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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 86-57353

COMMONWEALTH

v.

THOMAS ROSA

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

On March 4, 1993, Thomas Rosa was convicted of first-degree murder and kidnapping. The Supreme Judicial Court ("SJC") affirmed the conviction, and noted:

> At trial, two witnesses identified the defendant as the man with [Gwendolyn Taylor [, the victim,] and the person who walked off with Taylor the last time she was seen alive. Charita Offley identified Rosa at trial, stating she saw his face when she, Taylor, and the man were in the entryway of the apartment building. A second witness, Sharon Areh, testified that she had seen Rosa holding Taylor at the entrance to the apartment building. Areh had been walking home with a companion at the time. She stated at trial that she recognized the man holding Taylor as Rosa. Areh had seen him on several occasions previously because Rosa lived upstairs from Areh's cousin.
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> Physical evidence corroborated the identification of the two witnesses. Police detectives had collected physical evidence at the scene of the crime, including blood samples. The results of blood typing of those samples were consistent with the government's theory that Rosa committed the crime. Several hairs were found on Taylor's clothing, although none could be matched to anything that would implicate Rosa. The other major piece of evidence was a brown coat found at Rosa's apartment. Two identification witnesses, Charita and Tammy Offley, had stated that the man with Taylor had been wearing a brown coat and that the coat found at Rosa's was the same coat they had seen.

See Commonwealth v. Rosa, 422 Mass. 18, 21-22 (1996) (footnotes omitted).

At trial, the Commonwealth claimed that biological material on the brown coat seized from Rosa, a "major" piece of evidence, was consistent with the victim's blood type, and that fluids found in the victim's vaginal cavity were consistent with Rosa's blood type. The

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Commonwealth further claimed that the testimony of eyewitnesses, principally Offley and Areh, was reliable because the extreme stress and trauma they experienced significantly improved their memory and because their repeated identification of Rosa and their confidence in that identification were evidence of accuracy.

Subsequently-available scientific testing has weakened the Commonwealth's claims based on the biological materials found on the brown coat and the victim. Moreover, advances in eyewitness science have directly undercut the Commonwealth's trial arguments about trauma, repeat identification, and confidence that were used at trial to bolster the eyewitnesses' testimony. Pointing to these developments, Rosa moves for a new trial based on newly discovered evidence and a confluence of factors. The Commonwealth, while reserving its rights to contest certain of the newly available DNA evidence at trial, assents to the motion.

For the reasons that follow, Rosa's motion is **ALLOWED**.

BACKGROUND

A. Trials and Conviction

Following the crime, police obtained eyewitness accounts from Offley, the victim's roommate, and Areh, Offley's downstairs neighbor and the cousin of someone who lived in the same apartment building as Rosa. They placed Rosa and the victim together on the night of the crime. The police also analyzed physical evidence using blood typing tests. Analysis of body fluids found in and on the victim were consistent with Rosa's blood type. Similarly, a stain on Rosa's jacket, seized by police from Rosa's apartment and identified by Offley as the one worn on the night in question by the assailant, whom she identified as Rosa, revealed biological material consistent with the victim's blood type.

Rosa was first tried in late September and early October of 1986. The jury could not reach a verdict in that trial. Rosa was tried a second time in November of 1986 and was found guilty on all three charges. Rosa appealed, asserting that the prosecution had improperly made substantive use of the hearsay testimony. The SJC agreed, reversed the judgment, and remanded the case for a new trial. See Commonwealth v. Rosa, 412 Mass. 147 (1992).

Rosa was tried for a third time in February and March 1993. The prosecution's case rested on the eyewitness testimony of Offley and Areh, corroborated by physical evidence in the form of blood typing of biological material found on the brown coat and during the autopsy of the victim.

