COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-347

COMMONWEALTH

vs.

JERMAINE CELESTER.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Jermaine Celester, was convicted, following a jury trial in 1995, of murder in the first degree, pursuant to G. L. c. 265, § 1, and armed assault with intent to murder, pursuant to G. L. c. 265, § 18 (b). On appeal, the Supreme Judicial Court remanded to the Superior Court to determine whether a new trial was warranted in view of the defendant's assertion that he was provided ineffective assistance of counsel. Commonwealth v. Celester, 473 Mass. 553 (2016). On remand, a Superior Court judge allowed the motion for a new trial, and following a second jury trial, the defendant was convicted of murder in the second degree.[1] On appeal, the defendant contends that (1) the judge violated his

[1] The jury acquitted him of armed assault with intent to murder pursuant to G. L. c. 265, § 18 (b).

constitutional right to present a third-party culprit defense; (2) the judge erroneously held that a witness, who had testified in the first trial, had a valid privilege under the Fifth Amendment to the United States Constitution; (3) the judge erred in refusing to grant judicial immunity to that same witness; (4) the prosecutor improperly stated in his closing argument that one of the victims identified the defendant as the shooter; and (5) the defendant's mandatory life sentence was disproportionate in view of his age at the time he committed the crime. We affirm.

Background. In February 1994, Wakime Woods[2] was shot, as was his friend, Derek Gibbs. Wakime died of his wounds; Gibbs was paralyzed. Just prior to the shooting, Wakime and Gibbs walked shoulder-to-shoulder with the defendant down the middle of a street in Brockton. Gibbs testified that there were no other persons or cars on the street.[3] Gibbs was in the middle of the group with the defendant to his right and Wakime to his left. Suddenly, the defendant stopped short, leaving Gibbs's peripheral view. As Gibbs turned in the defendant's direction, he was shot in the right side of his face and fell to the ground. He heard more gunshots and Wakime screaming for help.

[2] Because they share a surname, we use the first names of Wakime Woods, Tommy Woods, and J.D. Woods.

[3] Prior to the shooting, Gibbs's father had driven past them.

Marlene Scott, who was sitting in the kitchen of her mother's house near the scene of the shooting, heard the gunshots and looked out the window. She saw a body lying in the street and ran outside to render aid. She did not see any people (other than the two victims) or cars.

The Commonwealth's theory at trial was that the defendant shot Gibbs because, approximately five months earlier, Gibbs (along with Calvin Dyous and Larry Brown) witnessed the shooting of the defendant's close friend, Robert Moses, but the three had been unable (or unwilling) to identify the perpetrator. After Moses's shooting, the defendant repeatedly questioned Gibbs, Dyous, and Brown. The defendant was not satisfied with Gibbs's answers.

Two weeks before Wakime and Gibbs were shot, the defendant (along with two others whom Gibbs could not identify) gathered Gibbs, Brown, and Dyous together to question them again about Moses's murder. The defendant was upset and angry; he insisted that the three witnesses to Moses's murder accompany him to the police station to identify photographs of the murderer. He threatened that if they did not do so, he would shoot them. Brown and Gibbs went with the defendant, but Dyous did not. Gibbs was unable to identify anyone at the police station.

The defendant presented a third-party culprit defense; specifically, he maintained that the gunshots, which killed

Wakime and maimed Gibbs, were delivered by occupants of a vehicle that drove past them. Corrina DeFrancesco, who lived near the site of the shooting, testified that upon hearing gunshots, she looked out the window. Contrary to Scott's and Gibbs's testimony that there were no cars on the street, DeFrancesco testified that she saw a small dark-colored, possibly maroon, car with square headlights and tinted windows on the road. DeFrancesco ran outside to investigate and saw the car fleeing the scene. She further testified that Wakime told her that the shots came from the back passenger's side.

Brockton Police Officer Mark Reardon testified that after receiving a radio message to be on the lookout for the described car, he spotted a Ford Tempo fitting DeFrancesco's description a few blocks away from the shooting. After following the car, Reardon pulled it over. Two males exited the vehicle and fled. A third occupant got out from the backseat, did not flee, and was arrested. DeFrancesco eventually identified the Ford Tempo as the car she had seen fleeing after the shooting. The red Ford Tempo was searched and no ballistics evidence was found.

Discussion. 1. Third-party culprit evidence. As set forth supra, the defendant presented a third-party culprit defense. He contends, however, that the judge erred by not permitting him to present additional evidence regarding the

identities of the occupants of the Ford Tempo,[4] their relationship with the victims,[5] and some discrepancies in statements regarding their whereabouts on the evening of the shooting, which he refers to as "consciousness of guilt" evidence.[6]

"[T]he exclusion of third-party culprit evidence is of constitutional dimension and therefore examined independently." Commonwealth v. Silva-Santiago, 453 Mass. 782, 804 n.26 (2009). However, "[i]n conducting an independent examination whether the evidence of the alleged third-party culprit's prior conduct was

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[4] According to the defendant, the identities of the occupants of the vehicle were (i) Donald Outlar, who was arrested by Reardon, (ii) Tommy, whom Outlar and Reardon identified as the passenger who fled and whom J.D. identified as being in the Ford Tempo on the evening of the shooting, (iii) Shelton Terry, whom Outlar identified as the driver, and (iv) possibly J.D., who was arrested after reportedly running through backyards near the area of the fleeing suspects.

