**COMMONWEALTH OF MASSACHUSETTS**
**SUPREME JUDICIAL COURT**

**HAMPSHIRE COUNTY** **No. SJC-12310**

**COMMONWEALTH OF MASSACHUSETTS,**
**Appellee**

**v.**
**CARA RINTALA,**
**Appellant**

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# BRIEF FOR THE DEFENDANT ON APPEAL FROM THE HAMPSHIRE DIVISION OF THE SUPERIOR COURT DEPARTMENT

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1. Whether the medical examiner's opinion as to the decedent's time of death should have been excluded where it was based solely on subjective observations by untrained first responders that Ann's skin was "cold" and her body was "stiff" and speculation that she did not struggle with her attacker despite undisputed evidence that she did.

2. Whether the defendant was entitled to a required finding of not guilty where the Commonwealth's case depended on expert opinions about time of death that ignored uncontroverted evidence that the decedent was in a violent struggle immediately before her death, supporting a reasonable inference that she was killed at a time when the defendant was not present.

3. Whether opinion testimony from the Commonwealth's "paint expert" that the Defendant intentionally poured paint on the decedent's body immediately before first responders arrived created a substantial likelihood of a miscarriage of justice, given that his opinions were unreliable because they were based on flawed experiments which he was unqualified to design, naked assumptions or both.

4. Whether the admission of disputed and remote evidence of domestic violence and marital strife as motive evidence despite substantial recent reconciliation was reversible error.

5. Whether the trial judge's *sua sponte* decision to instruct the jury that they could consider evidence of the defendant's consciousness of guilt was reversible error where the defense did not focus on that evidence in closing and had no opportunity to respond.

6. Whether the prosecutor's closing argument created a substantial likelihood of a miscarriage of justice where he materially misstated evidence.

7. Whether the defendant was deprived of her constitutional right to due process in a third trial.

## INTRODUCTION

The Commonwealth's murder case against Cara Rintala, a firefighter who had no prior criminal convictions, was built on a terrifying combination of flawed forensic science and outright junk science. After three trials, the Commonwealth convinced a jury to convict Cara of deliberately premeditated murder for the death of her wife, AnnMarie,[1] based entirely on disputed circumstantial evidence: (1) an ambiguous and speculative time of death estimate; (2) remote motive evidence; and (3) hotly disputed consciousness of guilt evidence, including an unreliable "expert" opinion that she intentionally poured paint on Ann's body just before first responders arrived.

Shortly after 7:00 p.m., on March 29, 2010, Cara ran to her neighbor's home with her young daughter, Brianna. She asked him to take Brianna and call 911 because Ann was in her basement and needed help.

First responders, who all knew Cara and Ann, found Cara sitting on her basement floor, holding Ann's body in her lap and sobbing. There was blood and paint around and on Ann's body and there were other obvious signs of struggle. The medical examiner determined that the cause of death was manual strangulation. Cara's hands and arms revealed no sign of struggle.

[1] Because both parties share the same last name, this memorandum will refer to them by their first names. Also, for brevity, AnnMarie will be referred to as "Ann".

Later that night, and again the next day, a state trooper interrogated a fully cooperative Cara for several hours, without a lawyer. Cara steadfastly maintained her innocence. She insisted that she had come home to find Ann dead.

There were no eyewitnesses to the crime. There was no physical evidence linking Cara to the killing.

The Commonwealth's case depended almost entirely on an ambiguous time of death estimate. Cara told police she was home with Ann until roughly 3:00 p.m., when she left with Brianna to run errands so that Ann could sleep. Ann had just worked a night shift, returned home after 8:00 a.m., and had to return to work for a second consecutive night shift at 8:00 p.m. Cara came home at approximately 7:00 p.m. to find Ann's dead body at the foot of the basement stairs. The Commonwealth's medical examiner opined that Ann died prior to 3:00 p.m. - when Cara admitted she was home - based solely on second-hand reports from untrained first responders that Ann's body was "cold" and "stiff". Defense experts, including the former chief medical examiner for Washington, D.C., strongly disagreed. Noting undisputed physical evidence that Ann was in a violent struggle with her attacker immediately before her death, they explained that such a struggle would have sped the onset of rigor mortis and therefore, Ann could have died as late as 4:30 p.m., after Cara had left the house with their daughter.

Faced with this ambiguous evidence, two different juries could not agree on a verdict.

Prior to the third trial, the Commonwealth secured a new expert witness: David Guilianelli, an employee of a consumer paint company. Despite a lack of any relevant experience, Guilianelli designed experiments upon which he based an opinion that paint found pooling around Ann's body was "deliberately poured" just before first responders arrived, when only Cara was home.

Trial counsel moved prior to trial to exclude both the medical examiner's time of death estimate and Guilianelli's opinion on multiple grounds, including that they did not satisfy the *Daubert/Lanigan* requirement that the expert's opinion be reliable. However, the trial judge denied both motions without an evidentiary hearing.

When she heard Guilianelli testify for the first time at trial, the trial judge openly questioned her decision to permit his opinion testimony. But counsel did not call an expert to challenge the reliability of Guilianelli's experiments or his opinions.

After trial, Dr. Arghavan Louhghalam, a professor of material sciences, provided an affidavit in support of a new trial motion demonstrating why Guilianelli's opinions were not reliable and therefore should have been excluded. But because the trial judge had retired, this fact-intensive motion was assigned to a new judge

(Mulqueen, J.), who had been a prosecutor in the Northwestern District Attorney's Office when Ann was killed and colleagues in that office began investigating her death. Without disclosing that potential conflict, she denied the motion and the request for an evidentiary hearing. At the very least, Cara was entitled to an evidentiary hearing on her motion.

On top of all this, there was powerful evidence that Ann was killed by her co-worker, Mark Oleksak, who admitted he was in love with her, had secretly given her credit cards on which she made thousands of dollars in charges, said he wanted to see her on the date of her death, was the last person to text her before her death, deleted that text, hid all of this from his wife, and repeatedly lied to the police about his activities on the date of her death.

## STATEMENT OF THE CASE

On October 19, 2011, a Hampshire County grand jury indicted Cara Rintala for the first degree murder of her wife Ann on March 29, 2010. G.L. c. 265, § 1. R.A.36

Cara was tried three times: (1) February 20 to March 7, 2013 (hung jury); (2) January 9 to February 4, 2014 (hung jury); (3) September 14 to October 7, 2016 (convicted of first-degree murder on a theory of deliberate premeditation). Tr.3:16:7.[2] The same judge

[2] Citations to the Trial Transcript shall be as follows: Tr.[Sequential trial]:[trial day]:[page(s)].

(Rup, J.) presided over all three trials. Cara appealed. R.A.354.

Undersigned counsel filed a Motion for Post-Conviction Relief and an Evidentiary Hearing on March 1, 2019. R.A.144 The motion was assigned to Judge Mulqueen. She denied it without an evidentiary hearing. Add.123. Cara appealed the denial. R.A.355.

## STATEMENT OF FACTS

Cara and Ann Rintala were married and had a young daughter, Brianna. They were both experienced paramedics. Tr.3:2:76. Cara worked for the Ludlow Fire Department. *Id.* Ann worked for the AMR Ambulance Company. *Id.* They lived at 18 Barton Street in Granby. *Id.* at 75.

On March 29, 2010, just after 7 p.m., Roy Dupuis, the Rintalas' neighbor, opened his door to find a distraught Cara, holding Brianna. Tr.3:6:19. Cara asked him to call 911 and told him: "Ann's in the basement." *Id.* She handed him Brianna and returned to Ann. *Id.* Mr. Dupuis called 911 and the dispatcher sent Granby police officers Gary Poehler and Mark Smith to the scene for a "domestic situation." Tr.3:1:146-147; 2:12-13.[3]

### A. First Responders

[3] In fact, Dupuis did not tell the 911 dispatcher this was a "domestic situation". R.A.123. The dispatcher's characterization of the call as such was pure speculation, immediately introducing cognitive bias against Cara.

Officer Poehler arrived at 7:15 p.m. and was the first officer on scene. He entered the house and heard Cara crying out from the basement. Tr.3:1:151-152; 2:17. He descended the stairs and found Cara seated on the floor, holding her dead wife, Ann, in her lap and sobbing. Tr.3:1:154-155. This was the first time Poehler had ever encountered a homicide victim. Tr.3:1:205. He knew both Cara and Ann through work. *Id.* at 144-45. Ann's body was covered in pinkish-white paint and there was "what appeared to be a large pool of pink wet paint" on the floor. *Id.* at 156; R.A.110. This area of the basement was in disarray. Tr.3:1:156; R.A.109.

Sergeant Smith arrived at 7:20 p.m. Smith found Cara, Ann and Poehler in the basement. Tr.3:2:16.[4] He briefly left the basement to get medical supplies from a police cruiser. *Id.* at 21. He then returned to the basement. On the floor he noted what "appeared to . . . be white paint, fresh, still wet." *Id.* at 23.

Smith and Poehler then asked Cara to come upstairs. She explained that she was stuck underneath Ann's body. Tr.3:1:165.[5] Poehler and Smith helped Cara roll Ann off of her lap so she could stand up. Tr.3:1:165-166; 2:25.

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[4] Like Poehler, Smith knew both Cara and Ann through work, Tr.3:2:13, and this was the first time he had ever encountered a homicide victim. *Id.* at 42.

[5] Ann weighed 202 pounds. Tr.3:2:185. Cara weighed only 135 pounds. Tr. 3:8:67.

Cara, Poehler and Smith then walked upstairs. Tr.3:1:168. Smith left the house. *Id*. at 2:33; 3:116. Poehler and Cara sat down in the kitchen and talked. *Id*. at 1:170; 2:31. Cara told Poehler she believed she left the house sometime around 3:00 p.m. with her daughter to do some shopping and let Ann take a nap. *Id*. at 1:177; 2:88. Cara told Poehler that upon her return, she discovered Ann lying face-down in the basement. Tr.3:1:192.[6] She said that she sat down on the floor and rolled Ann face-up into her lap. *Id*.

Smith called for an ambulance to respond. Tr.3:2:74. Granby Fire Department Paramedic Gene Os responded and encountered Smith in the driveway. Tr.3:2:32,77. Smith asked Os if he knew Ann Rintala. Tr.3:2:77. Os said he did. *Id*.[7]

Os followed Smith to the basement and viewed Ann's body. Tr.3:2:77. There was "paint everywhere"; it was "wet, shiny" and "off-whiteish". *Id*. Os "didn't understand the paint at all" and found it "extremely confusing". *Id*.

At approximately 8:36 p.m., State Trooper Jamie Magarian arrived at the scene. Tr.3:1:186. He was assigned to the Northwestern District Attorney's Office

[6] There was evidence of lividity in Ann's body, indicating that she had been lying face down for some time prior to being moved onto her back. Tr.3:2:210.

[7] In fact, Os, who had known both Cara and Ann for more than sixteen years through work, characterized them as friends. Tr.3:2:75.

as a detective. Tr.3:11:130. He immediately took control of the investigation, serving as the lead investigator. *Id.* at 131. He claimed that he examined Ann's body at some point after 9:18 p.m. Tr.3:12:51. Like the other first responders who had examined the body nearly two hours earlier, he described the paint on the floor as "wet" and "fresh" even though it had obviously been there for more than two hours. Tr.3:11:251.

**B. Testimony of Forensic Pathologists**

Dr. Joann Richmond conducted Ann's autopsy on April 1, 2010. She concluded that Ann died of manual strangulation.[8] Tr.3:2:191, 196. She noted that Ann had also suffered multiple bruises, abrasions, and lacerations to her head and body. Tr.3:2:198-200, 203-204, 207. Significant blood flow from these wounds suggested that she was still alive when she sustained them. Tr.3:2:201-202.

Dr. Richmond opined that Ann had died "six to eight to twelve hours" before first responders examined her. Tr.3:2:214. The Commonwealth called a second pathologist, Dr. Thomas Andrew who concluded that it was "unlikely" that Ann had died after 1 p.m. "give or take". Tr.3:8:139.

[8] There were no recorded bruises or marks on Cara's hands or body other than a mark on Cara's neck which she described as a hickey. Tr.3:4:13-14; 5:133.

The defense called two pathologists. They concluded that Ann could have died as late as 4:30 p.m., or three hours before first responders reached her. Tr.3:11:46.

As explained below, all four forensic pathologists agreed that if a homicide victim is engaged in violent struggle immediately before death, this can speed the onset of rigor mortis, and there was ample evidence that Ann was engaged in such a struggle with her killer.

**C. The Commonwealth's Paint "Expert"**

In an effort to bolster its case, the Commonwealth called David Guilianelli, an employee of the company that manufactured the paint that was found in the basement. Although he had no experience designing experiments for forensic applications, he concocted experiments to determine when and how the paint had been applied to the floor. Based on these experiments, Guilianelli opined that the paint around Ann's body was applied to the floor just before first responders arrived — a time frame when Cara was admittedly present in the home. Tr.3:7:162; 12:152. Guilianelli also opined that the paint had been "intentionally poured", not spilled,[9] despite clear evidence that several other items in the immediate area had been knocked over. Tr.3:7:178.[10] Although defense counsel cross-examined

[9] Although it was clear Ann was strangled, there was no paint on her neck. R.A.112.

[10] As explained below in Argument III, the defense moved to exclude Giulianelli's opinions prior to trial

Giulianelli and attacked the reliability of his opinions, he did not call an expert to rebut Giulianelli's opinions.

**D. Ann's Activities**

Ann worked an overnight shift (8:00 p.m. to 8:00 a.m.) at AMR the night before her death and was scheduled to work another on the night of her death. Tr.3:9:34. Police recovered her cellphone from her bed. Tr.3:9:34; R.A.109. Her cellphone activity indicated that she was awake and using her phone between the time she returned from her shift shortly after 8:00 a.m. and at least 12:21 p.m. Tr.3:4:195; R.A.113.

Ann communicated with several people including her parents, her friend and co-worker Mark Oleksak, and Cara. Tr.3:4:185-195; R.A.113. She made her last call at 12:21 p.m. to her aunt, Nancy Kaufman. *Id.* at 195. Oleksak texted Ann at 1:53 p.m. That text was unread. *Id.* at 196. Cara texted and called Ann repeatedly between 4:48 p.m. and 6:58 p.m. *Id.* at 196-200.

**E. Cara's Cooperation**

From the very beginning of the investigation, Cara cooperated. She immediately gave police permission to search her home and cellphone and take her clothing, Tr.3:1:189, and to interview her daughter Brianna alone.

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on the grounds that they did not satisfy the *Daubert/Lanigan* standard for admissibility. R.A.62-78. The Court denied the motion. Add.116

Tr.3:3:119; 5:133. Then, she agreed to accompany State Trooper Robin Whitney to the Granby Police Station for a recorded interview without counsel. Tr.3:3:121-122. For two-and-a-half hours, on the night of Ann's death, Cara recounted her activities that day. *Id.* at 129-130; Exhibit 23.[11] Specifically, she stated that she first took Brianna to look at animals, and then drove to the Holyoke Mall, a McDonald's in Holyoke, a Stop & Shop in Holyoke and a Burger King in Chicopee. Cara agreed to a second interview the following day, again without counsel. Tr.3:4:17-18.

Police recovered security video footage confirming Cara's account of her activities. Specifically, video footage from the Holyoke Mall depicted Cara and Brianna walking into the mall around 5:05 p.m. Tr.3:4:92. Receipts from stores inside the mall established that Cara made purchases at 5:19 and 5:29 p.m. Tr.3:4:95.

Likewise, video footage depicted Cara disposing of items in a trash can in a McDonalds parking lot at 5:47 p.m. Tr.3:4:96. Police collected the bag from that trash can. Tr.3:4:103-104, 106. In the bag, they found rags and a diaper. *Id.* at 107.

Video footage from a Stop & Shop on Lincoln Street in Holyoke and a receipt confirmed Cara's report that she bought some groceries there at 6:14 p.m. *Id.* at 114.

[11] The parties did not provide a transcript of this recorded interview to the jury.

Finally, a receipt from a Burger King in Chicopee confirmed her report that she bought food there on her way home. *Id.* at 115.