The first eyewitness, Offley, stated that at about 1 AM, she saw the victim in the entryway of her apartment building[1] with a man she later identified as Rosa, who held a "shiny object to [the victim's] shoulder." Transcript ("Tr.") at 2 58-59. The victim, who appeared to be frightened, asked for $100, which Offley did not have. Offley then went upstairs to see if others in her apartment had the money. The man (purportedly Rosa) told her, "yo, don't call the police." Offley was frightened by this encounter. Offley testified that the man was wearing a "tannish brown coat," Tr. 2:61, which she later identified from evidence seized from Rosa's apartment by the police, and had no hat on. Offley testified that the man was a stranger to her, and that she saw the man for about ten seconds. Tr. 2:139-140. Nevertheless, Offley testified there was "[n]o doubt" in her mind that the man she saw was Rosa. Tr. 2:62. She also testified that two days after the incident, she positively identified Rosa from mugshot books she was shown by the police. Tr. 2:70-71 ("This is him...I'm definite."). She further testified that she previously identified Rosa at hearings in October and November 1986.

[1] Offley testified that the area was illuminated by a "bright light." Transcript 2:144-145.

The second eyewitness, Areh, testified that on the night the victim disappeared, she saw Rosa for about ten seconds and from a distance of about eight feet standing on the sidewalk in front of the apartment building. He was holding the victim, and the victim looked frightened. Rosa was wearing a hat. Areh had seen Rosa in passing multiple times before that night because he lived in an apartment above her cousin. Like Offley, she identified Rosa's picture from mugshot books the police showed her, and previously identified Rosa at hearings in October and November 1986.

The Commonwealth used blood typing evidence from the brown coat and vaginal swabs taken from the victim's autopsy to bolster the eyewitness' testimony; specifically, evidence that bodily fluids found in and on the victim were consistent with Rosa's blood type and that the stain found on the brown coat revealed biological material consistent with the victim's blood type.

During closing arguments, the Commonwealth argued that the eyewitness' testimony was corroborated by the physical evidence:

> In the course of his examination, [the medical examiner, Dr. Suarez] he does the vaginal swabs as a result of the concentrated liquid that he finds in her vaginal cavity. You heard the chemist [Mr. Bogdan] testify that as a result of the blood grouping on those vaginal swabs, the presence of the "B" [blood type] comes forth and the "B" [blood type] is consistent with the defendant, Thomas Rosa, not consistent with [Gwendolyn Taylor]. … And the stains on the jacket were consistent with the "O" blood grouping status, which is consistent with Gwendolyn Taylor and not consistent with the defendant.

Tr. 5:79. The Commonwealth further argued that the testimony of the eyewitnesses was reliable because the extreme stress and trauma they experienced significantly *improved* their memory, that their repeated identification and confidence in such identification were evidence of accuracy, and that their familiarity with Rosa presented "devastating evidence" against him:

> it's very easy to come into the courtroom and have witnesses put on the stand and have counsel ask numerous, numerous questions and go over and over specific things. You've got to put yourselves and appreciate the drama and the intensity and the fear and the moment in your minds to deal with the case, because it isn't that easy as you hear it

portrayed in the courtroom. It's life out on the street at one o'clock in the morning. Things are happening real fast. And Cherita [sic] [Offley], when she runs up to tell the people up there that Gwen [Taylor] got herself in trouble, the defendant says, don't call the police, yo, don't call the police.

I mean, so all this conversation about whether Gwendolyn knew she was in trouble or what the situation was at that point in time, he's telling Cherita, don't call the police. Then she says to Cherita, Pebbles, her nickname, he's not kidding. And Gwendolyn says, I know, I know. And that's when she goes running upstairs.

You know what happened after that with respect to the photo I.D. of Cherita. You know because you heard her testify to it and Detective Doyle as to how that went. She positively picked out this guy right here. You heard that on prior occasions, ladies and gentlemen, in Dorchester Court, I believe it was twelve days later, she picked him out. And, in October of 86, she picked him out. And, in November of 86, she picked him out. Seven and a half years ago. She comes into court today -- I'm sorry -- in the course of this trial and picks him out and identifies him again. *That's because when something this traumatic happens to you in your life, the loss of a friend or the loss of a loved one or the loss of a president, for example, when President Kennedy was killed, things like that, they create in your mind an indelible imprint and you'll never forget certain things about it at the time. You probably remember exactly where you were when you received that news about the president and what you were doing for a living and maybe who even told you and you remember the T.. But you don't remember maybe what you had for breakfast that morning or what you were wearing. That's because the more dramatic and traumatic the experience, the more the mark becomes indelible and you'll never have it erased from your life.*

Cherita, for the rest of her life, will never forget his face; because it was as devastating and as traumatic an event that could ever happen to her ... It was devastating, and she'll never forget it seven and a half years later; because she's going to live with it for the rest of her life and indelibly imprinted in her mind is his face and that photograph that she picked out.