[5] Their relationship with the victims were that (i) Outlar and Terry had seen Gibbs at a barbershop earlier in the day, and Outlar stated that the Ford Tempo, which DeFrancesco placed at the scene of the crime and which was detained by Reardon a few blocks from the shooting, had been one block away from the scene earlier, (ii) Tommy was Wakime's cousin and reported in 2017 (just prior to the second trial) that he disliked Gibbs, and (iii) J.D. was Wakime's brother and stated that Tommy told him that he had gone to the scene of the crime after the shooting to check whether his friend was one of the victims.

[6] These discrepancies include (i) shortly before the second trial, Tommy identified Outlar as the driver and denied Terry was in the vehicle, (ii) Outlar identified Terry as the driver, (iii) Terry denied being in the car when he and Ruby Phillips, the registered owner of the vehicle, came to the police station to claim the car, and (iv) Phillips said she had lent the car to Ty Washington, but later denied the same and instead said she had lent the car to Terry.

too remote in time and too dissimilar, we [do] not . . . displace the judge's customary discretion with regard to the admission of evidence." Commonwealth v. Rosario, 444 Mass. 550, 556-557 (2005). Thus, the Supreme Judicial Court has held that where (as is the case here) the judge does not preclude introduction of evidence that someone else committed the crime or otherwise make any ruling that excluded an entire category of third-party culprit evidence,[7] we review the judge's assessment that the probative value of proffered evidence is outweighed by some countervailing prejudicial effect for an abuse of discretion. Id. at 557.

Especially in view of the third-party culprit evidence that was admitted, see supra, the judge did not abuse his discretion in excluding the additional proffered evidence. See Rosario, 444 Mass. at 557. As is evident from the summary of the proffered evidence set forth in notes 4 to 6, supra, the judge acted well within his discretion in finding that the additional evidence was too speculative and confusing and thus of limited probative value. See Silva-Santiago, 453 Mass. at 801, quoting

[7] This is not a case where the judge prevented the defendant from introducing a third-party culprit defense altogether or excluded an entire category of evidence. Contrast Commonwealth v. Conkey, 443 Mass. 60, 67-70 (2004) (conducting independent review of judge's decision to exclude evidence of victim's landlord's sexual assault of former girlfriend and more recent pattern of predatory, aggressive behavior towards women who spurned his advances).

Commonwealth v. Rice, 441 Mass. 291, 305 (2004) (third-party culprit evidence admissible where not too remote or speculative and will "not tend to prejudice or confuse the jury, and there are other 'substantial connecting links' to the crime"). It was not an abuse of discretion for the judge to conclude, for example, that the identities of the three (or possibly four) occupants were, on balance, more confusing and prejudicial than any marginal value those identities might add to DeFrancesco's and Reardon's testimony regarding the Ford Tempo and Wakime's dying declaration, that their relationships (a brother and a cousin to Wakime) or earlier sightings of Gibbs in a barbershop provided little additional value to the already admitted third-party culprit defense, or that the alleged consciousness of guilt evidence added marginal benefit in light of the evidence that the occupants fled the scene, which was admitted already.

2. Fifth Amendment privilege. The defendant next maintains that the judge erred in finding that Dyous, who had testified at the defendant's first trial, had a valid Fifth Amendment privilege on the basis that his testimony, in particular cross-examination, could expose him to criminal contempt. We review the judge's determination for an abuse of discretion. See Commonwealth v. Pixley, 77 Mass. App. Ct. 624, 628-629 (2010). When determining whether a claim of privilege is justified, "[t]he standards are highly protective of the

constitutionally guaranteed right against self-incrimination." Commonwealth v. Martin, 423 Mass. 496, 502 (1996). A witness may invoke the privilege against self-incrimination and refuse to testify unless it is "'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." Id., quoting Commonwealth v. Funches, 379 Mass. 283, 289 (1979). In assessing the validity of the assertion of the privilege, a judge takes into account "the real possibility of having to strike [a witness's] direct testimony if [the witness] exercise[s] the privilege on cross-examination, and having to declare a mistrial." Pixley, supra at 628.

The Commonwealth issued a trial subpoena to Dyous (who had been eluding the Commonwealth's attempts to reach him prior to the second trial). On the first day of the second trial, the judge told Dyous "to appear at the appropriate time to testify in this case. It will not be today." The judge stated that he expected that Dyous would be contacted by one of the parties and that it was important to respond and actually come back to court. The judge told Dyous that if he did not, he would be subject to a warrant. Dyous acknowledged the judge's order. Nevertheless, Dyous did not respond when the Commonwealth attempted to reach him. Despite one-half dozen attempts, he was

unreachable either through his mother or at the cellular telephone number he had provided to the Commonwealth specifically for the purpose of complying with the judge's order. The prosecutor reported Dyous's failure to respond to calls, and the judge issued a bench warrant. The prosecutor assembled a fugitive apprehension team to obtain Dyous's presence in court. The next day, Dyous appeared. He was ordered to wear a global positioning system bracelet until he testified. Thereafter, Dyous asked for counsel, was appointed an attorney, and raised a Fifth Amendment privilege. After conducting a hearing pursuant to Martin, 423 Mass. at 502,[8] the judge agreed that the defendant had a valid basis for asserting the privilege.

