . . which . . . may have resulted in a reversal of the conviction, or an order for a new trial.'" Commonwealth

v. Aspen, 85 Mass. App. Ct. 278, 282 (2014), quoting Commonwealth v. Sowell, 34 Mass. App. Ct. 229, 232 (1993).

Where, as here, a defendant is charged with a crime punishable by imprisonment for life, he is entitled to twelve peremptory challenges. See Mass. R. Crim. P. 20 (c) (1), 378 Mass. 889 (1979). Moreover, in a protracted trial, a judge may choose to empanel up to sixteen jurors, only twelve of whom will ultimately deliberate. See Mass. R. Crim. P. 20 (d) (1) & (2). In such instances, the defendant is "entitled to one additional peremptory challenge for each additional juror." Mass. R. Crim. P. 20 (c) (1).

"'[P]eremptory challenges are a creature of statute,' and, thus, a defendant is deprived of his constitutional right to an impartial jury 'only if [he] does not receive that which state law provides.'" Commonwealth v. Crayton, 93 Mass. App. Ct. 251, 255 (2018), quoting Ross v. Oklahoma, 487 U.S. 81, 89 (1988). The statute in effect at the time of the defendant's trial provided that a verdict may be set aside due to an irregularity in jury empanelment only if "the objecting party has been injured thereby or unless the objection was made before the verdict" (emphasis added). Commonwealth v. Pina, 481 Mass. 413, 428 (2019), quoting G. L. c. 234, § 32.[3]

[3] "Th[at] provision was effective until May 10, 2016, and was repealed by St. 2016, c. 36, § 1." Pina, 481 Mass. at 428 n.11.

We turn first to the issue whether the defendant adequately objected to selection of juror nos. 92 and 93 on the basis that he was deprived of two peremptory challenges. Here, the defendant did not object when the trial judge indicated his intent to continue with jury selection after finding fourteen qualified and indifferent jurors, after the individual voir dire of juror no. 92, or when juror no. 92 and juror no. 93 were substituted for the excused jurors from the original group of fourteen because of scheduling issues. See note 4, infra. The defense counsel's sole request for two additional peremptory challenges "if we're picking sixteen" after the individual voir dire of juror no. 93 did not adequately preserve the issue because in response, the judge disclaimed an intent to empanel juror no. 93 unless problems arose with the previously selected jurors. When the judge ultimately decided to seat juror no. 92 and juror no. 93, the defendant did not object or otherwise argue against their empanelment; therefore, the issue was not preserved.[4] See Pina, 481 Mass. at 427 (no objection where

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Under the current scheme, "a defendant seeking to overturn his conviction on the basis of defects in the empanelment process must both timely object and show that he was prejudiced by the procedure." Crayton, 93 Mass. App. Ct. at 255 n.11, citing G. L. c. 234A, § 74.

[4] The defendant contends that the trial judge expressly warned his counsel not to argue the issue before the judge substituted juror no. 93 for one of the excused jurors (juror no. 59). However, a reading of the transcript reflects that the judge merely alerted defense counsel to the fact that if the judge was

defense counsel erroneously deprived of two peremptory challenges stated, "It is my understanding, and I might be wrong, that I had two challenges left"). Contrast Crayton, 93 Mass. App. Ct. at 253 (defendant objected to number of peremptory challenges, renewed objection, sought additional challenges to exclude specific jurors, and stated reasons for wanting to exclude those jurors).

The defendant also has not demonstrated that he was injured by the failure to provide him with two additional peremptory challenges.[5] He contends that we can infer that defense counsel

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uncertain whether juror no. 59 would be a source of contamination, the judge was going to excuse juror no. 59 and seat juror no. 93. He then did just that. The trial judge never precluded defense counsel from objecting or otherwise arguing the issue when he excused juror no. 59 and substituted juror no. 93. Moreover, to the extent that the defendant argues that his trial counsel requested that juror no. 92 not be seated, no such objection was lodged. The defense counsel simply agreed with the judge's suggestion that the juror with the scheduling conflict remain. When it became clear that other jurors would not be able to accommodate an extended schedule so that that juror could participate, the judge decided to substitute juror no. 92. The defense counsel did not object to or otherwise take issue with this course of action.