Then what happens? After that identification of the photo happens and Sergeant Horsley is informed by Detective Doyle that she picked out a photo of Thomas Rosa, 61 Colonial Avenue, Sergeant Horsley then gets a call from Sharon Areh. And Sharon area tells him that she wants to have a conversation with him. This is after Cherita has already picked out Thomas Rosa. And the chronology is very important because not only is Sharon Areh's identification overwhelming but it certainly bolster's Cherita's if you have a problem with Cherita. *And I would submit that you shouldn't because you don't come into court and raise your hand and take that oath and positively identify somebody as the kidnapper and the murderer and the rapist of your roommate unless you're 100-percent sure time and time again.*

So Sharon Areh says to Horsley just what she told you, that she drove up that night and that she observed the individual walking across the street right in that same time frame

> with Gwendolyn, who she knew from living upstairs, that he had one hand, I believe she testified they were arm locked, and the other hand in his pocket. And she saw the look in Gwendolyn – I mean, is there any doubt in your mind that Sharon Areh knew at that point in time that there was something wrong and that Gwendolyn was in some kind of a situation? And she said she looked right in her eyes and she could see the fright and the scared look in Gwendolyn's eyes.
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> No matter how much cross-examination and no matter how much questions were asked, *Sharon Areh's testimony of the defendant in court the other day stands the test of time because she knew Thomas Rosa before the incident, an absolutely devastating piece of evidence.* She knew him from the past. She had known him from at least six to eight times that she had seen him over the course of that summer. She tells Sergeant Horsley not only do I know him, I can tell you where he lives. He lives over at 61 Colonial Avenue. And how did she know that? Because her cousin lived at 61 Colonial Avenue, devastating identification testimony, ladies and gentlemen. ...
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> I mean, Sharon Areh was scared. You saw her testify here. Did she strike you as being scared on the stand? Let me tell you something. Seven and a half years have gone by, yet ... Cherita ... shed tears on the witness stand during the course of their testimony. It doesn't go away. *It doesn't get any better with time. It's the most dramatic, traumatic thing that could happen to people in the course of their lives. They're never going to forget it and they're never going to forget who did it. Thomas Rosa.*

Tr. 5: 70-77 (emphasis added).

Rosa was found guilty of first degree murder and kidnapping but acquitted of aggravated rape. The SJC affirmed the convictions. Rosa, 422 Mass. at 19.

B. New Trial Motions

In 2001, at Rosa's request, Orchid Cellmark, a DNA testing company, performed post-trial DNA testing of the brown coat and the rectal and vaginal swabs collected from the victim. It ran a Y-STR DNA test on the vaginal swabs. Its report excluded the victim as a contributor to the DNA on the brown jacket but could not exclude Rosa as a source of the DNA from the vaginal swabs. The rectal swabs produced no results.

In 2002, Rosa filed a motion for a new trial based on the results from the testing of the brown coat. It was denied without a hearing in 2003. The single justice subsequently denied his petition for leave to appeal the denial, concluding that while the evidence was newly discovered,

it would not have affected the jury's verdict. See Commonwealth v. Rosa, SJ-2003-0087 (2003), attached as Exhibit H to Docket No. 106. Thereafter, the federal district court and First Circuit rejected Rosa's petition for habeas relief. See Rosa v. Maloney, 197 F. App'x 10 (1st Cir. 2006).

In 2017, Rosa submitted the vaginal, rectal, oral, and cervical scraping samples taken from the victim to Bode Cellmark, another DNA testing company, for further testing and analysis. That lab ran Y-STR DNA tests on the samples.