**F. Crime Scene Analysis**

The frame of the side door was damaged. Tr.3:5:155-156. The tip of a shovel leaning against a wall near the garage contained white residue, similar to the paint on the door frame, *id.* at 151, supporting an inference that the shovel had been used to damage the door frame.

Crime scene analysts found several blood stains in the basement near Ann's body. Tr.3:5:173. There was one spatter stain on the floor near Ann's body which contained a mixture of DNA from Ann and someone else. *Id.* at 55-56. Likewise, a stain on a vacuum near Ann's body contained Ann's DNA profile. Tr.3:7:60. Along with other evidence described *infra*, this evidence supported an inference of a struggle.

Crime scene technicians obtained a partial DNA profile from a red-brown stain on the gray rag recovered from the trash can at the McDonalds. Tr.3:7:69. The DNA was degraded. Tr.3:7:71. Analysts were only able to obtain identification markers for two alleles. Tr.3:7:70. Ann's DNA was consistent with these two markers. Tr.3:7:69. The probability of a match was approximately one in 128 African Americans, one in 118 Asians, one in 105 Caucasians, and one in 106 Hispanics. Tr.3:7:70. A defense expert, Dr. Frederick Bieber, one

of the leading experts in the world on degraded DNA, opined that this degraded DNA had not been "freshly deposited" and was not consistent with DNA that had been exposed to water for a few hours. *Id.* at 141-42. Rather, it was consistent with DNA that had deteriorated over a longer period of time. *Id.* The Commonwealth's DNA expert agreed. *Id.* at 92, 105.

**G. Evidence of Marital Discord**

In an attempt to establish motive, the Commonwealth introduced evidence of the Rintalas' marital discord. They clearly had troubles in the past, which had resolved by November 2009, when Ann and Cara reconciled and Ann moved back in with Cara. They began attending church together with Brianna shortly before that and continued to do so until Ann's death. Tr.3:9:216-17. There was no evidence of significant discord after that point.[12]

The Commonwealth suggested that one source of marital discord was Ann's financial irresponsibility. Cara and Ann kept their assets separate. Tr.3:11:173. They were required by law to file separate tax returns. *Id.* at 175. Cara owned the marital home at 18 Granby Street. Exhibit 62. The mortgage was in her name and she paid it herself. *Id.* She had other significant assets, including retirement accounts, and no debts. Tr.3:11:182; R.A.128. Ann, by contrast, had no savings

[12] This evidence will be discussed in more detail in Argument V, *infra*.

and substantial credit card debt. Tr.3:11:172. She had accounts in default. *Id.* at 174-175. At one point, Ann obtained a line of credit exceeding $20,000 in Cara's name without Cara's knowledge. Tr.3:11:177-178. When Cara found out, Ann began repaying Cara monthly. *Id.*

**H. Other Suspects**

Ann took advantage of others as well. AMR co-worker Mark Oleksak gave her credit cards; she accumulated about $7,000 in debt on those cards. *Id.* Shortly before Ann and Cara reconciled, Ann convinced a former romantic partner, Springfield police officer Carla Daniele, to furnish a new apartment for her and take her on a vacation at a cost of $10,000. Tr.3:11:190, 212, 249.

From the very beginning of the investigation, though suspicion had focused on Cara almost immediately, the police also considered these two as suspects.

**1. Mark Oleksak**

Oleksak and Ann had a very close relationship that Oleksak was hiding from his wife. Tr.3:11:188. On the date of Ann's death, Oleksak told her that he loved her. R.A.113 (8:14 a.m. text). He claimed that she said she loved him as well. Tr.3:11:189. Moreover, he was the last person to contact her before her death. R.A.113 (1:53 p.m. text).

Oleksak opposed Ann marrying Cara and their adoption of Brianna. Tr.3:11:190. Also, he told police,

"I would be willing to do anything for a friend as long as they didn't lie to me." *Id.* at 199.

As noted above, Oleksak had obtained three credit cards for Ann even though he knew she had a spending problem. Tr.3:12:41. Oleksak hid this from his wife. Tr.3:11:188.

Shortly before Ann's death, Oleksak and Ann had spent the day together shopping. *Id.* at 191-192. On that date, Oleksak loaned Ann $350 to buy a dog. *Id.* The day before her death, Ann asked Oleksak for $20 so that she could buy a dog crate. *Id.* at 193. Ann never purchased the dog or the crate. *Id.* at 193-94.

The morning of her death, Ann was texting with Oleksak. Tr.3:11:180. Oleksak told Ann that he wanted to come to her house four days later, on Friday night because he knew Cara had to work that night. Tr.3:11:180. But then he texted Ann at 1:53 p.m. and shared that his sister had just called, told him she had cancer, and he was "real sad". *Id.* at 185. Oleksak deleted this text message from his cell phone before the police questioned him. Tr.3:11:185.[13]

Police interviewed Oleksak a few days after Ann's murder, on April 2, 2010. He initially told them that on the date of Ann's death he had been home all day except

[13] Police learned of this text because they saw it on Ann's cell phone. Tr.3:11:184-85. Oleksak never mentioned it in multiple police interviews and police never asked Oleksak about it. *Id.* at 185-86.

when he went to physical therapy at 10 a.m. Tr.3:11:194, 235. This was a lie.

On November 18, 2010, Trooper Magarian learned something that forced him to re-evaluate Oleksak as a suspect: months after Ann's death, Oleksak had been sleeping in her pink sleeping bag at work. Tr.3:11:197.[14] Based on this revelation, Magarian re-interviewed Oleksak about his activities on the date of Ann's death. This time, Oleksak said his daughter came over for dinner and then they went to a furniture store together. Tr.3:11:199. Police did not speak to his wife and daughter to confirm this new information until June 2011 - fifteen months after Ann's death. *Id.* at 209. When they finally did so, Oleksak's wife corroborated his claim. *Id.* at 209. But she stated that their daughter usually came over on Wednesdays. Tr.3:11:210. In fact, Ann died on a Monday. *Id.* Oleksak's wife did not mention anything about learning that his sister had cancer. *Id.* at 209.

In July 2011, Magarian asked Oleksak to turn over his bank statements and phone records for the period around the murder. Tr.3:11:245. The records revealed that Oleksak had failed to disclose to police that on the date of Ann's death he went to several grocery

[14] Because AMR paramedics worked overnight shifts, they sometimes kept sleeping bags at work, presumably to sleep in during inactive periods.

stores, a Walmart in Westfield, and a gas station. *Id.* In May 2012, Magarian recovered a receipt from Walmart documenting that on March 29, 2010, at 4:28 p.m., Oleksak bought a pair of fleece pants. *Id.* at 206.[15] In June 2011, neither Oleksak's wife nor daughter mentioned any of this. *Id.* at 209-210.

Furthermore, Oleksak's phone records indicated no activity on his cell phone between 1:53 p.m. and 8:15 p.m. on the day of Ann's death. *Id.* at 208; R.A.129. This was especially odd given that in his last text at 1:53 p.m., Oleksak wrote to Ann, "My sis just called. She has [cancer]. I'm real sad." Tr.3:11:208. Moreover, Oleksak deleted that text from his cell phone.

**2. Carla Daniele**

Ann and Daniele had dated in the past. *Id.* at 211. They began dating again in June 2009 when Ann and Cara separated. *Id.* at 211-212. Daniele quickly incurred $10,000 in debt to set up Ann in a new apartment and a vacation they took together to Las Vegas. *Id.* at 212.

When Ann and Cara reconciled in the Fall of 2009, Ann suddenly broke up with Daniele and moved back in with Cara at 18 Granby Street. Daniele told police she "never saw it coming". *Id.* at 216. Ann then asked Oleksak to clean out her apartment. Tr.3:11:213. But Ann had

[15] Magarian never asked Oleksak why he had bought these pants or why he had not mentioned it in previous interviews. Tr.3:11:206.

never told Oleksak that she had been dating Daniele. *Id.* He learned about the relationship while cleaning the apartment. He discovered a photograph of Ann and Daniele in Las Vegas and became "very upset". *Id.* at 198, 213. Oleksak stole the photo of Ann and Daniele and a card Daniele had written to Ann. *Id.* at 214.

The day of Ann's death, Daniele went to her gym in East Longmeadow at about 3:00 p.m. *Id.* at 217. Security video footage establishes that she drove into the gym parking lot shortly before 3:10 p.m. and left at 7:00 p.m. *Id.* at 221. Daniele told police that she worked out at the gym and went for a run in East Longmeadow during that four-hour window. *Id.* According to bank records, however, Daniele made a withdrawal at a Springfield bank at 6:18 p.m. while her car was parked at the gym. *Id.* at 218.[16] She did not mention this to police.

Daniele claimed her last contact with Ann had been in November 2009 when Ann returned to Cara. *Id.* at 212. However, Daniele continued to call Ann's cellphone after her death. *Id.* at 222.

## SUMMARY OF ARGUMENT

The medical examiner's opinion that Ann died six to twelve hours before she was discovered by the first responders was unreliable and therefore inadmissible

[16] Google Maps indicates that the gym was 4.7 miles from the bank, and it takes approximately one hour and thirty-two minutes to travel by foot one way between them.

because it was based solely on subjective observations by first responders with no training in death scene investigation that Ann's skin was "cold" and her body was "stiff" and naked speculation that Ann did not struggle with her attacker despite undisputed physical evidence that she did. [31-47].

The trial judge erred in denying Cara's Motion for a Required Finding of Not Guilty at the close of evidence because the Commonwealth's circumstantial case depended on an unreliable time of death estimate. Undisputed evidence that Ann was in a violent struggle with her attacker immediately before her death supported a time of death when Cara was not home. [47-50].

The admission of the unrebutted opinion testimony of the Commonwealth's "paint expert" that the Defendant intentionally poured paint on the decedent's body immediately before first responders arrived created a substantial likelihood of a miscarriage of justice. The totality of the evidence, including the post-conviction affidavit of a professor of material science, demonstrated that his opinions were unreliable because they were based on flawed experiments which he was unqualified to design, assumptions or both. [51-84].

The admission of disputed and remote evidence of domestic violence and marital strife as motive evidence despite substantial recent reconciliation was reversible error. [85-90].

The trial judge's sua sponte decision to instruct the jury that they could consider evidence of Cara's consciousness of guilt was reversible error where the defense did not focus on the evidence in closing argument. [91-98].

During closing argument, the prosecutor misstated the facts and attacked defense counsel, creating a substantial likelihood of miscarriage of justice. [98-103].

Cara was deprived of her constitutional right to due process when she was subjected to a third trial. [103-105].

## ARGUMENT

### I. The medical examiner's opinion that Ann died at least six hours before she was discovered by first responders was unreliable and therefore inadmissible because it was based solely on subjective observations by first responders with no training in death scene investigation that Ann's skin was "cold" and her body was "stiff" and speculation that Ann did not struggle with her attacker despite undisputed physical evidence that she did.

Prior to the second trial, defense counsel filed a motion in limine to bar expert testimony by the medical examiner, Dr. Joann Richmond, as to time of death and requested a *Lanigan* hearing. R.A.48. In support of the motion, he included a written opinion from Dr. Jonathan Arden, the former chief medical examiner for the District of Columbia. The trial judge denied the motion without a hearing. Add.115. Counsel renewed his objection during the third trial. Tr.3:3:101.

Because Dr. Richmond's opinion on time of death was not based on sufficient "facts or data" and was not "a product of reliable principles and methods" reliably applied to the case, Mass. G. Evid. § 702, it was unreliable and inadmissible. Because it was the centerpiece of the Commonwealth's case, Cara's conviction must be reversed.

#### A. Evidence Relevant to Dr. Richmond's Time of Death Opinion

Officer Poehler was the first responder to touch Ann – at some point after 7:20 p.m. He claimed that he

merely placed a gloved finger on her carotid artery to check for a pulse. He later described the skin on her neck as cold and stiff. Tr.3:1:162.[17]

Shortly thereafter, Poehler and Smith worked together to shift and roll Ann's body so Cara could get up. Tr.3:1:165-166; 2:26-27. Poehler grabbed Ann's right arm and lifted. Tr.3:1:166. Simultaneously, Smith and Cara rolled Ann onto her left side by pushing her thigh and hip. Tr.3:2:26. The officers perceived Ann's body to be "very stiff" and claimed "the entire body stayed together stiff as [Poehler] attempted to move her body by moving her arm" while Smith pushed her hip. Tr.3:1:166. Smith testified that "[t]he whole body moved as one unit . . . without any bend". Tr.3:2:27.

Paramedic Os arrived at the scene after Cara, Poehler and Smith had left the basement. Tr.3:2:77. Wearing gloves (*Id.* at 112), Os grabbed Ann's right wrist for "a cursory confirmation" that she was dead. *Id.* at 108. She was "very, very cold". *Id.* at 82. Os "pulled on her . . . wrist a little" but it did not move. *Id.* at

[17] Poehler's reliability was undermined because (1) this was the first time he had seen a homicide victim, (2) he knew the victim personally as a fellow member of the first responder community and (3) he had no training determining the level of rigor mortis.

80. He pulled her wrist "away from her head". *Id*. at 82. Her arm was "locked in a rigid position." *Id*. at 81.[18]

Paramedic Michael Pandora was the last of the first responders to arrive. Poehler led him to the basement. He merely looked at Ann and returned upstairs without touching the body. Tr.3:1:180, 202.

Trooper Magarian arrived at the scene at 8:36 p.m. Although he had investigated many homicides, and had attended autopsies, he had no formal training in how to assess rigor mortis to determine time of death. Tr.3:3:57-61. He did not examine Ann's body until some time after 9:18 p.m. Tr.3:12:51. Although not documented in any report, Magarian claimed that he pulled "a little bit" at Ann's right arm. Tr.3:11:251; 12:48. This was the full extent of his physical examination of the body. He never touched her head, torso or legs. Tr.3:12:53-54. He claimed that when he did this, "it was cold to the touch". Tr.3:11:251.[19] He also claimed that "*her entire body moved as one*; the forearm, the humerus and the upper arm, the shoulder, *the torso, the hips all shifted as kind of one board*." *Id*. (emphasis added). This claim is problematic.

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[18] This "cursory" examination did not and could not possibly have revealed anything about the degree of rigor in any muscle groups beyond Ann's right arm.

[19] Again, like other first responders, he was wearing latex gloves. Tr.1:9:10,52.

Ann weighed 202 pounds at her autopsy. Tr.3:2:185. As Poehler and Smith described, Cara could not move Ann's body off of her lap. Tr.3:1:165. Working together, the two officers and Cara had to exert considerable force to roll Ann onto her side so that Cara could get out from under her. Tr.3:1:165-166; 2:25. Therefore, it is highly implausible that Magarian, grabbing an extremity and pulling "a little bit" by himself, could have moved her torso and hips at all, much less enough to assess the level of rigor mortis in those large muscle groups.

Magarian spoke to the medical examiner Dr. Richmond by phone at some point after 9:20 p.m. Magarian asked if it was possible for a body to become "stiff as a board" and "cold as ice" in three to four hours. Dr. Richmond said no. She estimated this would take six to eight to twelve hours. Tr.3:3:17-18. Dr. Richmond had no other data when she gave Magarian this estimate on the night of Ann's death. *Id.* at 18 ("I don't remember getting any other scene data"). Dr. Richmond never went to the scene to examine the body herself.

Ultimately, Dr. Richmond testified to the same opinion she had given Magarian on the night of Ann's death: "based on the cooling of the body and the stiffening. . . .[Ann] had been dead for several hours, somewhere between six to eight to twelve [hours]." Tr.3:2:214.

Dr. Arden challenged Dr. Richmond's time of death estimate in the defendant's motion in limine. R.A.52-56. First, he noted that while post-mortem cooling of the body can be relevant to a determination of time of death, it requires an accurate measurement of internal body temperature, which did not occur in this case. R.A.54. Therefore, Dr. Richmond's reliance on subjective reports by untrained personnel that Ann's surface skin temperature was "cold" was unreasonable.[20]

Dr. Arden noted that Dr. Richmond's reliance on the degree of rigor mortis was equally flawed because it derived entirely from subjective reports of "stiffness" from untrained personnel who had not made an adequate assessment of the extent of rigor in the body.