On this record, the judge did not abuse his discretion in finding that, in particular on cross-examination, Dyous's testimony could lead to self-incrimination. See G. L. c. 233, § 5; Commonwealth v. Delaney, 425 Mass. 587, 596 (1997), cert. denied, 522 U.S. 1058 (1998), quoting Commonwealth v. Brogan, 415 Mass. 169, 171 (1993) (where Commonwealth established "there was a clear, outstanding order of the court, that the defendant knew of that order, and that the defendant clearly and

[8] Because only the Justices of the Appeals Court may examine the contents of the Martin hearing, we discuss the merits to the extent they were revealed in open court. See Pixley, 77 Mass. App. Ct. at 628 n.3, 629.

intentionally disobeyed that order in circumstances in which he was able to obey it," witness can be convicted of criminal contempt). If, for example, Dyous testified as he did in the first trial, the defendant might try to impeach his credibility by eliciting testimony regarding Dyous's failure to abide by the judge's order, thereby exposing Dyous to a potential charge of criminal contempt. If, on the other hand, he testified (as the Commonwealth suggested he might) more helpfully to the defendant than he had in the first trial, the Commonwealth might try to impeach him by eliciting testimony that he had been nonresponsive to the Commonwealth pretrial, that he had been ordered to appear, and that he had failed to respond (at least initially). Such testimony, the judge properly concluded, might lead to a link in the chain towards criminal contempt.

The defendant, nonetheless, maintains that Dyous lacked the required intent for criminal contempt because he did not intend to thwart the administration of justice and received insufficient warnings that his failure to comply with the order would expose him to criminal consequences. However, Dyous's failure to respond (despite numerous attempts to garner his cooperation) in violation of the judge's order to do so could be a basis to infer the requisite intent (even if Dyous changed his mind and ultimately conformed his conduct to the judge's order once the bench warrant issued). See Furtado v. Furtado, 380

Mass. 137, 141 (1980), quoting Blankenburg v. Commonwealth, 260 Mass. 369, 373 (1927) (charge of criminal contempt "is designed wholly to punish an attempt to prevent the course of justice"). Moreover, the judge expressly told Dyous that his failure to respond when called could subject him to a warrant. Contrast Commonwealth v. Carr, 38 Mass. App. Ct. 179, 181 (1995) (contempt improper where "defendants were neither told of the significance of being recognized as a witness nor warned of the consequences of failure to appear"). Because a valid Fifth Amendment privilege exists where there is a possibility of prosecution for criminal contempt even if conviction is unlikely, the judge did not abuse his discretion. See Commonwealth v. Borans, 388 Mass. 453, 459 (1983), quoting Turner v. Fair, 476 F. Supp. 874, 880 (D. Mass. 1979) ("neither a practical unlikelihood of prosecution nor the prosecutor's denial of an intention to prosecute negates an otherwise proper invocation of the Fifth Amendment").

3. Judicial immunity. The defendant contends that the judge should have granted judicial immunity to Dyous on the ground of prosecutorial misconduct. See Commonwealth v. Brewer, 472 Mass. 307, 312 (2015), quoting Commonwealth v. Vacher, 469 Mass. 425, 439 (2014) (leaving open possibility that judge may grant immunity to defense witness where government has engaged in "deliberate intent to distort the fact-finding process").

The judge, however, found no prosecutorial misconduct -- a finding that is not clearly erroneous on the record before us. See Commonwealth v. Valentin, 91 Mass. App. Ct. 515, 522 (2017) (proper denial of immunity where records failed to show prosecutorial misconduct and proffered testimony "relates only to the credibility of the government's witnesses").

4. Prosecutor's closing argument. The defendant argues that the prosecutor's phrase in his closing argument, "but [Gibbs] told you that it was this man," was improper in light of the allowance of the defendant's motion to exclude Gibbs from identifying the defendant as his shooter. We view the prosecutor's remarks in light of the "entire closing argument, the judge's instructions to the jury, and the evidence produced at trial." Commonwealth v. Lyons, 426 Mass. 466, 471 (1998). In the closing, which spanned twenty-seven pages of transcript, the prosecutor reminded the jury multiple times that Gibbs did not complete the turn to see the defendant shoot him. When viewed in context, there was no error. See Commonwealth v. Whitman, 453 Mass. 331, 345 (2009).

5. Life sentence. Finally, the defendant contends his life sentence is unconstitutionally disproportionate because he

was twenty-one years old at the time of the shooting. The argument lacks merit. See Miller v. Alabama, 567 U.S. 460 (2012).

Judgment affirmed.

By the Court (Lemire, Singh & Wendlandt, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: January 30, 2020.

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