Rosa subsequently hired Dr. Steven Laken, a DNA expert, who concluded that with regard to the vaginal swab, Orchid Cellmark's 2001 conclusion was incorrect and that Rosa was excluded as a potential contributor to the major profile.

On June 29, 2020, Rosa filed a new motion for a new trial, which he amended on February 16, 2021. He argued that under a confluence of factors analysis, he was entitled to a new trial. Among the factors he highlighted were newly discovered DNA testing that eliminated Rosa as the major contributor in the semen recovered from the victim; DNA testing alleged in support of his first motion for a new trial excluding the victim as a contributor of biological material on Rosa's brown coat; and developments in eyewitness science. In support of it, Rosa, among other things, relied on Dr. Laken's analysis.

Following the amendment, the Commonwealth retained its own DNA expert, Dr. Karl Reich, to evaluate the Bode Cellmark results. He produced a report dated July 9, 2021, in which he concluded that Rosa was excluded from cervical samples taken from the victim but not excluded from oral or vaginal samples. Specifically, Reich concluded that there was more than one male contributor to the DNA found in samples taken from the victim, and that Rosa was excluded from sample E01, a cervical scraping, but not excluded from sample E02, oral swabs, or from sample E07, vaginal swabs. In reaching this conclusion, he relied on certain data spikes

or "peaks" in the graphs of Bode Cellmark's results which Bode Cellmark had ignored because they were not considered sufficiently reliable under the lab's standards.

On January 7, 2022, the Commonwealth filed a Response to the Defendant's Motion for New Trial, in which it conceded that a new trial was warranted, in part based on Reich's opinion. In his Reply to this response, Rosa indicated that, in addition to the conclusions of Dr. Laken, he intended to rely on Reich's conclusions to support his motion. The Reply further suggested that the newly discovered DNA evidence alone warranted a new trial. See Docket No. 145.

On June 15, 2022, this Court held a hearing on Rosa's motion and asked whether the DNA analysis and opinion provided by Reich was reliable and admissible under Section 702 of the Massachusetts Guide to Evidence and applicable caselaw. See, e.g., Commonwealth v. DiCicco, 470 Mass. 720, 729–730 (2015) (noting that the admissibility of DNA test results should be determined on a case-by-case basis). Specifically, the issue for the Court was whether the methodology applied by Reich was generally accepted or otherwise reliable under Daubert-Lanigan such that Reich's work would be admissible at trial and therefore relevant to the new trial motion. Even though the Commonwealth initially assented to Rosa's motion for a new trial, it objected to the admissibility of Reich's analysis.

On November 18, 2022, the Court held the evidentiary hearing to determine whether Reich's DNA analysis and opinion based upon it were sufficiently reliable to get to a factfinder under the principles set forth in Daubert-Lanigan. After the hearing, the Commonwealth filed a memorandum arguing Rosa had not shown that Reich's underlying scientific methodology was sufficiently reliable. In a decision dated April 20, 2023, the Court concluded that Reich's analysis and opinion were reliable under Daubert-Lanigan and therefore admissible. It found that while Reich's findings were subject to attack, such an attack went to the weight of the

evidence and not to their admissibility. In so ruling, the Court note that the Commonwealth declined to call its own expert at the hearing to challenge the evidence Rosa presented in support of Reich's methodology.

On June 5, 2023, the Court heard further argument. During it, the Commonwealth reaffirmed its assent to Rosa's motion, but reserved the right to renew at trial its challenge to Reich's DNA analysis.

DISCUSSION

A trial judge is authorized to grant a new trial "at any time it appears that justice may not have been done." Mass. R. Crim. P. 30 (b). Where a motion is premised on newly-discovered evidence, the defendant bears the burden to prove that: (1) newly available or newly discovered evidence exists; and (2) the new evidence "casts a real doubt on the justice of the conviction." Commonwealth v. Grace, 397 Mass. 303, 305 (1986). The judge must decide "whether the new evidence would have been a real factor in the jury's deliberations." Id. at 306. It is not enough for the new evidence to be "material and credible," it must also "'carry a measure of strength in support of the defendant's position.'" Commonwealth v. Shuman, 445 Mass. 268, 272 (2005) (citation omitted).