> In this case, neither a forensic pathologist nor a trained medicolegal death investigator was present at the death scene to examine and document the condition of the body . . . . Therefore, from the outset, *any estimates of her time of death are suspect, because they are based on observations made by persons lacking the necessary expertise to appreciate and document the critical features accurately*. . . .
>
> The evidence available regarding the extent of rigor mortis when the body . . . was discovered is . . . incomplete and suspect. The various observers at the scene provided inconsistent characterizations of her rigor mortis. . . . Notably, *none of the observers at the scene*

[20] The Commonwealth's own pathologist, Dr. Andrew, agreed, stating that the description of Ann's skin as cold had "no scientific meaning to [him]". Tr.3:8:148.

> *specifically manipulated different parts of her body to determine the degree of stiffening and whether it was consistent in different areas* (which is not surprising, given their lack of appropriate expertise in postmortem examinations and medicolegal death investigation). At best, one can conclude that Ann Marie Rintala had well developed rigor mortis when the first responders initially encountered her. This finding is consistent with a wide range of postmortem intervals, ranging from three hours up to approximately 18 or even as much as 24 hours.

R.A.55 (emphasis added).

**B. Standard of Review**

A trial judge's denial of a motion in limine is reviewed for an abuse of discretion.[21] "[T]he trial judge's gatekeeper role under *Commonwealth v. Lanigan* … includes the obligation to determine whether the testing at issue was conducted properly (and not just whether the testing method is theoretically reliable)[.]"[22] "The goal of *Lanigan* . . . is to keep unreliable (or so-

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[21] In *L.L. v. Commonwealth*, 470 Mass. 169 (2014), this Court announced that it was retiring the "no conscientious judge" iteration of the abuse of discretion standard. In its place the Court announced the following standard:

> a judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives.

*L.L.*, *supra* at 27 n.27 (cleaned up).

[22] *Commonwealth v. McNickles*, 434 Mass. 839, 850 (2001).

called 'junk') science from fact finders, thereby reducing the prospect of the return of verdicts . . . of dubious validity."[23] If the process or theory underlying an expert's opinion lacks reliability, that opinion is inadmissible.[24]

Although opinion testimony on time of death is generally admissible,[25] the Commonwealth must still demonstrate the reliability of an expert opinion subject to a *Lanigan* challenge by a preponderance of the evidence in order to present it to the jury. *Commonwealth v. Camblin*, 478 Mass. 469, 476 (2017).[26]

**C. Argument**

**1. Time of death estimates based solely on rigor mortis are unreliable and not generally accepted in the field of forensic pathology.**

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[23] *Case of Canavan*, 432 Mass. 304, 317 (2000) (Greaney, J., concurring).

[24] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592–593 (1993); *Commonwealth v. Lanigan*, 419 Mass. 15, 25 (1994).

[25] See *Commonwealth v. Bennett*, 424 Mass. 64, 68-69 (1997).

[26] See e.g., *State v. Poteat*, 711 S.E.2d 531, at *6 (N.C. Ct. App. 2011) (unpublished) ("Since it is unclear from his testimony what other factors besides Morton's state of rigor mortis, if any, were used by M.E. Paysour to bring his estimate of Morton's time of death outside the initial eight-to-ten-hour window predicted by Morton's state of rigor mortis, his method of proof for determining Morton's time of death cannot be said to be sufficiently reliable to be admissible at trial under Rule 702. Thus, the trial court abused its discretion by admitting M.E. Paysour's estimate of Morton's time of death.")

The only "facts or data" Dr. Richmond relied on were first responder reports about the surface temperature of Ann's skin and the stiffness of her body. Putting aside the fact that the first responders' assessment of the surface temperature of Ann's skin, made while gloved, was inherently subjective, the Commonwealth's own expert, Dr. Andrew, agreed that it was irrelevant to determining time of death. Tr.3:8:148 ("[O]nce blood is not circulating anymore, the skin takes on a very, very cold tactile sense fairly early in the game. . . .[A]ny description of her skin . . . .as being cold or ice cold has *no scientific meaning to me*").[27] Dr. Arden similarly noted that Dr. Richmond's reliance on first responder reports that Ann's skin was "cold", without a measured core body temperature, was unreasonable. R.A.55.

This left only the reports of stiffness. The two leading treatises on forensic pathology make clear that time of death determinations based on rigor mortis alone

[27] Although the trial judge did not have the benefit of Dr. Andrew's opinion when she considered the defense motion to exclude Dr. Richmond's time of death opinion, this court has "considered scientific studies that arise following the denial of initial *Daubert-Lanigan* hearings where necessary to ensure an accurate decision concerning the reliability of scientific evidence[,]" and has also "considered scientific studies that were not before [the] lower court judge". *Camblin*, 478 Mass. at 479. In short, this Court considers all relevant evidence to determine the reliability of scientific evidence presented to the jury.

are unreliable.[28] In fact, Dr. Richmond agreed with a statement in *Forensic Pathology* that while "rigor mortis usually appears two to four hours after death and fully develops in six to twelve hours," these estimates "*can vary greatly*." Tr.3:3:68 (emphasis added). For this reason alone, Dr. Richmond's time of death opinion should have been excluded.

**2. Even if evidence of rigor mortis could theoretically be sufficient to estimate time of death, Dr. Richmond's opinion relied on insufficient and unreliable information.**

The issue here is not whether time of death estimates are generally admissible or whether they can rely at least in part on evidence of rigor mortis; rather, the issue is whether Dr. Richmond's specific opinion was reliable in light of the scarce, subjective and unreliable information available to her about the condition of Ann's body.[29] It was not.

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[28] See DiMaio & DiMaio, *Forensic Pathology*, (2nd ed. 2001) ("all methods now in use to determine time of death are, to a degree, unreliable and inaccurate"); Spitz & Fisher, *Medical Legal Investigation of Death: Guidelines for the Application of Pathology to Crime Investigation*, (4th ed. 2005) (hereinafter *Medical Legal Investigation of Death*) ("The variability of post-mortem rigor makes its use as a postmortem plot tenuous, to be considered only in conjunction with other timing indices") (emphasis added).

[29] *Commonwealth v. Patterson*, 445 Mass. 626, 645 (2005) overruled on another ground by *Commonwealth v. Britt*, 465 Mass. 87 (2013) (cleaned up) ("specific issue before the court was not the reasonableness in general of [the expert's method]. Rather, it was the

This case is analogous to *Patterson* where this court found that, while the underlying theory and process of fingerprint identification was reliable, the expert opinion should have been excluded because the Commonwealth failed to show that the process could be reliably applied to the facts of the case. *Patterson*, 445 Mass. at 628. The Commonwealth's expert applied the traditional methodology for examining individual fingerprints to a cluster of partial prints using what another expert witness called a "hodgepodge" approach, not based on any science. *Id.* at 638.

In reversing and excluding the expert opinion, this Court acknowledged that fingerprint evidence has been used extensively in criminal investigations for over one hundred years. *Patterson*, 445 Mass. at 628-29. The Court concluded the methodology is generally reliable when used to identify individual fingerprints, but not to evaluate a cluster of incomplete prints. In that context, the methodology was not sufficiently reliable.

As in *Patterson*, Dr. Richmond relied to some extent on a generally accepted methodology to estimate time of death but did not apply the methodology in a reliable manner. Most importantly, she did not personally examine the body for rigor, delegate the task to a properly

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reasonableness of using such an approach...to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant.") (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153-154 (1999)).

trained death scene investigator or, at the very least, instruct one of the first responders to perform a complete assessment of the body. In short, she failed to apply accepted principles and methods to the case in a reliable manner in order to obtain sufficient facts or data to develop a helpful opinion. Mass. G. Evid. § 702.

In *Patterson*, this court noted that the trial judge must conduct an individualized evaluation of the facts and methodology relevant to the reliability of the expert opinion in each case, even when the opinion is based on a "generally accepted methodology": "the determination of the reliability of the testing process entails a fact-based inquiry, including questions of credibility. While questions of credibility are traditionally left for the jury . . . in this context, this inquiry [is] the responsibility of the judge." *Patterson*, 445 Mass. at 647–48 (cleaned up). Here, the trial judge failed to examine the reliability of Dr. Richmond's application of a generally accepted methodology. That was an abdication of her responsibility to act as a gate-keeper in order to ensure that the jury received only reliable opinion evidence. Therefore, it was an abuse of discretion.

First, Dr. Richmond measured time of death from 7:15 p.m., when Poehler first encountered Ann. Tr.3:2:214. In fact, Dr. Richmond's initial information came from Magarian's examination at some point after

9:18 p.m. He was the only first responder with any experience assessing dead bodies.

Second, none of the first responders who touched Ann were trained, much less certified, to assess bodies for evidence relevant to time of death. Tr.3:1:207; 2:43,110; 3:61. Beyond that, Granby Officers Poehler and Smith had never even encountered a homicide victim. Tr.3:1:205; 2:42. Worse, all the local first responders knew and worked with Cara and Ann. Os, the most experienced of that group, candidly admitted that it was "extremely difficult" to encounter the dead body of a fellow first responder. Tr.3:2:106.[30]

Third, the degree of stiffness the first responders noted in Ann's body was based on very cursory contact with a very limited section of her body for a variety of purposes. Specifically, Poehler placed a finger on her carotid artery to check for a pulse. Tr.3:1:162. Then Poehler and Smith, working together with Cara, rolled Ann's body off of Cara by lifting her right arm and pushing her hip simply to help Cara stand up. Tr.3:1:165-166; 2:26-27. Os grabbed her right wrist to check for a pulse and pulled on it "a little" for a "cursory

[30] Dr. Andrew explained that there is a national trend in medical examiners' offices to rely on formally trained and licensed "death scene investigators" to assess bodies at crime scenes for signs of rigor mortis, as in New Hampshire. Tr.3:8:173-75. Dr. McDonough relied on such investigators in Connecticut and Delaware. Tr.3:9:30.

confirmation" that she was dead. Tr.3:2:108. Finally, Magarian pulled "a little bit" on Ann's right arm. Tr.3:11:251.

According to the generally accepted methodology for assessing rigor mortis, this cursory group of disparate touches was not adequate to determine the degree of rigor mortis. Most importantly, no one even attempted to assess Ann's lower extremities for stiffness.

All of the forensic pathologists agreed that rigor mortis appears sequentially in the body, developing first in the smaller muscles, including the jaw, and then appearing in the arms and shoulders. Tr.3:3:6-7; 8:140-141. Dr. Andrew agreed that rigor mortis can appear as quickly as thirty minutes after death in the jaw and neck. Tr.3:8:170,176. It develops in the larger muscles of the lower extremities later. Tr.3:3:7; 8:141. For this reason, medical legal death investigators are trained to palpate several muscle groups of varying sizes in order to determine the extent of rigor mortis. Tr.3:3:56; 8:164; 9:29. Though Poehler and Smith rolled Ann on her side to help Cara get out from under her and in doing so pushed on her hip, this was clearly not intended to be an assessment of rigor mortis in her lower extremities, nor could it have been since three people were simultaneously exerting force on different parts of Ann's body. A defense expert, Dr. McDonough, observed that no one properly assessed rigor mortis. Tr.3:9:30;

86 ("there was no systematic joint-by-joint analysis by somebody who is trained in death investigation").

Dr. Arden noted that "the discrimination of degrees of development of rigor mortis should be based on abundant experience." R.A.54. He observed that Dr. Richmond's reliance on subjective reports from untrained first responders that the body was "stiff", in the absence of a complete evaluation of the body for rigor, was "suspect". R.A.55.

**3. Dr. Richmond ignored undisputed evidence that Ann engaged in a violent struggle immediately before death that would have sped the onset of rigor mortis and instead speculated that she may not have struggled.**

"[A]n opinion must rest on evidence or data that provide a permissible basis for an expert to formulate an opinion." *Commonwealth v. Barbosa*, 457 Mass. 773, 790 (2010). An opinion based on speculation is unreliable and thus inadmissible.

All four forensic pathologists agreed that manual strangulation was the cause of death, Tr.3:8:180,[31] and that there was evidence of a struggle.[32] Moreover, they

[31] Yet, when Cara spoke with police that evening, she had no relevant injuries or scratches. Tr.3:4:63-64; 5:133.

[32] Tr.3:3:71, 75 (Richmond: "I cannot rule out that she was struggling for her life. . . . Q: Could she have been locked in a fight for her life while receiving those blows? A: She could have"); Tr.3:8:143 (Andrew: "And there was certainly the suggestion based on the scene images and the disarray of things that were in the

all agreed that if Ann had been engaged in a violent struggle immediately before her death, this would have sped the onset of rigor mortis. Tr.3:2:68; 8:142; 9:37.

Beyond that, both Dr. Richmond and Dr. Andrew acknowledged abrasions on Ann's neck. They conceded that it was reasonably plausible that Ann had caused them trying to pull off the hands of the person who was strangling her. Tr.3:3:37; 8:180. Despite this, Dr. Richmond also speculated that if Ann were knocked unconscious by a fall down the stairs and was strangled at that point, she would not have struggled. Tr.3:2:197.

Dr. Arden noted, however, that there was no evidence that Ann was knocked unconscious by her fall down the stairs. Specifically, he noted the autopsy revealed no injury to her skull or brain. Tr.3:11:37. Conversely, he noted that there was clear *physical* evidence of a struggle in addition to the fact that the area around Ann's body was in disarray.

Specifically, Dr. Arden noted that in addition to the abrasions on her neck consistent with defensive injuries inflicted while fighting off strangulation, there were many large petechial hemorrhages in Ann's

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basement and her body being nearby this upset container of paint that suggested there may have been some sort of physical altercation and/or struggle"); 9:40-41 (McDonough: "[A]lmost by definition a manual strangulation would involve a struggle, yes."); 11:36 (Arden: same).

eyes.[33] Citing the leading treatise on forensic pathology,[34] he concluded that all of this supported an inference that Ann was conscious and struggling fiercely for her life immediately before she died. Tr.3:11:36. Both Dr. Andrew and Dr. McDonough agreed that the "larger petechial hemorrhages" in Ann's eyes were also "indicative of a struggle". Tr.3:8:181; 9:41.[35]

Finally, Dr. Arden noted that Ann's clinical obesity provided greater insulation for any heat generated by struggle and therefore would have sped up onset of rigor. Tr.3:11:38-40.

Dr. Arden concluded that all of this evidence supported a reasonable possibility that rigor could have developed relatively rapidly and therefore it was reasonably possible that Ann had been killed within three hours of the time the first responders saw her at 7:30 p.m. Tr.3:11:46. Conversely, given all the undisputed evidence, it was impossible to conclude to a reasonable degree of medical certainty that Ann had been killed before 4:30 p.m.

Rather than confront this undisputed evidence, Dr. Richmond speculated that Ann "could have been dazed or

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[33] Dr. Richmond acknowledged this. Tr.3:3:33.

[34] Tr.3:3:34, citing DiMaio & DiMaio, *Forensic Pathology* (2nd ed. 2001) (conjunctiva hemorrhages will be larger if the victim struggles and the assailant responds with increased pressure about the neck).

[35] Dr. Richmond refused to say whether she agreed or disagreed with this assertion. Tr.3:3:35.

even unconscious because of [her] injuries to the scalp". Tr.3:2:197. This naked speculation was not based on "evidence or data that provide[s] a permissible basis for" an expert opinion. *Barbosa*, 457 Mass. at 790 (internal quotations omitted). Indeed, it was *contradicted* by the available evidence. Therefore, it was unreliable.

"[T]he touchstone of admissibility is reliability[.]" *Commonwealth v. Sands*, 424 Mass. 184, 185 (1997) (cleaned up). For the reasons stated above, Dr. Richmond's time of death opinion was not reliable.

## II. The defendant was entitled to a required finding of not guilty where the Commonwealth's case depended on expert opinions about the decedent's time of death that failed to account for uncontroverted evidence that the decedent was in a violent struggle immediately before her death, when the defendant was not present.

The denial of Cara's motion for a required finding of not guilty was error. R.A.79; Tr.3:12:97-98. She had a constitutional right to acquittal unless the evidence established every element of the offense beyond a reasonable doubt.[36] It did not.