[5] To the extent that the defendant argues he need not show injury flowing from the denial of a right to peremptory challenge, we disagree where the claim of error was not preserved. Compare Pina, 481 Mass. at 428-429 (no new trial warranted where defendant did not object to erroneous deprivation of two peremptory challenges and did not show injury resulting from that deprivation), with Commonwealth v. Bockman, 442 Mass. 757, 763 (2004) (recognizing general rule that defendant "need not show prejudice when his exercise of a peremptory challenge is erroneously denied and the challenged juror is seated on the panel and participates in deciding the case").

wanted to exercise a peremptory challenge on juror no. 93 because she stated that if they were empanelling two additional jurors she should receive two additional peremptory challenges; however, she did not object to when the judge indicated that juror no. 93 would be empanelled and the defendant has not alleged that either juror no. 92 or juror no. 93 were partial or biased, nor did he express dissatisfaction with these jurors. Contrast Crayton, 93 Mass. App. Ct. at 254 n.6, 256 (after exhausting peremptory challenges defendant set forth specific reasons for wanting to eliminate two potential jurors who were seated). The defendant has not demonstrated that he was injured by their placement on the jury or that he was denied his right to an impartial jury. Therefore, his claim fails.[6]

2. Newly discovered evidence. Approximately four months before the defendant's trial, a codefendant pleaded guilty to acting with the defendant in the robbery, kidnapping, and shooting of the victim. That codefendant was not called as a witness at trial. In support of the motion to vacate conviction, the defendant presented evidence demonstrating that he learned after the trial that this codefendant was Jewish. Given the victim's testimony that the shooter stated he was

[6] The defendant argues that he was denied his right to due process under the law; however, this argument fails because, as discussed above, he was provided all the rights afforded to him by state law. See Crayton, 93 Mass. App. Ct. at 255.

Jewish,[7] the defendant argues this information would have supported a conclusion that the codefendant shot the victim and that the defendant was a mere accomplice. Where the accomplice refused to shoot the victim, the defendant argues the accomplice lacked the requisite intent to support a conviction for armed assault with intent to murder.

"A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." Mazza, 484 Mass. at 547, quoting Commonwealth v. Grace, 397 Mass. 303, 305 (1986). "Newly discovered evidence is evidence that was unknown to the defendant or counsel and not reasonably discoverable by them at the time of trial." Commonwealth v. Sullivan, 469 Mass. 340, 350 n.6 (2014).

We agree with the motion judge's conclusion that the defendant "has failed to demonstrate how the evidence of [the codefendant's] religion was undiscoverable prior to trial. The defendant's proffered evidence shows that [the codefendant's] practice of Judaism could have been discovered prior to trial."

[7] We recognize that the shooter's statement was not offered to establish that he was, in fact, Jewish; rather, the statement was meant to convey that the shooter was not moved by the victim's prayers. While we do not subscribe to the shooter's logic that a person of one faith would be unsympathetic to the victim's prayers in another faith, we must consider the statement as it was offered into evidence.

The defendant argues that he had no reason to investigate the codefendant's religious affiliation until he heard the victim's trial testimony that the shooter stated he was Jewish. However, the record before us is lacking any affirmative evidence whether the defendant was aware of the victim's statement about the shooter's religious affiliation prior to trial.[8] Where the defendant bears the burden of demonstrating the existence of a substantial issue of newly discovered evidence warranting an evidentiary hearing, his claim fails. See Pina, 481 Mass. at 435 (defendant bears "burden of demonstrating that reasonable pretrial diligence on his part would not have produced the statements by the purportedly newly discovered witnesses").

3. Victim's identification. Prior to trial, defense counsel unsuccessfully moved to suppress the victim's identification of the defendant from the photographic arrays on the basis that the procedures utilized were unduly suggestive. The defendant now argues that trial counsel was ineffective for failing to challenge the victim's visual and voice identifications of the defendant, and the victim's subsequent in-court identification as unreliable.

[8] The Commonwealth asserted before the motion judge that this information was known to the defendant through discovery. In his original motion, the defendant did not claim surprise based on the victim's trial testimony that the shooter stated he was Jewish and the affidavit of the defendant's trial counsel is silent on this point.

Where the defendant seeks a new trial based on counsel's failure to file a motion to exclude evidence, the defendant must demonstrate that challenging the identification on the basis of its reliability "might have accomplished something material for the defense." Commonwealth v. Lally, 473 Mass. 693, 703 n.10 (2016).

Identification testimony may be excluded under common law principles of fairness where the trial judge concludes that the identification is unreliable such that its probative value is substantially outweighed by the danger of unfair prejudice. See Commonwealth v. Vasquez, 482 Mass. 850, 860 (2019); Commonwealth v. Dew, 478 Mass. 304, 315 (2017).

a. Visual identification. The defendant asserts that trial counsel should have argued that the victim's visual identification of the defendant as the shooter was unreliable because the assailants' faces were partially obscured by masks; the victim was under the stress of being held at gunpoint; the victim later identified the codefendant from a photographic array as the person who said, "You're going to die for money," suggesting that the codefendant was the shooter; and the victim misidentified a third assailant from a photographic array.