Where a new trial motion is based on a so-called "confluence of factors," the judge "look[s] beyond the specific, individual reasons for granting a new trial" and considers whether the case before them presents the "rare" situation where "a number of factors act[ed] in concert to cause a substantial risk of a miscarriage of justice and therefore warrant the granting of a new trial." Commonwealth v. Rosario, 477 Mass. 69, 77-78 (2017). See also Commonwealth v. Diaz Perez, 484 Mass. 69, 76 (2020), abrogated on other grounds by Commonwealth v. Tavares, 491 Mass. 362 (2023) (a substantial likelihood of a miscarriage of justice can be "demonstrate[d] [if]

… the defendant [can] … show that any such error was likely to have influenced the jury's conclusion.") (internal quotes omitted); Commonwealth v. Epps, 474 Mass. 743, 767 (2016) (a new trial is required "where there is a substantial risk of a miscarriage of justice because a defendant was deprived of a substantial defense, regardless of whether the source of the deprivation is counsel's performance alone, or the inability to make use of relevant new research findings alone, or the confluence of the two")

Here, Rosa argues that newly discovered evidence (Reich's DNA analysis) and a confluence of factors, including new developments in eyewitness research, requires a new trial.

To the extent Rosa argues that Reich's DNA analysis is newly discovered evidence entitling him to a new trial, he has met his burden. As to the first requirement of the test, there can be no doubt that Reich's analysis is newly discovered. As to the second requirement, the impact of this evidence must be considered in light of the 2001 testing of the brown coat that excluded the victim's DNA (which is also newly discovered for purposes of this analysis).[2] At trial, Offley testified that the alleged assailant had been wearing a brown coat and that the coat found at Rosa's was the same coat. Rosa, 422 Mass. at 21–22. In its decision affirming Rosa's conviction, the SJC described the coat as a "major piece of evidence." Id. at 21. Moreover, in its closing the Commonwealth sought to strengthen the eyewitness testimonies by emphasizing both that the stain found on the brown coat was consistent with the victim's blood type (the O blood type) and that fluids from the victim's vaginal cavity were consistent with Rosa's blood type (the B blood type). See Tr. 5:79. Taken together, the significance of the newly discovered DNA analysis is twofold:

> First, the evidence tends to bolster the argument that [assertions based on biological samples] presented at trial were erroneous, thereby eliminating a piece of evidence that

[2] Although denying his petition for appeal, the single justice concluded that the test result constituted newly discovered evidence.

either did or could have linked the defendant to the crime. Second, the newly available DNA evidence could be used at a new trial because it would tend to contradict the testimony and undermine the credibility of the prosecution's key witness[es] [here, Offley and Areh], and would transform what had been the prosecution's only physical evidence into evidence on behalf of the defendant.

Commonwealth v. Cameron, 473 Mass. 100, 109–110 (2015). See also Commonwealth v. Cowels, 470 Mass. 607, 617-618 (2015) (new trial granted where DNA testing "eliminates the [bloody] towels [allegedly connected to the murder] as evidence against the defendants.").

Reich's analysis, in combination with the 2001 testing results of the material on the coat, "would probably have been a real factor in the jury's deliberations," Grace, 397 Mass. at 305, and raises "a serious doubt [as to] whether the result of the trial might have been different" had this evidence been presented, Commonwealth v. Randolph, 438 Mass. 290, 297 (2002) (citation omitted). But Rosa does not rely on this ground alone, and instead asserts a confluence of factors supports his motion – that the new DNA evidence, coupled with statements in the prosecution's closing concerning the reliability of eyewitness identification that have since been debunked by newly available scientific research,[3] warrant a new trial. The Court agrees.