### A. Standard of Review

"It is not enough for the appellate court to find that there was some record evidence, however slight, to support each essential element of the offense; it must

[36] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). U.S. Const., Amend. XIV; Mass. Const. art 12.

find that there was enough evidence that could have satisfied a rational trier of fact of each such element beyond a reasonable doubt." *Commonwealth v. Lopez*, 484 Mass. 211, 216 (2020) (cleaned up). "Further, although the jury are permitted to draw rational inferences from the evidence, no essential element of the crime may rest in surmise, conjecture or guesswork." *Id.* (cleaned up). "That is, a conviction may not rest upon the piling of inference upon inference or conjecture and speculation." *Id.* (cleaned up).

**B. Argument**

The centerpiece of the Commonwealth's case was a contention that Ann died before 3:00 p.m., a period when Cara said she was home. Without proof of this claim, no reasonable jury could have convicted Cara of murder.

The Commonwealth's second forensic pathologist, Dr. Andrew, relied exclusively on the first responders' description of stiffness in Ann's body to establish his time of death opinion. Whereas Dr. Richmond speculated that Ann never struggled at all because she could have been knocked unconscious before she was strangled, Dr. Andrew speculated that certain factors could have slowed the onset of rigor mortis (e.g. that Ann's body was on a "relatively cool concrete floor",[37] that she was

[37] In fact, Dr. Andrew acknowledged that the basement temperature was relatively moderate. Tr.3:8:143.

wearing relatively little clothing, and had "unusually large muscle mass"), and thus could have offset the effect of the struggle and the insulation of heat by Ann's body mass. Tr.3:8:141-45 ("just about a wash in my opinion"). He cited no quantifiable "facts or data" for this unfounded hypothesis.

Unlike the Commonwealth's witnesses, the defense experts - Dr. Arden and Dr. McDonough - considered all of the relevant evidence, including the undisputed evidence that Ann engaged in a violent struggle immediately before death. They noted that this would have sped the onset of rigor mortis, supporting a reasonable possibility that well-developed rigor mortis could have set in after 3:00 p.m. – as late as 4:30 p.m.

"Generally, it is for a jury to decide whether to credit the testimony of a witness." *Lopez*, 484 Mass. at 220. This applies to expert opinions as much as the factual testimony of lay witnesses. *Commonwealth v. Polk*, 462 Mass. 23, 32 (2012). However, where "it is impossible to reconcile [one witness's] testimony not only with the testimony of each of the other witnesses, but also with . . . uncontroverted testimony", *Lopez*, 484 Mass. at 220, this principle must yield. Furthermore, "[w]hile it is true that the jury may believe part of a witness's testimony and reject part or believe all or reject all, the jury's right to selective credibility does not permit [them] to distort or

mutilate any integral portion of the testimony or permit them to believe an *unfounded hypothesis*." *Id.* at 217 (cleaned up) (emphasis added).

"If a rational jury necessarily would have had to employ conjecture in choosing among the possible inferences from the evidence presented, the evidence is insufficient to sustain the Commonwealth's burden of proving guilt beyond a reasonable doubt." *Commonwealth v. Rodriguez*, 456 Mass. 578, 582 (2010) (cleaned up).[38]

The Commonwealth's theory that Ann died at least six hours before Poehler and Smith first moved her at 7:30 p.m. is based on impermissible conjecture and inferential leaps that were contradicted by uncontroverted testimony pointing to a violent struggle that would have sped up the onset of rigor. Accordingly, "[b]ecause the Commonwealth's evidence was insufficient to demonstrate beyond a reasonable doubt [Cara's] presence when [Ann] was [strangled], the conviction cannot stand." *Lopez*, 484 Mass. at 221.

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[38] See *Lopez*, 484 Mass. at 218 (murder conviction reversed because Commonwealth's theory required the jury to engage in "impermissible conjecture" and make "impermissible inferential leaps"); *Commonwealth v. Mazza*, 399 Mass. 395, 399 (1987) (no rational jury could convict defendant of murder where case built on impermissible conjecture); *Commonwealth v. Salemme*, 395 Mass. 594 599-600 (1985) ("If, upon all the evidence, the question of the guilt of the defendant is left to conjecture or surmise and has no solid foundation in established facts, a verdict of guilty cannot stand.").

## III. The admission of the unrebutted opinion testimony of the Commonwealth's "paint expert" that the Defendant intentionally poured paint on the decedent's body immediately before first responders arrived created a substantial likelihood of a miscarriage of justice. His opinions were unreliable because they were based on flawed experiments which he was unqualified to design, naked assumptions or both.

In 2014, after the second trial, the Commonwealth notified the defense that it might call David Guilianelli, an employee of the company that made the paint in the basement, as an expert witness to opine about "the manner and pace at which [the paint] dries in specific atmospheric conditions", the amount of paint spilled, and the amount of time that passed between when the paint was "dumped/poured/spilled" and when it was first photographed. R.A.157 ¶7.

In May 2015 the Commonwealth disclosed results from some of Guilianelli's experiments. *Id*. at ¶8.

On May 2, 2016, defense counsel filed a motion in limine challenging the admissibility of these experiments as irrelevant. R.A.62.

During the last week of May 2016, more than three months before trial, the Commonwealth produced a report by Guilianelli, in which he opined that the paint around Ann's body was intentionally poured on the floor just before first-responders arrived – a time when Cara was admittedly present. R.A.211. But he also stated that the paint may have been applied as much as four hours before

the first crime scene photographs were taken at 9:08 p.m., "based on any unknown factors [he] did nor could not account for." R.A.205; Tr.3:7:185-86.

As soon as he read Guilianelli's report, defense counsel understood that the Commonwealth intended to use Guilianelli to prove that Cara deliberately poured the paint to contaminate the scene. R.A.158 ¶9. Therefore, he moved to exclude Guilianelli's opinions as unreliable. *Id.* at ¶10. He included an affidavit from Dr. Otto Gregory, explaining why.[39] R.A. 74 ¶2.

The trial judge heard oral argument on defense counsel's motion to exclude Guilianelli's opinion on July 8, 2016. Defense counsel did not call an expert at that hearing because he had not yet located one he felt he could call. R.A.159 ¶12.

Nevertheless, immediately after the argument, defense counsel attempted to find an expert to testify in support of the motion. R.A.159 ¶13. Three days after oral argument, he filed a motion for funds to retain a defense expert (granted). R.A.222. Although counsel spoke to one expert, he found no one appropriate. R.A.159 ¶13. He ended his search after one week.

On July 18, 2016, defense counsel waived an evidentiary hearing on his motion to exclude

[39] Dr. Gregory is a social acquaintance of Cara's step-father and therefore, defense counsel immediately concluded that he could not call Dr. Gregory to testify. See R.A.157-158 ¶8; R.A.74 ¶2.

Guilianelli's opinion and asked the Court to decide the motion on the papers. Add.116 ("The parties have agreed that the court can decide this motion based on their pleadings, the supporting materials and their oral arguments"). On August 23, 2016, the trial judge denied that motion because she found that Guilianelli's experiments had sufficiently replicated the conditions in the basement to be reliable. *Id*.

At trial, Guilianelli offered the anticipated opinions. Tr.3:7:162. At one point, the judge openly questioned her decision to permit his testimony,[40] and expressed regret that she had not been able to hear it prior to trial. *Id*. at 213. But when the ADA vociferously objected to her suggestion that she might strike it, she took no action. *Id*. at 214.

After trial, undersigned counsel retained Dr. Arghavan Louhghalam, a professor of civil engineering, whose areas of research includes the effect of environmental conditions on construction materials. R.A.163 ¶1. Dr. Louhghalam concluded that Guilianelli's experiments were fundamentally flawed and his conclusion that the paint was applied to the floor shortly before first responders arrived was manifestly unreliable.

[40] "I'm having great difficulty understanding how this witness can or should be testifying about this paint spilled versus paint poured . . . it just seems as though the hole keeps getting dug deeper and deeper and deeper. And my inclination is to strike at least that portion." Tr.3:7:209.

R.A.167 ¶10. She noted that his opinion that the paint was deliberately poured was a naked assertion unsupported by any data or argument. *Id.*

Relying on Dr. Louhghalam's opinion, undersigned counsel filed a new trial motion alleging ineffective assistance, and requesting an evidentiary hearing.

Judge Mulqueen's denial of Cara's new trial motion was reversible error. Add.123. At the very least, Judge Mulqueen erred in denying an evidentiary hearing.

Alternatively, in light of all the evidence, the record now establishes that Guilianelli's unrebutted opinions should not have been admitted and created a substantial likelihood of a miscarriage of justice under G.L. c. 278, § 33E.

**A. Standard of Review**

Because this is first degree murder case, this Court is required to conduct an independent review under G.L. c. 278, §33E. The question is "whether there was an error in the course of the trial *(by defense counsel, the prosecutor, or the judge)* and, if there was, whether that error was likely to have influenced the jury's conclusion." *Commonwealth v. Wright*, 411 Mass. 678, 682 (1992) (emphasis added).

### B. Defense counsel was ineffective for failing to request an evidentiary hearing on his motion to exclude Guilianelli's opinion testimony and locate an expert witness who could challenge the reliability of Guilianelli's opinions.

It was counsel's duty to "[conduct] a complete investigation of the possible defense" and explore expert assistance. *Commonwealth v. Epps*, 474 Mass. 743, 757 (2016). While defense counsel did ask the court to exclude Guilianelli's testimony under the *Lanigan* standard, and did spend a week searching for an expert to challenge Guilianelli's opinions, he ultimately failed and waived an evidentiary hearing. As explained below, because counsel could have found an expert who would have demonstrated that Guilianelli's opinions were unreliable and therefore inadmissible under *Lanigan*, counsel's performance was unreasonable. See *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984).[41]

First, given that Guilianelli's proposed opinion testimony did not fall into a commonly-accepted area of

[41] Defense counsel asserted that the Commonwealth's late notice of Guilianelli's testimony contributed to his inability to locate and hire his own expert – particularly because he was forced to conduct his search over the Summer, when many academic scientists are unavailable. R.A.158 ¶10. Accepting the possibility that the Commonwealth was partially to blame for defense counsel's inability to locate an appropriate expert, Cara is still entitled to relief "if it appears that justice may not have been done", regardless of the cause. *Commonwealth v. Brescia*, 471 Mass. 381, 388 (2015).

"expertise," an evidentiary *Lanigan* hearing was especially critical.[42]

Second, the trial judge herself eventually seemed to appreciate that there were serious questions about the reliability of at least some of Guilianelli's opinions. In the midst of defense counsel's cross-examination of Guilianelli at trial, the judge, *sua sponte*, called both parties up to sidebar to express her "inclination to strike" a portion of Guilianelli's opinions. Tr.3:7:209. In response to the prosecutor's observation that there had already been a *Lanigan* challenge to the reliability of Guilianelli's opinions, the judge noted that her ability to judge the opinions on paper alone was "obviously quite different than having the individual come before the Court and testify and be subject to cross-examination." Tr.3:7:213. But in the face of the prosecutor's vociferous objection,[43] the judge did not strike any of his testimony. Tr.3:7:214. She did not offer any explanation for this decision.

This sidebar exchange in the midst of a murder trial illustrated with startling clarity the importance of the

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[42] See *Commonwealth v. Camblin*, 471 Mass. 639, 645 (2015) (trial court erred in refusing to conduct *Lanigan* hearing where breath test methodology was new, even though legislature deemed it generally admissible).

[43] The prosecutor protested against the late-hour of the Court's concerns, noting that "if Your Honor had ruled or indicated that you were unlikely to let this in, we wouldn't have proffered that testimony." *Id*.

judge's role as a *pre-trial* gate-keeper charged with an obligation to evaluate novel opinion testimony to ensure that it bears sufficient indicia of reliability. See *Commonwealth v. DiCicco*, 470 Mass. 720, 729 (2015) (cleaned up).

Had counsel located and retained a properly qualified expert, like Dr. Louhghalam, to thoroughly review Guilianelli's work and then insisted on an evidentiary *Lanigan* hearing in which both parties examined Guilianelli and the defense expert critiqued his work, counsel could have properly educated the Court on the unreliability of Guilianelli's opinions. See *Case of Canavan*, 432 Mass. 304, 312 (2000) (describing *Lanigan* determination as "inherently fact-intensive").

*Lanigan* requires the Commonwealth to demonstrate that its proposed expert satisfies five foundational requirements:

> (1) that the expert testimony will assist the trier of fact; (2) that the witness is qualified as an expert in the relevant area of inquiry, (3) that the expert's opinion is based on facts or data of a type reasonably relied on by experts to form opinions in the relevant field, (4) that the process or theory underlying the opinion is reliable; and (5) that the process or theory is applied to the particular facts of the case in a reliable manner.

*Barbosa*, 457 Mass. at 783 (citations omitted). See Mass. G. Evid. § 702 (2016). While even a single missing element may trigger exclusion of the proposed testimony,

*Barbosa*, 457 Mass. at 783, Dr. Louhghalam's affidavit makes clear that Guilianelli failed every prong.

When determining the admissibility of expert opinion testimony based on experiments, an essential consideration is "whether the experiment was conducted under conditions substantially similar" to the conditions at the crime scene, "so that the jury can infer something material" from the experiment. *Read v. Mt. Tom Ski Area*, 37 Mass. App. Ct. 901, 904 (1994) (cleaned up). Dr. Louhghalam demonstrated that Guilianelli's experiments failed this test too.

Guilianelli was asked to perform two tasks: (1) to pinpoint when the paint was applied and (2) to determine whether the paint was deliberately poured. He generated opinions on both points. However, both opinions were based on unreliable data or no data at all.

**1. Guilianelli was not qualified in the relevant area of inquiry.**

Because the trial judge did not hold an evidentiary hearing, there was no pre-trial exploration of Guilianelli's qualifications to develop the experiments upon which he ultimately based his opinions. But at trial, both attorneys developed this point.

Guilianelli apparently knew how to build and test particular paint blends for ordinary consumer applications (i.e. brushed or rolled onto a flat surface). Tr.3:7:129, 132, 134-135 ("So we do all of our

testing, what we call three mils. . . That's where we do all of our testing. That's all of our results").[44] However, the subject of his testimony was not the behavior of house paint under ordinary circumstances. He was actually asked to design and execute an original scientific experiment to determine when pools of paint in varying thicknesses far greater than the intended application had been applied to a concrete basement floor. This was completely new to him:

> A: Now, granted these aren't -- this isn't an application that we're typically used to seeing so this is a new realm for myself[.]
>
> . . .
>
> Q: When you say "a new realm," am I correct that pouring paint out and just letting it sit isn't how it's designed to be used?
>
> A: Correct.
>
> Q: Had you done any testing or studies to simulate that situation before?
>
> A: No, we would never let it dry. You pour it into paint pans and things like that. But besides spilling it by accident, you typically don't pour out paint and check dry capabilities of it.

Tr.3:7:143-144.

[44] Although Guilianelli's job title was "quality engineer", he did not have an engineering degree – or any advanced degree. Rather, he received a B.S. in chemistry from Baldwin-Wallace University in 1996. Tr.3:7:126.

> Q: And by the way, while we're on this subject of being an expert in wrinkling and dulling of paint, you said that you had never done this before, correct?
>
> A: Correct.
>
> . . .
>
> Q: You had never, prior to being approached by Mr. Gagne, done any research on this topic, correct?
>
> A: That is correct.
>
> Q: You've never read any articles, scholarly articles in journals, industry journals about judging time of drying based on wrinkling and cracking, have you?
>
> A: No.

Tr.3:7:187. Guilianelli's self-professed lack of qualifications for designing experiments to establish drying time in atypical circumstances alone should have disqualified him from offering expert opinions based on his own experiments.[45]

Professor Louhghlam, by contrast, has a PhD in Engineering Mechanics and specializes in designing

[45] See *Peterson v. Foley*, 77 Mass. App. Ct. 348, 351-352 (2010) (officer not qualified as accident reconstruction expert where he had no training with respect to accident reconstruction and determining speed); *Commonwealth v. Frangipane*, 433 Mass. 527, 536 (2001) (witness not qualified to discuss medical and scientific underpinnings of dissociative memory loss where only training was attendance at various seminars and studies with noted researchers); *Commonwealth v. Guinan*, 86 Mass. App. Ct. 445, 450-451 (2014) (witness not qualified to discuss integrity of car's onboard computer where he lacked any training or experience in electronic power steering).

experiments, following the scientific method, to study environmental effects on construction materials. R.A.163 ¶1. She publishes her results in peer reviewed journals to check the reliability of her work. R.A.163-164 ¶2.