We are not persuaded that a challenge to the reliability of the identification might have accomplished something material for the defense. The factors raised by the defendant are

potentially relevant to the weight given to the victim's identification, but would not have rendered the identification unreliable such that it would have been inadmissible. See Commonwealth v. Walker, 460 Mass. 590, 606-607 (2011) ("where the alleged unreliability of the eyewitness identification arose from distance, lighting, the brevity of the observation, and the emotional state of the eyewitness at the time of the observation, . . . [t]he jury were capable of making an informed assessment of the accuracy of such an identification and assessing its weight"); Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 403 (1999) (permissible for jurors to accord weight and probative value to identification based solely on defendant's eyes, rather than full view of defendant's face).

On cross-examination, the defense counsel challenged the victim's identification, eliciting testimony that the assailants were masked, that the victim was held at gunpoint, that the victim was "terrified" during the robbery, and that the victim identified a third assailant against whom charges were ultimately dropped. The jury also were properly instructed on how to evaluate identification evidence, including examining all the circumstances in which the identification was made.

While the defendant points out that his trial counsel failed to raise the issue of the victim's identification of the codefendant from a photographic array as the person who said,

"You're going to die for money," we are not convinced that challenging the identification of the defendant as the shooter based on this fact combined with the others discussed above would have accomplished something material for the defense.[9] Nor are we convinced that the defendant was deprived of a substantial ground of defense based on the failure to introduce this evidence at trial. As discussed below, the victim was familiar with Marco's voice and identified him as the person who shot him. The victim also identified the defendant from a photographic array and other evidence implicated the defendant as Marco.

b. Voice identification. The defendant argues that his trial counsel was ineffective for failing to challenge the victim's voice identification of his assailant as Marco. The defendant also argues that he made a sufficient showing of unreliability such that he was entitled to an evidentiary hearing on the issue. In support of this argument, the defendant unsuccessfully sought funds to retain Nancy Franklin, Ph.D., as an expert in identification with a specific expertise in voice identification. Dr. Franklin opined that humans are less accurate in identifying people by voice than by sight;

[9] In her affidavit, trial counsel explained that she "was sent a copy" of the video recording wherein the victim identified the codefendant but "[does] not remember it." Nor did trial counsel introduce any evidence concerning this identification at trial.

stress makes identification less accurate; accuracy rates fall when the speaker is not using a normal range, i.e., yelling or whispering; people demonstrate a strong "expectation effect," meaning they hear voices that they expect to hear and do not correctly identify different voices when introduced; and the more confident a witness is in a voice identification, the less likely it is to be accurate.

We conclude that the defendant failed to raise a substantial issue warranting an evidentiary hearing. To the extent that the defendant argues that trial counsel should have moved to exclude the voice identification on the basis of its unreliability, we are not convinced that such a challenge, even if supported by expert evidence, might have accomplished something material for the defense. As the defendant concedes, the fact that the defendant was the caller who identified himself as Marco was established at trial.[10] Where the victim spoke with Marco on the phone on more than one occasion prior to the robbery, the victim had sufficient familiarity with Marco's voice such that his identification of Marco as one of his assailants was properly admitted. See Commonwealth v.

[10] As we previously noted, two other witnesses who had each "known the defendant for about twenty years" identified the defendant's voice from a voicemail left by Marco. Commonwealth v. Chamberlin, 86 Mass. App. Ct. 705, 713 n.12 (2014), S.C., 473 Mass. 653.

Mezzanotti, 26 Mass. App. Ct. 522, 527 (1988) ("In the discretion of a trial judge, a voice identification may be considered by a jury as long as the witness expresses some basic familiarity with the voice he or she claims to identify").

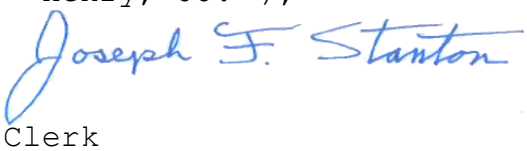
To the extent the defendant argues that trial counsel was ineffective for failing to offer expert evidence at trial challenging the victim's voice identification, that claim also fails. See Commonwealth v. Ayala, 481 Mass. 46, 63 (2018) ("The decision to call, or not to call, an expert witness fits squarely within the realm of strategic or tactical decisions"). Given the strength of the Commonwealth's case, we are not convinced that the absence of expert evidence challenging the voice identification deprived the defendant of a substantial

ground of defense.[11]

Order denying defendant's motion to vacate convictions affirmed.

Order denying defendant's motion for postconviction fees and costs affirmed.

By the Court (Rubin, Milkey & Henry, JJ.[12]),



Clerk

Entered: January 13, 2022.

[11] For the same reasons, we conclude the motion judge did not err in denying the motion for expert funds. See Commonwealth v. Johnson, 486 Mass. 51, 55 (2020) (denial of expert funds reviewed for abuse of discretion).

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