The eyewitness science undermines many of the Commonwealth's arguments. As noted above, in its closing, the Commonwealth argued that the testimony of the eyewitnesses was reliable because the extreme stress and trauma they had experienced significantly *improved* their memory. It also argued that their repeated identifications and their confidence in those identifications were evidence of accuracy. See Tr. 5: 70-77. These arguments, however, are scientifically erroneous, as reflected in the decision in Commonwealth v. Gomes, 470 Mass. 352,

[3] The eyewitness jury instruction that the Supreme Judicial Court adopted in 2015 had "no retroactive application," Commonwealth v. Gomes, 470 Mass. 352, 376 (2015), holding modified by Commonwealth v. Bastaldo, 472 Mass. 16 (2015), but the scientific principles underlying it are relevant in a case such as this where the prosecutor specifically referenced now-debunked principles. See Commonwealth v. Alcide, 472 Mass. 150, 167 n. 23 (2015) (court noting that it must not be "unmindful of the concerns that prompted" new rules involving in-court identification, such that "we need not blind ourselves to the unfairness that may be created by in-court show-up identifications in certain circumstances.").

380 (2015), holding modified by Com. v. Bastaldo, 472 Mass. 16 (2015). Gomes recognized that stress and trauma arising from an event detracts from acquiring and retaining an accurate memory of it, rather than enhancing accuracy, as the Commonwealth argued:

> [A]n eyewitness under high stress is less likely to make a reliable identification of the perpetrator. [H]igh levels of stress significantly impair a witness's ability to recognize faces and encode details into memory. There is considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details. This principle is counterintuitive to the common misconception that faces seen in highly stressful situations can be 'burned into' a witness's memory.

Id., at 372–373 (internal quotations, citations, and footnote omitted). Moreover, where, as here, the assailant evidently had a weapon (the shiny object held to the victim's head), "the visible presence of a weapon may reduce the reliability of an identification if the crime is of short duration, but the longer the event, the more time the witness has to adapt to the presence of the weapon." Id. at 381. Further, a witness' multiple identifications or level of confidence, also emphasized by the Commonwealth, are not reflective of accuracy. As explained in Gomes, "[w]hen a witness views the same person in more than one identification procedure or event, it may be difficult to know whether a later identification comes from the witness's memory of the actual, original event, or from the witness's observation of the person at an earlier identification procedure or event." Id. at 388. Indeed, "[y]ou should consider how much time elapsed between the event observed and the identification. Generally, memory is most accurate right after the event and begins to fade thereafter." Id. at 383. Gomes additionally explained that "an eyewitness's express[ion of] certainty in an identification, standing alone, may not indicate the accuracy of an identification, and that this is especially true where the witness did not describe that level of certainty when the witness first made an identification." Id. at 372. Further, Areh testified the man wore a hat. Gomes recognized that "hats, hoods, and other items that conceal a

perpetrator's hair or hairline ... impair a witness's ability to make an accurate identification." Id. at 380 n. 5. And, both eyewitnesses were black, and the assailant was Hispanic, another detracting factor: "[R]esearch has shown that people of all races may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race." Id. at 382.

Under a confluence of evidence analysis, the new DNA evidence and modern eyewitness science warrant a new trial. Rosa's conviction, the result of three trials and based on evidence that was "far from overwhelming," Commonwealth v. Diaz Perez, 484 Mass. 69, 77 (2020), abrogated on other grounds by Commonwealth v. Tavares, 491 Mass. 362 (2023), was based on two eyewitness identifications supported by blood typing, all of which has been called into question. The new DNA evidence excluding Rosa debunks the prosecution's closing statement connecting the victim to the brown jacket and thus to Rosa, and casts doubt regarding the reliability of the eyewitness testimony given by Offley, who testified that Rosa's brown jacket was worn by the assailant. Moreover, the advances in eyewitness science suggest that the identifications of the eyewitnesses are not as strong as the Commonwealth argued they were. Because such evidence would be a real factor within jury deliberations, there was a substantial risk of a miscarriage of justice sufficient to grant a new trial.

ORDER

For the foregoing reasons, Rosa's motion for a new trial is **ALLOWED**.

SO ORDERED.

Michael D. Ricciuti
MICHAEL D. RICCIUTI
Justice of the Superior Court

Dated: September 6, 2023