**2. The process underlying Guilianelli's opinions, including the design of his experiments, was not reliable and therefore his opinions were not based on "sufficient facts or data".**

Dr. Louhghalam demonstrated that Guilianelli did not follow the most basic elements of the scientific method. First, he did not design or execute reliable experiments replicating "substantially similar" conditions to determine the rate at which the paint found in the circumstances of this case would have dried. *Read,* 37 Mass. App. Ct. at 904. His experiments did not *control* for any important characteristics of the paint or the basement environment, such as paint thickness and homogeneity, the fact that the paint was disturbed, humidity level, temperature, airflow or the porosity of the substrate. R.A.167-176 ¶¶10-23.[46] Furthermore, he did not pour the paint directly on concrete, but poured it on a sealed surface. R.A.172 ¶¶18-19. Also, he did not pour the paint onto a rigid substrate. R.A.173 ¶20.

[46] The judge credited Guilianelli's control of temperature and humidity [Add.121] but refused to confront his failure to control for these other factors. She asserted that these failings merely affected the weight of Guilianelli's opinions. Add.121.

Second, he did not *repeat* the trials at different paint thicknesses, humidity levels and temperatures, reporting the average and standard deviation of results. R.A.169-171 ¶¶12-16. Rather, he conducted only six trials total, introducing different variables in each.

Third, Guilianelli's methodology was inherently subjective. He merely observed wet paint over time in a variety of conditions. He then compared photographs of this paint to crime scene photographs. He then drew conclusions about how long the paint in the basement had been drying based on its apparent visual similarity to the paint in his experiments.

**a. Guilianelli's experiments did not control for relevant characteristics of the paint or the environment and he did not repeat them to confirm the results**

Guilianelli's experiments (1) used the same brand of paint found in the basement and (2) sometimes replicated the temperature and humidity readings on the dehumidifier found in the basement. But even as to the limited conditions that Guilianelli attempted to replicate (temperature and humidity),[47] trial counsel

[47] Guilianelli conducted the first trial in his office without attempting to replicate the temperature and humidity of the Rintala basement. Tr.3:7:145. He conducted the second trial in a large environmental chamber in which he was not able to control temperature and humidity accurately. *Id.* at 144-46. He conducted the final four trials in a small environmental chamber in

noted that there was no evidence that the basement dehumidifier, upon which he relied, accurately recorded the temperature and humidity. Tr.3:7:183. And Guilianelli admitted that he did not know whether the temperature and humidity on the basement floor where Ann's body was found differed from the temperature and humidity around the dehumidifier. Tr.3:7:228.

Moreover, in order to control temperature and humidity in his last four trials, Guilianelli used an environmental chamber with a fan that "blows the air through it". Tr.3:7:145. He conceded that airflow would affect drying time and that he did not know the airflow in the basement. Tr.3:7:218. Therefore, even if the chamber was able to precisely replicate the temperature and humidity on the basement floor around Ann's body, because the airflow in the chamber may have been different than the airflow in the basement, experimentation was necessary to determine the effect of the airflow on the drying time of paint.

The most obvious flaw in Guilianelli's experiments was that, despite the fact that the thickness of paint affects drying time, Tr.3:7:227, and the paint at the crime scene was distributed unevenly, he did not determine the thickness anywhere. For example, he did not examine the topography of the floor depicted in

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which he was able to control temperature and humidity. *Id*. at 145.

photographs to determine the extent to which paint pooled in depressions.[48] Moreover, with the exception of a single trial,[49] he did not determine the thickness of the paint in his experiments. R.A.170 ¶15.

In a single trial - Trial 5 - Guilianelli purported to address "how drying time would be affected if paint pooled in a depression." R.A.204. Specifically, he filled a tray, lined with aluminum foil, with 300 grams of paint and compared its characteristics over time to a shallower pool of paint. Undermining his effort to study paint thickness, he added an additional variable, placing the tray onto a concrete slab, to determine if that affected drying time. In fact, the tray of paint *never dried*, even after 24 hours. R.A.176 ¶23. Regardless, because he did not determine the paint's

[48] At trial, Guilianelli explained that his company added a pink dye to this paint that was designed to evaporate within 30 minutes after application, turning the applied paint from pink to white. Tr.3:7:135. And yet, crime scene photos made clear that the paint at the crime scene was still pink in many places long after first responders arrived, illustrating that the paint clearly dried much more slowly here than it would have in its intended commercial application. See e.g. R.A.125-127. Guilianelli conceded that even in his experiments, the pink dye did not evaporate and therefore offered no guidance in the drying time of thicker applications of paint. Tr.3:7:138.

[49] In "Trial 1", Guilianelli applied paint at a thickness of "40 mil" or 40/1000's of an inch. He determined that this sample dried in three hours and 40 minutes. But this thickness appeared much thinner than most areas at the crime scene and in any event, Guilianelli did not control for temperature or relative humidity in this experiment. Tr.3:7:145; R.A.170 ¶15.

thickness, did not conduct multiple tests at multiple thicknesses, and added an additional variable – a concrete slab - this single test provided virtually no quantifiable data on the relationship of paint thickness to drying time.

Dr. Louhghalam noted that since Guilianelli did not measure the thickness of the paint in his trials and never established reliable outer bounds for drying time, he could not draw any conclusions about the significance of the fact that paint at the crime scene might have been wet in places. R.A.170-171,176 ¶¶16,23.

Second, Guilianelli failed to address the fact that the paint found at the scene was clearly disturbed.[50] Once again, he conducted a single experiment – Trial 5 – which attempted to address this point. In the trial, a film eventually formed on the paint he had poured into a tray. After 24 hours, he removed the film, only to find wet paint underneath. This experiment demonstrated two important points: (1) in some circumstances, thick applications of this paint are still wet, 24 hours after application; and (2) where this paint dries enough to form a surface film or skin, it can conceal wet paint, which will be revealed if the paint is disturbed.[51]

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[50] For example, paint had pooled between Ann's body and the floor. It appeared that when she was turned onto her back, this paint was disturbed and some of it dripped down her side.

[51] Guilianelli acknowledged this point at trial. Tr.3:7:138 ("when [paint is] thicker, . . .[o]ver time

This result rendered meaningless his observation of drips and sags of paint on Ann's body. More specifically, in support of his opinion that the paint was "freshly applied", he noted that when Ann was rolled onto her back, paint dripped down the side of her stomach and torso. R.A.206; Tr.3:7:165. Dr. Louhghalam explained that this opinion was unreliable because it was not based on experimental data:

> The flaw in his reasoning is that he had no data about how long the paint under the body could remain wet because he did not know how much paint was stuck under the body when it was turned over and did not properly test for variable amounts of paint to try and establish a reliable predictive model.

R.A.177 ¶ 24. Indeed, it was clear that paint had pooled under Ann's body before she was turned onto her back (Tr.3:7:217), and the turning of her body disturbed that pooled paint. Guilianelli's own observation that thicker applications of this paint can take more than 24 hours to dry and that a skin or film can form on thicker applications of paint, concealing wet paint underneath (Trial 5), demonstrated that it was possible the paint dripping on Ann's body could have been applied to the floor hours before she was moved.

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you're going to start forming a film so it's going to be harder for [the pink dye] to escape [i.e. evaporate] out of that latex film that's started on the top. So it's not a linear [drying] progression.").

Guilianelli also noted a lack of paint "tearing"[52] around the body. Tr.3:7:166. But Dr. Louhghalam noted that this was explainable by the fact that the paint in the area around the body was much thicker than paint that has been applied to a flat surface with a roller. R.A.178 ¶25. She noted once again that without appropriate experimentation controlling for paint thickness, Guilianelli could not make reliable statements about when tearing would have occurred. *Id.*

Third, Guilianelli did not attempt to determine how long the paint had been in the basement, the conditions in which it had been stored or to what degree it had separated.[53] As he acknowledged, paint is made up of three components - solvents, binders and pigments - which "separate over time." R.A.199.[54] Crime scene photographs establish that the spilled paint had clearly separated. Accordingly, it would have dried at different rates in different locations depending on the percentage

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[52] When paint is applied smoothly and evenly on a flat surface over paint tape, and then it dries, it can tear like paper if the paint tape is removed rapidly.

[53] At trial, Guilianelli implied that he accounted for this factor by using paint "that had been sitting there for a while. I would say at least four to six months." Tr.3:7:149. In addition to the fact that this was obviously an imprecise estimate of the age of his test paint, he offered no information about the conditions in which the test paint had been stored (e.g. temperature, humidity, condition of lid).

[54] At trial, Guilianelli seemed to contradict himself. He claimed this was "a pretty stable paint system". Tr.3:7:148.

of the three components. Despite this, Guilianelli proceeded on the oxymoronic premise that the paint was "homogeneous except for the [pink] dye" when distributed (R.A.199), implying erroneously, that it would have dried at a uniform rate.

Finally, Guilianelli did not attempt to replicate the fact that the paint was found on a concrete basement floor and human skin. He admitted that concrete can be porous unless it is sealed and that he did not know the porosity of the concrete or whether it was sealed. Tr.3:7:216. He also admitted he did not know the temperature of the body or how much paint it would absorb. *Id*. at 217. Finally, where paint was trapped between Ann's body and the concrete floor, he acknowledged "it would stay more wet between two surfaces that aren't allowing air". *Id*.

In any event, he conducted all of his experiments by pouring paint on sealed CU-1 chart paper (and in one instance the tray). R.A.204.[55]

Guilianelli claimed to test the relevance of this factor in a single trial - Trial 6 - by placing a cement

[55] Guilianelli justified this failure by asserting that a sealed substrate "forces virtually all of the water to leave the coating through the coating air interface" and therefore "represents the worst case [i.e. slowest] scenario for the paint to dry. If the floor at the scene was not sealed well, it would only cause the paint to dry more rapidly." R.A.204. Guilianelli offered no authority for this naked assertion, much less data derived from experimentation.

slab into the chamber and placing the CU-1 chart on top of the slab. *Id.* Since the paint never touched the concrete, it is not clear what effect the presence of the concrete slab could possibly have had, but it clearly did not replicate the conditions in the Rintala basement where paint was applied directly to the floor. And once again, Guilianelli undermined his effort to study the effect of this factor by adding a second variable in this trial: he placed a piece of cardboard between a paint sample and a fan in the chamber "to help minimize the air blowing down on the sample". Tr.3:7:151.

**b. The "results" of Guilianelli's experiments to determine drying time depended on subjective descriptions of paint.**

Guilianelli admitted that the descriptions of the paint in his experiments and the paint at the scene (e.g. "wet", "fresh", "shiny") were subjective and affected by lighting. Tr.3:7:189-90. More importantly, his conclusions were contradicted by the evidence.

Specifically, the first change he noted was the "dulling of the surface" of the paint. Tr.3:7:156. He claimed that this occurred within 30 to 45 minutes. *Id.* at 157; R.A.210. He asserted that "wet paint appears shiny". R.A.210. Moreover, he noted that first responders reported the paint at the crime scene

appeared wet.[56] He asserted that this supported his conclusion that the paint had been applied within half an hour of the arrival of first responders. R.A.211. See also Tr.3:7:162.[57]

Even if one ignores the inherently subjective nature of descriptive comments like "wet" and "shiny", and his own observation that thicker applications of this paint sometimes take much longer to dry, Guilianelli failed to note that Trooper Magarian also described the paint he observed on the floor after 9:18 p.m. – nearly two hours later - as "wet" and "fresh". Tr.3:11:251. Clearly, then, the description of the paint as "wet" was not a "reliable principle" that could "help the trier of fact to understand" when the paint had been applied to the floor. Mass. G. Evid. § 702 (a), (c).

Dr. Louhghalam also explained that perceptions of "shininess" or "dullness" depend on the angle of incident light. R.A.184-185 ¶37. It also depends on the amount of film. The speed with which film forms depends,

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[56] Guilianelli quoted observations of the paint from Granby police officers Poehler and Smith, and Granby Fire Department paramedics Os and Pandora. R.A.209.

[57] Guilianelli claimed that his experiments established that after paint dulls, the edge dries and a lip forms within 60 minutes. Then, he claimed that wrinkling and cracking appear around the edges within 90 minutes. Finally, he claimed that cracking and waviness appears in the center of the pool. Tr.3:7:158-59. Presumably, Guilianelli thought all of this was irrelevant because first responders reported the paint was still wet when they arrived.

in turn, on temperature, humidity and airflow, which was unknown. R.A.185-186 ¶39.

Finally, Guilianelli opined that the paint was recently applied based on cracking that appeared "the next day". Tr.3:7:168. However, Dr. Louhghalam noted that the relationship between the thickness of paint, drying and the appearance of cracking is not linear. Therefore, she noted that experimentation would be necessary to draw reliable conclusions about the time required to develop cracking at various thicknesses. R.A.186 ¶40. Because Guilianelli had not performed any experiments that controlled for thickness, his opinions about the relevance of cracking were unhelpful. *Id.*

**c. Guilianelli's opinion that the paint was deliberately poured was not based on any experimental data at all.**

Guilianelli's opinion that the paint was deliberately poured, rather than accidentally spilled, was even more problematic. He claimed that the pink dye stains in the empty bucket proved that the paint was poured out of the left corner. Tr.3:7:177; R.A.199. Dr. Louhghalam explained that basic scientific principles demonstrated that Guilianelli's observations of the dye stains did not support his own conclusion. R.A.179-181 ¶¶26-27.

Dr. Louhghalam noted that the remainder of Guilianelli's opinions that the paint was deliberately

poured were unsupported by any data. Compare *Peterson v. Foley*, 77 Mass. App. Ct. 348, 354 (2010) (expert's opinion inadmissible where unsupported by "a basis in fact").

For example, Guilianelli concluded that if the paint bucket had been spilt "you'd just have a straight line" as opposed to what he called a "controlled turn" in Figure 5 of his report, and there would be signs of spatter. Tr.3:7:178, 192. He admitted that he had not tested this theory. Tr.3:7:192. First, Dr. Louhghalam noted this opinion was unsupported by data. R.A.182-183 ¶33. Second, she noted that flowing paint could have covered any spatter, R.A.181 ¶29, illustrating the need for actual experimentation.

Guilianelli also contended that if the bucket had been dropped in a way that caused the lid to come off, there would have been signs of paint on the lid. Tr.3:7:175, 198. Guilianelli referenced a photo of a dark metal lid from a round, unused paint can for comparison. Dr. Louhghalam noted that the lid materials were different and, given that both the lid and the paint in this case were white, it was not even clear, from crime scene photographs, how much paint was on the lid. R.A.181-182 ¶30.

Finally, Guilianelli opined that the paint was deliberately poured because the lid was found partially underneath the paint bucket, rather than in front of the

bucket, as he would have expected if it had been spilled. Tr.3:7:175. Again, Dr. Louhghalam noted that Guilianielli conducted no experiments to support this opinion. Also, she noted that there was pink paint on the lid (R.A.126), indicating paint had recently been spilled onto the lid and therefore either the lid or the bucket, or both, had been moved. R.A.182 ¶31.

Guilianelli's opinion that the paint was intentionally poured was reminiscent of the improper expert testimony in *Commonwealth v. Franceschi*:

> Laviolette testified at the *Lanigan* hearing that he examined the mark in the road and concluded, based on his training and experience, that the mark "look[ed] like a shoe scuff." . . . On direct examination at the hearing, he testified only as to how, in general, he could determine whether a given mark was a shoe scuff: "They're pretty identifiable, roughly the size of a shoe, sometimes directional. Again, it's like a bicycle tire, it's pretty clear -- leaves a clear mark. Something I've seen many times before and it's easily identifiable."
>
> When asked later on cross-examination what "scientifically acceptable way" enabled him to tell whether the mark was left during the incident, he responded, "Again, it comes from my training and experience of seeing these marks, and that's a mark that, like I said, that's something I've seen before."

94 Mass. App. Ct. 602, 607-609 (2018). The Appeals Court concluded that the expert's opinion was inadmissible:

> We agree with the defendant that *Laviolette did not articulate a methodology that is sufficiently reliable to satisfy the*

> *Lanigan standard. His testimony that it looked to him like a shoe scuff simply states his conclusion.* While training and experience, to which Laviolette referred, might have taught him a methodology, it is not itself a methodology. . . . *In the absence of any explanation of how he identifies the mark as a shoe scuff, Laviolette's circular statement that he has seen such marks before at accident scenes, with its implication that this one looked like the others, is not an explanation of methodology.*

*Id.* at 609-610 (emphasis added). The flaw in Guilianelli's opinion was identical. One exchange with defense counsel illustrates the point:

> A: When you kick it or something, it's going to spatter.
>
> Q: How do you know that?
>
> A: Because I've dropped this paint before.
>
> Q: Have you done it in your test circumstances? Have you dropped it ten times to see how many times it spatters in which direction?
>
> A: No, I did not.
>
> Q: That's what scientists do, don't they, test things in that way?
>
> A: They test things, yes.

Tr.3:7:192. See also Tr.3:7:197-199; Tr.3:7:205.

Guilianelli did not articulate a methodology that was sufficiently reliable to satisfy the *Lanigan* standard. His circular statement that he had spilled paint before, that this paint looked different and therefore, had *not* been spilled, was "not an explanation

of methodology." *Franceschi*, 94 Mass. App. Ct. at 610. Had counsel revealed this in a pretrial evidentiary hearing, there is a reasonable probability that the trial judge would have excluded Guilianelli's opinion. Again, the judge admitted as much in the midst of trial when she actually heard this cross-examination for the first time. Tr.3:7:209.

#### 3. Guilianelli's opinions were not helpful to the jury.

For the reasons explained above, at a *Lanigan* hearing, a qualified expert could have explained that Guilianelli's opinions could not "help the trier of fact to understand" any disputed fact. Mass. G. Evid. § 702.

In sum, a properly qualified expert would have demonstrated that the jury could not possibly have inferred "something material" from Guilianelli's opinions and so they were inadmissible. *Read*, 37 Mass. App. Ct. at 904 (cleaned up).

### C. Trial counsel was ineffective for failing to present an expert witness to the jury challenging Guilianelli's conclusions

Alternatively, counsel was ineffective for failing to call his own expert at trial. This was a quintessential "battle of the experts." The Commonwealth's case was entirely circumstantial, and both sides presented multiple expert witnesses on hotly contested issues (primarily time of death and the

relevance of a degraded DNA sample). Against this backdrop, the absence of a defense expert on the paint issue must have been glaring to the jury. Compare *Epps*, 474 Mass. at 768 ("The missing link in the defendant's accident defense was any credible expert evidence"). Especially where defense experts challenged the Commonwealth's other experts, the lack of an expert to controvert Guilianelli's opinions falsely communicated that there was no expert response.

**D. The error prejudiced Cara.**

The Commonwealth relied on Guilianelli's testimony to add a new facet to its circumstantial case against Cara that proved inadequate in the first two trials. Specifically, the prosecutor argued that Guilianelli's opinion supported an inference that Cara deliberately poured the paint shortly before first responders arrived to contaminate the crime scene. Tr.3:12:152-154. That two prior trials ended with hung juries "serve[s] as a meaningful benchmark for determining the likelihood that the outcome of the third trial was affected by the . . . mistake." *Ouber v. Guarino*, 293 F.3d 19, 35-36 (1st Cir. 2002).

Consciousness of guilt evidence was especially critical because the Commonwealth had no direct evidence implicating Cara in the murder. Guilianelli's opinion

that the paint was deliberately poured was the only new – albeit unreliable – evidence proffered on the point.[58]

In prior trials, the prosecutor had merely argued that the presence and appearance of the paint suggested an effort to contaminate the crime scene. Tr.1:12:63-65; 2:13:96. The impact of offering "expert" opinion in support of an asserted inference is a familiar notion.[59] Guilianelli's testimony improperly vouched for the prosecutor's desired inferences. "A witness, lay or expert, may not form conclusions for a jury that they are competent to reach on their own."[60]

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[58] The Commonwealth presented two other pieces of evidence that allegedly illustrated consciousness of guilt. See e.g., Tr.3:12:149 (Cara's voicemails to Ann as veiled attempts to create a false alibi); 12:150 (degraded DNA on a discarded rag as disposal of evidence). Both had been presented at the first two trials and had obviously been insufficient, combined with other evidence, to secure a conviction.

[59] See *Simon v. Solomon*, 385 Mass. 91, 105 (1982) (commenting generally on the significant sway expert testimony may hold over jurors' opinions); *Frangipane*, 433 Mass. at 537 (finding prejudice where improper expert testimony "served to bolster the complainant's credibility by providing a medically scientific explanation for his purported memory loss and its later recovery"); *Commonwealth v. Tanner*, 45 Mass. App. Ct. 576, 581 (1998) ("When the evidence comes from the mouth of a police expert witness, and so bears an official imprimatur, the likelihood for prejudice is great").

[60] *United States v. Freeman*, 730 F.3d 590, 597 (6th Cir. 2013). See also *Tanner*, 45 Mass. App. Ct. at 581; *Commonwealth v. Connolly*, 91 Mass. App. Ct. 580, 593 (2017), citing *Freeman*, 730 F.3d at 597 (lay opinion should not "merely tell the jury what result to reach").

The prosecutor spent more than two pages of his closing argument discussing Guilianelli's opinions. Tr.3:12:152-54. He asserted, "[t]here can be no question that paint was intentionally poured, deliberately poured on the body . . . .this was an intentional pour." *Id.* at 152. See *Id.* at 153-55 (seven references to "poured" paint). Then he asserted "there's no way that if that body had been killed at the same time the paint had been poured, that paint would be fresh and wet and liquidy when first responders got there." *Id.* at 153. The prosecutor explicitly relied on Guilianelli's experiments in support of this argument. *Id.*

The prosecutor's focus on his claim that the paint was intentionally poured was particularly noteworthy given the judge's candid acknowledgement in the midst of Guilianelli's cross-examination, that she regretted admitting his opinion that the paint had been intentionally poured. If not for the prosecutor's vigorous objection, the judge made clear she would have stricken at least that much. And yet, the prosecutor had no hesitation to press this claim in his closing argument. Worse still, the judge bolstered this claim by instructing the jury *sua sponte* that there was "evidence that Cara altered the crime scene" which the jury could

consider as consciousness of guilt. Tr.3:12:193.[61] See Argument V, *infra*.

If defense counsel had called Dr. Louhghalam to explain why Guilianelli's experiments were flawed and his opinions were nothing more than speculation, the prosecutor never could have made these claims. But he did and the jury relied on them.

Lest there be any doubt about this, on a nationally televised news program, Dateline NBC, the jurors themselves explained that Guilianelli's opinion that the paint had been intentionally and recently poured was a major inculpatory factor in their deliberations:

> **Interviewer:** [Juror C], do you agree there are some time problems between when you believe the time of death is and this paint still being wet?
>
> **Juror C:** Oh absolutely.
>
> **Interviewer:** What do you make of it?
>
> **Juror C:** I really – I almost wanted her to admit to spilling the paint just to make sense out of it, because without her spilling the paint, it just didn't make any sense.

[61] There was no paint on Ann's neck or hands. See R.A.109, 112. Given that Ann was strangled and the evidence that she struggled to pull her attacker's hands from her neck, it seems the killer would have been most likely to cover these areas with paint if he or she intended to conceal evidence of guilt.

R.A.351.[62] Clearly then, counsel's failure to call an expert witness to demonstrate the unreliability of Guilianelli's opinions "was likely to have influenced the jury's conclusions." *Wright*, 411 Mass. at 682.

### E. Judge Mulqueen improperly denied Cara's request for an evidentiary hearing on her motion for a new trial.

Judge Mulqueen denied Cara's request for an evidentiary hearing in connection with her new trial motion so she could call Dr. Louhghalam. At the very least, because Cara has raised a substantial issue, this Court should remand the case to the trial court for an evidentiary hearing.

Judge Mulqueen defended trial counsel's performance by noting that, with help from Dr. Gregory, he "skillfully hammered home" Dr. Loughalam's critiques of Guilianelli's opinion on cross-examination. Add.127. But this is not the issue. Rather, it is whether counsel's failure to present expert opinion testimony challenging the reliability of Guilianelli's opinions to the judge

[62] Ordinarily, the jury's deliberative process cannot be used to impeach a verdict. See *Commonwealth v. Solis*, 407 Mass. 398, 403 (1990). But here, counsel simply reviewed a television interview. Moreover, Cara does not seek to use this information to impeach the jury's verdict. Rather, it is simply evidence of the materiality of Guilianelli's testimony. This Court is not barred from considering unsolicited jury information for any purpose. Cf. *Commonwealth v. Kincaid*, 444 Mass. 381, 391-392 (2005) ("[S]ome inappropriate information may be learned from the postverdict inquiry. . . If so, that information cannot be ignored").

as gatekeeper and, if that failed, to the jury, might have made a difference.[63]

Trial counsel's cross-examination, no matter how skillful, was not evidence -- further highlighting the need for a rebuttal expert. *Boice-Perrine Co. v. Kelley*, 243 Mass. 327, 330 (1923) ("Disbelief of testimony is not the equivalent of proof of facts contrary to that testimony"). Moreover, Guilianelli did not make material concessions and did not waver in his confidence that his conclusions were correct. In order to render cross-examination equivalent to Dr. Louhghalam's proffered testimony, Guilianelli would have had to concede before the jury that (1) he was unqualified to conduct these tests, (2) his tests were not reliable, and (3) his core conclusions were incorrect. He did none of these things.

Judge Mulqueen's reliance on trial counsel's work with Dr. Gregory [Add.126] only highlights that trial

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[63] See *Commonwealth v. O'Neil*, 51 Mass. App. Ct. 170, 183 n.10 (2001) (single serious mistake by defense counsel at trial may amount to ineffective assistance of counsel despite over-all good quality of defense); *Commonwealth v. Frisino*, 21 Mass. App. Ct. 551, 556 (1986); *Commonwealth v. Rossi*, 19 Mass. App. Ct. 257, 258–260 (1985) (single issue with trial counsel's performance required reversal on ground of "ineffective assistance," notwithstanding defense counsel's display of "high degree of professional competence"). See also *United States. v. Cronic*, 466 U.S. 648, 657 n. 20 (1984) ("the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole specific errors and omissions may be the focus of a claim of ineffective assistance as well").

counsel recognized the importance of Guilianelli's testimony. While he made a tactical decision not to call Dr. Gregory to testify because of his obvious bias, his decision not to call *any expert* – after a mere one-week search - was manifestly unreasonable.

In fact, the record illustrates that trial counsel wanted to call an expert. He explicitly stated that if he had been able to find an expert who would have given an opinion like Dr. Louhghalam's, he would have done so R.A.161 ¶¶ 17, 19. This claim is entirely consistent with his motion in limine to exclude Guilianelli's testimony, cross-examination of Guilianelli at trial, and closing argument.

At the very least, an evidentiary hearing was necessary to determine whether (1) Guilianelli's opinions were reliable and admissible, or alternatively (2) that trial testimony of an expert could have made a difference to the jury.[64]

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[64] See e.g., *Commonwealth v. Velez*, 479 Mass. 506, 514-515 (2018) (where it was "not apparent on the face of the record that counsel was ineffective," it was error for the judge to deny the motion without a hearing because "the motion judge could not determine whether it was 'manifestly unreasonable' for trial counsel to forgo these defenses when he chose to do so"). See also *Commonwealth v. Celester*, 473 Mass. 553, 574 (2016)(vacating denial of new trial motion and remanding for evidentiary hearing); *Commonwealth v. Williams*, 68 Mass. App. Ct. 287, 290–291 (2007)(remanding for further fact finding to determine if trial counsel's performance was "manifestly unreasonable" where record was insufficient to make such determination).

This court should grant the requested relief or at least remand the case for an evidentiary hearing.[65]

**F. The trial judge's admission of the "paint expert's" unreliable opinion that the Defendant intentionally poured paint on the decedent's body immediately before first responders arrived, based on flawed experiments or naked assumptions, was reversible error.**

As noted above, this Court is especially concerned about the reliability of expert testimony based on novel scientific methodology.

> Where new hard science is involved, an appellate court will *always* take a hard look at the trial judge's decision to admit or exclude the evidence. And, as the cases illustrate, the appellate court will not hesitate to substitute its judgment for that of the trial judge, if the judge has erred in ruling on the evidence by finding it either reliable or unreliable."

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[65] In the event that this court remands the case for an evidentiary hearing, the defense requests that the Court order that it be reassigned to another judge. After Judge Mulqueen was assigned and denied the new trial motion, undersigned counsel learned from discovery provided by the Commonwealth that at the time Ann was killed, in March 2010, Judge Mulqueen was employed as the head of the child abuse unit in the Northwestern District Attorney's Office (NWDAO). In that capacity, she held a meeting on April 2, 2010, about the well-being of the Rintalas' daughter Brianna. Presumably, she also worked with the CPAC team assigned to the NWDAO that led the homicide investigation and her fellow prosecutors who developed the case against Cara. "In order to preserve and protect the integrity of the judiciary and the judicial process, and the necessary public confidence in both, even the appearance of partiality must be avoided." *Commonwealth v. Cousin*, 484 Mass. 1042, 1046 (2020) (cleaned up).

*Case of Canavan*, 432 Mass. 304, 317 (2000) (Greaney, J., concurring) (emphasis added).

And this Court makes a broad inquiry; it has "considered scientific studies that arise following the denial of initial *Daubert-Lanigan* hearings where necessary to ensure an accurate decision concerning the reliability of scientific evidence[,]" including scientific studies that were not before the lower court judge. *Camblin*, 478 Mass. at 479.

All of the relevant evidence, including evidence developed at trial and Dr. Louhghalam's affidavit, establishes that – putting aside any claims of ineffective assistance – Guilianelli's opinions were unreliable and should not have been admitted at trial.

As explained above, the prosecutor relied heavily on Guilianelli's opinions in his closing argument and the jurors explicitly acknowledged that they relied on the paint evidence in post-trial interviews. In any event, given that the first two trials ended in mis-trials and Guilianelli's opinions were the only material new evidence in the third trial, it is impossible to claim that it likely did not affect the outcome. Accordingly, the conviction must be reversed.

## IV. The admission of disputed and remote evidence of domestic violence and marital strife as motive despite substantial recent reconciliation was reversible error.

From the very beginning, Cara made clear that she and Ann had struggled in their marriage. She was forthcoming about it during her lengthy recorded interrogation on the night of the crime, which the Commonwealth played at trial. Exhibit 23.

But the Commonwealth was apparently not satisfied with that. Prosecutors introduced the details of specific allegations of misconduct that in some cases took place over two years prior to Ann's death. This irrelevant, remote and cumulative evidence unfairly prejudiced Cara and should have been excluded.

### A. Standard of Review

The admission of prior bad act evidence is reviewed for an abuse of discretion.[66] *Barbosa*, 457 Mass. at 794.

### B. Argument

The longstanding rule of law is that the Commonwealth "may not introduce evidence that a defendant previously has misbehaved, indictably or not, for the purposes of showing h[er] bad character or propensity to commit the crime charged." *Commonwealth v. Helfant*, 398 Mass. 214, 234 (1986) (cleaned up).

[66] Trial counsel filed "Defendant's Motion in Limine to Exclude Extrinsic "Bad Act" Evidence" (R.A.37) prior to the first trial and renewed his objections throughout the third trial. Tr.3:5:57.

Because the evidence presented was remote, in some instances merely unproven allegations, and in others cumulative of Cara's admissions, it was insufficiently probative of motive, identity, or Cara's state of mind and alternatively whatever probative value it had was outweighed by the danger of unfair prejudice.[67]

**1. 2008 Assault and battery allegation**

In 2008, Ann accused Cara of assault. Tr.3:5:46-49. Later, she obtained a restraining order. *Id*. at 56,60.

Cara was arraigned on September 29, 2008. Tr.3:5:65. At that time, upon Ann's request, the court vacated the restraining order (Tr.3:5:68) and in November dismissed the assault charges. *Id*. at 66.

In addition to the fact that this was merely an allegation, it was temporally remote. Ann brought it some eighteen months prior to her death. While some courts have admitted incidents that were more remote,[68] there was an ongoing hostile relationship,[69] a condition that was absent here.

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[67] See *Commonwealth v. Sapoznik*, 28 Mass. App. Ct. 236, 245 (1990) (reversing conviction where prior bad act was relevant as to defendant's knowledge but danger of unfair prejudice outweighed probative value).

[68] See, e.g., *Commonwealth v. McGuane*, 77 Mass. App. Ct. 371, 377-78 (2010) (finding no error in admission of middle school incident "approximately six to eight years prior to the killing").

[69] See *McGuane* at 378 ("[T]here was evidence of ongoing animosity between the defendants and the victim"). See also *Commonwealth v. Butler*, 445 Mass.

### 2. Events of May 2009

On May 12, 2009, Cara filed for divorce. See R.A.115. That same day, someone placed a 911 call from the Rintala home and then hung up after someone said, "just leave, just leave." Tr.3:5:95.

Later that month, Ann filed for divorce and sought full custody of Brianna. *Id.* at 104. On May 26, 2009, Ann served Cara with the complaint. *Id.* at 106. Later in the day, Cara called 911 and Detective Fenn responded to their home. Tr.3:5:100-101.

Ultimately, Ann and Cara sought restraining orders against each other. Tr.3:5:107. The court issued the orders. R.A.119, 121.

In August 2009, Cara and Ann separated and Ann moved into an apartment in South Hadley. Tr.3:11:127. On August 18, 2009, Ann and Cara asked the court to vacate their restraining orders and the court granted their requests. *Id.*

Ann and Cara reconciled three months later, and Ann moved back to 18 Barton Street. Tr.3:12:74.

All of this occurred nearly a year before Ann's death. And once again, long before Ann's death, Cara and Ann asked the court to vacate their restraining orders, voluntarily dismissed their divorce complaints, moved

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568, 576 (2005) ("The bad act evidence, taken as a whole, demonstrated continuing animosity on the defendant's part toward [the victim]").

back in together, and, by all account, made a serious mutual effort to reconcile. Tr.3:12:75. Therefore, this evidence held little probative value but significant unfair prejudicial effect.

**3. Alleged quarrel in February 2010**

In February 2010, Cara and Ann visited Ann's aunt, Nancy Kaufman, in Florida while on vacation. Tr.3:4:143-146. She claimed that they quarreled. *Id*.

And yet, in the same trip, Cara and Ann visited Cara's uncle Jim Roberts. They had just come from a cruise with Brianna which they enjoyed greatly. Tr.3:11:123. They also expressed a desire to move to Florida together. *Id*.

Accordingly, the claims of Ann's aunt, a biased witness, carried little probative value, especially where Cara immediately disclosed to police that she and Ann struggled in their marriage. "Any minimal value it may have had in adding to an understanding of the relationship was far outweighed by its prejudicial nature." *Commonwealth v. Almeida*, 42 Mass. App. Ct. 607, 612–13 (1997).

**4. Evidence of more recent reconciliation**

There was ample evidence of genuine more recent reconciliation. Cara and Ann started attending church together with Brianna in October 2009, even before Ann moved back home. Tr.3:9:202. Cara's father testified that they had been going to counseling. Tr.3:12:74. When

Cara's uncle visited in 2009, they all had dinner together in Ann's apartment. Tr.3:11:121. As noted above, in February 2010, they took a vacation cruise and visited family in Florida. *Id.* at 123. And in the weeks and days before Ann's death, witnesses saw Cara and Ann together, apparently happy, at a race Cara ran (Tr.3:8:226) and taking Brianna to meet the Easter bunny (Tr.3:9:196).[70] This evidence is important because it illustrates a lack of the hostility, undermining any basis for claiming "settled ill-will" that in turn reduced the probative value of the more remote bad act evidence. *Commonwealth v. Cormier*, 427 Mass. 446, 450 (1998) (cleaned up).

**5. The trial judge's ruling**

The trial judge admitted prior bad act evidence to demonstrate Cara's state of mind, finding that even the earliest incidents demonstrated continued animosity. Add.109. However, the judge failed to take into account the remoteness of these events and the fact that they were followed by a substantial reconciliation in the five months immediately preceding Ann's death.[71]

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[70] Contrast *Commonwealth v. Nom*, 426 Mass. 152, 160 (1997) (no error in admitting two protective orders where "the claimed 'improvement' in the relationship appears to consist only of the defendant's promises, made only days before the killing, to change his behavior").

[71] See, e.g., *Commonwealth v. Abbott,* 130 Mass. 472, 475 (1881) overruled on other grounds by *Commonwealth v. Beldotti*, 409 Mass. 553, 561 n.6 (1991) (animosity

Additionally, because much of this evidence would come in through Cara's statement to police, the specific bad act evidence was cumulative, and its admission increased the likelihood that it would be treated as improper "propensity" evidence.[72]

Finally, the prosecutor exacerbated the prejudice by highlighting this evidence in his closing argument. Tr.3:12:140 ("And then there were the bad times. . . .things getting quote out of control as the defendant herself said in her interview that night, *escalating to the point of restraining orders, assault and battery allegations, multiple 911 calls, divorce filings, allegations of both physical and verbal and psychological abuse*.") (emphasis added).

Accordingly, the prejudicial effect of this remote and disputed bad act evidence outweighed its minimal probative value and the judge abused her discretion in admitting it.

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between husband and wife three years before wife's murder too distant to be probative of husband's motive); *Commonwealth v. Burke*, 339 Mass. 521, 534 (1959) (evidence of defendant husband's adulterous relationship which terminated seven months before wife's death not probative of motive to murder). Contrast *Commonwealth v. Bartolini*, 299 Mass. 503, 510–511 (1938) (evidence that defendant physically abused victim within month prior to her death properly admissible on issue of motive), *cert. denied*, 304 U.S. 565 (1938).

[72] See *Commonwealth v. Mills*, 47 Mass. App. Ct. 500, 505 (1999) (bad act evidence can become "dangerously confusing to the triers when piled on and unduly exaggerated").

## V. The trial judge's sua sponte decision to instruct the jury that they could consider evidence of the defendant's consciousness of guilt was reversible error where the defense did not focus on that evidence in closing and had no opportunity to respond.

### A. Relevant Facts

In the first two trials, neither party had requested a consciousness of guilt instruction and the judge had not given one.

As noted above, video footage from a McDonald's depicted Cara disposing of items in a trash can in the parking lot at 5:47 p.m. on the date of Ann's murder. Tr.3:4:96. Police recovered rags and a diaper. *Id.* at 107. Crime scene technicians recovered a partial DNA profile from a red-brown stain on the gray rag, which was degraded. Tr.3:7:69-71.

Dr. Bieber, one of the world's leading experts on degraded DNA, opined that this degraded DNA had not been "freshly deposited" but rather, had deteriorated over a longer period of time. *Id.* at 141-42.

Also, as discussed in detail above, paint had been spilled on the basement floor and covered Ann's body. David Guilianelli opined it was poured intentionally within thirty minutes before first responders arrived. The defense objected to this opinion.

During his closing argument, the prosecutor argued that Cara "concealed" Ann's murder by disposing of the

rags, one of which was "presumptively positive for blood . . .with Ann's DNA". Tr.3:12:150. The prosecutor disputed Dr. Bieber's opinion that the DNA had not been recently deposited. *Id*. Moreover, the prosecutor claimed that Cara "ma[de] one final desperate attempt at covering up, concealing, misleading" by intentionally pouring paint on the body. *Id*. at 152.

Neither party requested a consciousness of guilt instruction and the judge did not indicate that she would give one. Despite this, during her final charge, she gave a consciousness of guilt instruction, *sua sponte*:

> Now, members of the jury, you have heard evidence and arguments suggesting that Cara Rintala may have altered the scene there in the basement and at her house, that she may have attempted to discard evidence or to do other things to mislead police officers.
>
> If the police -- if the Commonwealth, if the prosecution has proven that she did, in fact, engage in this conduct, you may consider whether such actions indicate feelings of guilt by her and whether in turn such feelings of guilt might tend to show her actual guilt on this charge.

Tr.3:12:193. The judge then gave the rest of the model instruction. *Id*. at 193-94.

Defense counsel promptly objected to the consciousness of guilt instruction. Tr.3:12:226-227. The judge refused to take any curative action. Tr.3:12:227.

**B. Standard of Review**

When defense counsel objects to a jury instruction, "appellate courts conduct a two-part test: whether the

instructions were legally erroneous, and (if so) whether that error was prejudicial."[73]

**C. Argument**

The trial court's consciousness of guilt instruction was erroneous for three reasons: (1) it violated this Court's advice that if such an instruction is not requested, the better practice is not to give it; (2) the instruction bolstered the Commonwealth's irrelevant and unreliable evidence on the point; and (3) giving the instruction without notifying counsel before closing argument deprived defense counsel of the opportunity to address the issue. Accordingly, the error was prejudicial, and reversal is required.

First, neither party requested the instruction. Where neither party requests the instruction, "the better practice is to allow counsel to decide, as a matter of trial tactics, 'to discuss evidence suggesting consciousness of guilt in closing arguments or simply to leave it for the jury's reflection unadorned by comment either by them or the judge.'" *Commonwealth v. Evans*, 469 Mass. 834, 845 n.14 (2014) (cleaned up).

The parties may not want such an instruction: a prosecutor may decide the consciousness of guilt evidence "was of peripheral value" and the instruction

[73] *Commonwealth v. Kelly*, 470 Mass. 682, 688 (2015) (internal quotations omitted). See also *Commonwealth v. Vick*, 454 Mass. 418, 423 n.5 (2009).

could distract the jury from stronger evidence; defense counsel may be concerned about the risk that it could focus the jury's attention on ambiguous or disputed concealment evidence. *Commonwealth v. Simmons*, 419 Mass. 426, 435 (1995). Here, there was a risk of focusing the jury's attention on the weak, speculative evidence that Cara intentionally altered the crime scene and disposed of evidence. Even more dangerous, however, was the trial judge's placement of her imprimatur on this weak and unreliable evidence.

The overwhelming weight of the evidence demonstrated that the rag Cara threw away had no relevance to Ann's killing. The Commonwealth's own expert admitted that the degradation of the DNA on the rag was consistent with the DNA having been deposited well before Ann's death. Tr.3:7:92. Likewise, as the judge herself noted, there was no reliable basis for Guilianelli's opinion that anyone, much less Cara, intentionally poured the paint that covered Ann's body. Despite this, the judge singled out these two speculative aspects of the Commonwealth's case for special attention when she mentioned them in her *sua sponte* instruction and suggested that the jury could consider them as evidence of consciousness of guilt.

"It is error to instruct a jury on consciousness of guilt based on facts without reasonable support in the record." *Commonwealth v. Tu Trinh*, 458 Mass. 776, 782

(2011) (cleaned up). In *Tu Trinh*, the judge instructed the jury that they had heard evidence that the defendant knew of his impending arrest. In fact, there was no evidence he knew that police had been looking for him at the time he fled. *Id*. Accordingly, this Court held that the instruction was erroneous. *Id.*

The same is true here; the instruction was based on an expert opinion that the judge herself viewed as unreliable and the disposal of trash with no proven link to the offense.[74] The allegations that purportedly supported Cara's consciousness of guilt, that she may have "altered the scene there in the basement and at her house," and "that she may have attempted to discard evidence[,]" Tr.3:12:193, were devoid of "reasonable support in the record." *Tu Trinh*, 458 Mass. at 782.

Giving a consciousness of guilt instruction based on unsupported allegations "presupposes that there is evidence of consciousness of guilt, [and] communicates to the jury the judge's belief that there is such evidence. . ." *Vick*, 454 Mass. at 424. Though the jury can "decide whether to credit this evidence, and, if so, how to factor it into their deliberations[,]" *id*., the

[74] See also *Commonwealth v. Brown*, 414 Mass. 123, 127 (1993) (instruction should not have referred to evidence of defendant's flight where "there was no evidence of flight in any common sense of the term").

existence of consciousness of guilt has already been endorsed by the judge.[75]

In this case, the instruction unfairly augmented the relevance and importance of Guilianelli's opinion that the paint was poured and the McDonald's trash, even though, perversely, these were two of the weakest aspects of the Commonwealth's case.

Finally, the judge's failure to inform counsel, before closing argument, that she intended to give the instruction exacerbated the prejudice. "A trial judge must inform counsel of [her] proposed instructions before final argument." *Commonwealth v. Degro*, 432 Mass. 319, 332 (2000), citing Mass. R. Crim. P. 24(b). This permits the parties to craft their arguments accordingly.[76]

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[75] See also *Commonwealth v. Groce*, 25 Mass. App. Ct. 327, 332 (1988) (consciousness of guilt instruction "may well have conveyed the notion to the jury that [the judge] believed that it was the defendant who fled and, thus, that the victim's identification testimony was accurate[,]" even though the judge's framing of the instruction sought to avoid doing so); *United States v. Mundy*, 539 F.3d 154, 159 (2d Cir. 2008) (due in part to the "great influence over juries" that judges wield, where a party objects to a consciousness of guilt instruction regarding flight, the judge should "think carefully whether the charge serves a useful and proper purpose or whether it simply gives court imprimatur to one side's factual contention").

[76] *Commonwealth v. Thomas*, 21 Mass. App. Ct. 183, 186-187 (1985) (the purpose of Rule 24(b) "is to enable counsel to argue intelligently to the jury"); *Commonwealth v. Green*, 27 Mass. App. Ct. 762, 771 (1989), *aff'd*, 408 Mass. 48 (1990).

The judge unfairly surprised defense counsel with her consciousness of guilt instruction, which she had not given in either of the two prior trials and neither party had requested. Though defense counsel addressed the paint testimony and the McDonald's trash, he only mentioned consciousness of guilt briefly. Tr.3:12:115. In contrast, the prosecutor made it the linchpin of his closing argument. Tr.3:12:146-155. In fact, after Cara objected to the unexpected instruction, the prosecutor countered, "But I think given how strongly we emphasized [consciousness of guilt] in our closing, it was a live issue." Tr.3:12:227. This is precisely the problem. Given that the prosecutor's closing argument followed the defense closing argument, defense counsel could not respond. Thus, the jury received a one-sided view of this "live issue", which the judge then validated. As a result, the jurors may have concluded that Cara was conceding the point.

The error here is remarkably similar to the error in *Commonwealth v. Diantonio*, 94 Mass. App. Ct. 1122, *2 (2019) (unpublished decision). The defendant did not focus on flight in closing, but the prosecutor did. *Id.* The judge then gave a consciousness of guilt instruction *sua sponte*. *Id.* The Appeals Court concluded that this "made it possible for the jury to accept, without challenge by the defendant, the prosecutor's claim that the defendant believed herself to be guilty of the

battery in stark contradiction of her defense". *Id.* Accordingly, the Appeals Court reversed.

Cara was prejudiced by the instruction. The Commonwealth's case was not strong, as evidenced by the two prior mistrials. This "serve[s] as a meaningful benchmark for determining the likelihood that the outcome of the third trial was affected by the . . . mistake." *Ouber v. Guarino*, 293 F.3d at 35-36. The instruction put a thumb on the scale in favor of the prosecution's argument, despite its weak evidentiary basis.[77] Because "one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error," *Kelly*, 470 Mass. at 688, reversal is required.

## VI. The prosecutor's closing argument, which misstated facts and attacked defense counsel, created a substantial likelihood of a miscarriage of justice.

The prosecutor's closing argument created a substantial likelihood of a miscarriage of justice under G.L. c. 278, § 33E.[78]

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[77] Cf. *Commonwealth v. Stuckich*, 450 Mass. 449, 454 (2008) ("the instruction, with its implication that there was indeed evidence that the defendant had demonstrated consciousness of guilt, could well have affected the verdict[,]" which, in combination with other errors created a substantial risk of a miscarriage of justice).

[78] For convenience the appellant includes the prosecutor's closing argument in her record appendix. R.A.130.

### A. The prosecutor made multiple material factual misstatements.

Prosecutors have a duty to "argue the Commonwealth's case . . . in a way that states the evidence clearly and fairly." *Commonwealth v. Cyr*, 433 Mass. 617, 626 (2001). They "must also take caution not to misstate the evidence." *Commonwealth v. Coren*, 437 Mass. 723, 730 (2002). Where a prosecutor misrepresents the facts to such an extent that he renders the trial fundamentally unfair, he violates the defendant's state and federal constitutional rights to due process of law.

#### 1. The record on rigor mortis.

The prosecutor grossly mischaracterized the evidence on rigor mortis in closing argument: "Virtually all of the medical examiners in this case testified that well-developed rigor mortis which Ann was displaying at 7:15 that evening takes at least four to six hours, if not more." Tr.3:12:144. This claim ignored that: (1) the first plausibly useful assessment of Ann's rigor mortis was not made until sometime after 9:20 p.m., (2) Dr. Arden indicated that well-developed rigor can occur as soon as *three* hours after death, and (3) given the undisputed evidence of a violent struggle immediately before Ann's death, the onset of rigor likely occurred in less than four to six hours, not "more".

#### 2. The record on Cara's concealment of the crime

Next, the prosecutor misrepresented the evidence that Cara "concealed" the crime. First, he pointed to Guilianelli's opinion that the paint had been intentionally poured on Ann's body shortly before first responders arrived. In an effort to bolster the credibility of the experiments on which Guilianelli's purported to base this opinion, the prosecutor asserted, falsely, that "all variables were taken into account." *Id*. at 153. See Argument III, *supra*.

Second, he claimed that Cara threw out a rag that tested "presumptively positive for blood . . . with Ann's DNA". Tr.3:12:150. Then, addressing the undisputed expert testimony that it was degraded and Dr. Bieber's unchallenged opinion that it had not been "freshly deposited", he argued, "And degraded, not degraded, why degraded, there are so many variables here with how little Dr. Bieber knows about the actual circumstances of that rag, how he can say it's not recent is beyond me." *Id*. This was grossly misleading.

In short, this evidence did not prove that "Ann's DNA" was found on the rag in the trash can and it was improper for the prosecutor to claim as much. More importantly, Dr. Bieber explained that this "degraded" DNA had not been freshly deposited and therefore ruled out the possibility that it had been transferred after Ann's death in an effort to "conceal" the crime.

**3. Analysis**

Applying the factors laid out in *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 807-808 (2009)[79], and the gloss of G.L. c. 278, § 33E, Cara submits that the prosecutor's improper comment, in combination with other errors, likely affected the jury's verdict.

First, defense counsel did not object to the misstatements of fact. Although courts typically view this as a sign that the comments did not seem especially prejudicial, see *Commonwealth v. Johnston*, 467 Mass. 674, 695 (2014), the defense clearly disputed both misstatements. Defense experts challenged the significance of rigor mortis and the DNA on the rag.

Second, the improper argument did not involve a collateral matter. Rather, it went to the central issue – identification of the perpetrator. The time of death analysis was designed to disprove Cara's alibi. And by asserting that "Ann's DNA" was on the rag, the prosecutor attempted to support a claim that Cara cleaned up the crime scene with evidence linked to the crime, building on a claim that only Cara would have taken the time to clean up the crime scene. Tr.3:12:146-47. Thus, this claim distorted the only piece of physical evidence that could have supported the theory that Cara cleaned up the scene. In short, "the error[] very much went to the heart

[79] Abrogated on other grounds by *Commonwealth v. Moore*, 480 Mass. 799 (2018).

of the case." *Silva-Santiago*, 453 Mass. at 808. The SJC has viewed this fact as crucial.[80]

Third, the judge did not give specific curative instructions. To the contrary, she gave a consciousness of guilt instruction, *sua sponte*, for the first time (Tr.3:12:193), which implicitly validated the Commonwealth's unsupported claim that Cara used the rag to conceal the crime, and then disposed of it.[81]

### B. The Prosecutor Improperly Attacked Defense Counsel

At the end of his closing argument, the prosecutor expressed his personal opinion about strength of the defense and questioned counsel's motivation. He asserted repeatedly that counsel was disingenuously trying to plant "imaginary doubt". This was improper.

Specifically, he asserted that "Attorney Hoose . . . has attempted to stir up in your minds . . . imaginary doubt." Tr.3:12:156. He then repeated the point: "the defense wants you to" find "imaginary doubt". *Id.* He asserted, "in trying to . . . inject some doubt into your minds, the defense has brought up Mark Oleksak, Carla Daniele." *Id.* Then one last time: "[W]hen all else

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[80] Compare *Coren*, 437 Mass. at 731 (reversing first degree murder conviction based on improper closing argument; "[m]ost importantly, some of the misstatements went to the heart of the case") (emphasis added).

[81] Compare *Commonwealth v. Beaudry*, 445 Mass. 577, 585 (2005)(judge's standard instructions did not address the improprieties in Commonwealth's closing); *Coren*, 437 Mass. at 731.

fails, let's throw some cat hairs against the wall and see if that sticks. Let's see if that trips up any of you to find some imaginary doubt." *Id.* at 157.[82]

A prosecutor's "injection of personal belief" about the strength of the evidence and motivation of defense counsel is improper. See *Commonwealth v. Jenkins*, 458 Mass. 791, 798 (2011). Likewise, "[d]isparaging remarks about the . . . motivations of defense counsel. . . are disfavored." *Commonwealth v. Awad*, 47 Mass. App. Ct. 139, 142 (1999).

While the prosecutor's expression of opinion about the strength of the evidence and motivation of defense counsel might not warrant reversal on its own, in the third retrial of a fiercely disputed circumstantial capital case it unfairly prejudiced the defense by reducing the Commonwealth's burden of proof. In combination with all the other trial errors discussed above, it warrants reversal.

## VII. Cara was deprived of her constitutional right to due process when she was subjected to a third trial.

The Commonwealth's approach to the third trial in this case violated the Double Jeopardy Clause of the Fifth Amendment, and denied Cara due process.

The Supreme Court has explained the policy behind the Double Jeopardy Clause:

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[82] Crime scene technicians found many cat hairs on Ann's body even though the Rintalas did not own a cat.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting [her] to embarrassment, expense and ordeal and compelling [her] to live in a continuing state of anxiety and insecurity, *as well as enhancing the possibility that even though innocent [she] may be found guilty*.

*Green v. United States*, 355 U.S. 184, 187-188 (1957) (emphasis added).

After two hung juries, the Commonwealth changed its trial presentation. First, it hired David Guilianelli to develop an inculpatory opinion that the paint had been intentionally poured to contaminate the crime scene. As explained in Argument III, *supra*, this opinion was unreliable and should have been excluded. But the fact that the Commonwealth did not even seek out this opinion until two mistrials revealed the weaknesses of its case raises a separate due process concern.

Second, after watching the performance of lead investigator Magarian on cross-examination in the first two trials, and the performance of the primary third-party suspect Mark Oleksak in the second trial, prosecutors decided not to call these two, central fact witnesses at the third trial. This decision to present *less* evidence at the third trial was a clear effort to minimize the weaknesses in the Commonwealth's case.

The Commonwealth took unfair advantage of two mistrials to improve its case without advancing any reliable new evidence. Prosecutors cannot be permitted to revise their case after every mistrial until they find a successful mix of evidence to obtain a conviction. This was a violation of Cara's constitutional right to due process, requiring reversal.

## CONCLUSION

This Court should vacate Cara Rintala's conviction and remand to the superior court for a new trial. In the alternative, this Court should vacate the superior court's denial of her new trial motion and remand the case to the superior court for an evidentiary hearing, reassigning the case to a new judge.

Respectfully submitted,
Cara Rintala,
By her attorneys

/s/Chauncey B. Wood

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Date: October 2, 2020

## Certificate of Compliance

I hereby certify that the brief in this matter complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices and other papers).

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**Certificate of Service**

I hereby certify under the pains and penalties of perjury that I have today made service on counsel for both parties by sending a copy of Appellant's Brief and separate Record Appendix via e-file to ADA Steven Gagne.

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**ADDENDUM**

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 2011-128

COMMONWEALTH

vs.

CARA RINTALA

ORDERS ON MOTIONS IN LIMINE

The defendant filed motions in limine seeking rulings prior to trial on the admissibility of certain evidence during trial.[1] After hearing, I find and rule as follows:

(1) Defendant's Motion in Limine to Exclude Evidence of Blood Drops (pleading no. 27).

When viewed in the context of other evidence that the Commonwealth will seek to offer during trial, together with the fact that blood evidence attributed to the defendant was found in three different locations, objections by the defendant, while well-founded, go more to the weight and not admissibility of this evidence. This motion will be denied.

(2) Defendant's Motion in Limine to Exclude Extrinsic "Bad Act" Evidence (pleading no. 28).

The only relevance of and sole purpose for which the this evidence may be admitted is that it may show motive, state of mind and/or intent of the defendant. The incidents the Commonwealth seeks to admit allegedly take place in September 2008, May 2009, summer months of 2009, December 2009, February and March 2010. Annamarie Rintala's death occurred on March 29, 2010. In light of evidence of strains and discord in the marital relationship of the Rintalas over this time period, the earliest incidents are not so remote in time as to bar their admission. While evidence exists of recanted accusations and the parties's reconciliation, other

[1] I ruled, in open court, on other motions filed by the defendant and the Commonwealth.

evidence may tend to show continuing or recurring tensions and hostility between them during this eighteen month period. See *Commonwealth v. Butler*, 445 Mass. 568, 575-576 (2005), and cases cited. Jurors will receive appropriate instruction as to the limited purposes for which they may consider such evidence.

Evidence of the defendant's arrest and the criminal charge of assault and battery in September 2008, is *not* admissible to show that she may have acted violently in the past toward her spouse, but is probative of the couple's hostile relationship. *Id.*, 445 Mass. at 575. The related restraining order granted to Annamarie Rintala has similar relevance. Because the defendant has contended that her spouse fabricated facts that lead to the charge and evidence shows the charge was dismissed upon an accord and satisfaction, and to the extent that the defendant spoke of the incident during police questioning following her spouse's death, it also has some relevance as evidence of the defendant's ongoing state of mind and intent toward her spouse. The restraining order grants custody of the parties' then-fifteen month old child to Annamarie Rintala, and evidence suggests the parties had disputes about care, visitation or custody of their daughter. Such evidence is likewise probative of the defendant's state of mind toward the spouse with whom she may have sparred over such matters. That said, if offered as exhibits during trial, these court documents will be subject to redaction of immaterial and unnecessarily prejudicial information.

Evidence of a disconnected call to 911 from the parties' residential telephone, with arguing heard in the background, is admissible to show marital discord. See *Commonwealth v. Andrade*, 422 Mass. 236, 239 (1996). It appears that police officers went to the residence after this call, and that, at some point, the defendant stated that she placed the call or answered a call returned by the police dispatcher. The Commonwealth's inability to produce evidence identifying

the person(s) involved in the argument does not bar admission, but goes to the weight that the fact-finders will accord this evidence.

Pleadings filed in the Probate and Family Court in May 2009, showing when each party filed for divorce from the other are probative of their marital relationship. I agree with the defendant's counsel that their stated grounds for divorce ("irretrievable breakdown") are based on a legal standard. That legal language has the potential to confuse jurors and would require further explanation, while having little probative effect. If admitted in evidence, these court documents will be subject to redaction of irrelevant and immaterial information.

Evidence of restraining orders is relevant and admissible to show the status of the marital relationship. *Commonwealth v. Cheremond*, 461 Mass. 397, 410 (2012). The defendant's affidavit, filed in support of her restraining order application, and her testimony during the court hearing may be admitted to show her state of mind - both fearful and hostile - toward her spouse. If admitted as exhibits during trial, these court documents will be subject to redaction of irrelevant, immaterial and unnecessarily prejudicial information.

With regard to admission of the statements made by the District Court judge during the hearing on issuance of cross-restraining orders, I have reviewed the recording and an unofficial transcription of that hearing. That issue remains under advisement until further hearing.

Alleged arguments and an alleged statement by the defendant overheard by Annamarie Rintala's aunt and/or mother during telephone conversations are probative of the parties' marital relationship and admissible. *Andrade*, *supra* at 239. Issues regarding the reliability of such testimony because of family-member bias is appropriate for impeachment but does not preclude admission.

With regard to evidence from Annamarie Rintala's aunt that, during the Rintalas'

February 2010 visit to her Florida home, the defendant allegedly stated that the relationship was not working and she intended to get a divorce, that statement is probative of the defendant's hostility, state of mind and intent toward her spouse, as well as the state of their marital relationship. I reserve ruling on the admissibility of the aunt's alleged observations and impressions of the couple's interactions during that time period. I also reserve ruling on the admissibility of an alleged telephone call from the defendant to this aunt regarding financial issues between the couple, other than her statements about disagreement over the couple getting another dog (a statement to which the defendant does not object). If the Commonwealth seeks to admit such evidence, voir dire of the witness is in order.

3. Commonwealth's and Defendant's Requests to Seal Documents

Because good cause exists to do so, see *The Republican Company v. Appeals Court,* 442 Mass. 218, 222 (2004), it is appropriate to order that the following materials remain sealed until the end of trial or further court order.

Financial records that the Commonwealth may seek to admit as exhibits contain significant amounts of personal information of Cara Rintala and Annamarie Rintala,, including their dates of birth, social security numbers, past residences, places of employment, and credit card information (credit grantors and account numbers). If made part of the public record, this private information could be easily be misused or compromised.

Other materials, which were attached to motions or presented to the court during hearing on the motions, will remain sealed until they are admitted in evidence, until the conclusion of the trial or until further court order. Portions of these documents contain private or personal information. It is as yet unsettled if these materials (in their present state) will, in fact, be offered or admitted during trial. Most significantly, exposure of these materials to the public before trial

may significantly prejudice the defendant's right to a fair trial, including her right to a unbiased and impartial jury.[2] See *Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 608-609 (2000).

Mary-Lou Rup
Justice of the Superior Court

Dated: February 6, 2012

[2] The parties represent that the District Court has impounded its records of the restraining orders.

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HAMPSHIRE, ss

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT OF
THE COMMONWEALTH
SUPERIOR COURT DEPT.
HAMPSHIRE DIVISION
INDICTMENT NO.
11-128

12/13/13.
Denied without evidentiary hearing.
(M.L Rup)

COMMONWEALTH

v.

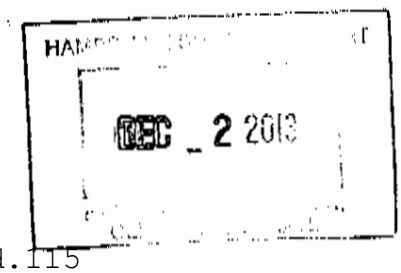
CARA L. RINTALA

**DEFENDANT'S MOTION IN LIMINE TO BAR EXPERT TESTIMONY AS TO TIME OF DEATH AND REQUEST FOR *LANIGAN* HEARING**

Now comes the defendant in the above captioned matter and requests that this Honorable Court exclude any expert opinion as to the time of the victim's demise in this case on the ground that any such opinion is inherently unreliable and does not meet the standard for admission of scientific evidence established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) and by *Commonwealth v. Lanigan,* 419 Mass. 15 (1994).

The defendant contends further that this action is required to secure her rights to a fair trial and to due process of law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article XII of the Massachusetts Declaration of Rights.

The defendant requests an evidentiary hearing on this motion.



COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 11-00128

COMMONWEALTH

vs.

CARA L. RINTALA

**MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT'S MOTION IN LIMINE RE: PAINT TESTING EVIDENCE**

A Hampshire County grand jury returned an indictment charging the defendant, Cara L. Rintala, with murder, a violation of G. L. c. 265, § 1. The defendant's previous two trials ended in mistrials when the juries could not reach unanimous verdicts.

At the upcoming trial, the Commonwealth proposes to offer expert testimony from David Guilianelli ("Guilianelli") regarding paint found at the crime scene. The defendant has moved, in limine, to exclude Guilianelli's proposed testimony, arguing that it is irrelevant and will not fairly or accurately assist the jury in assessing the factual issues. The parties have agreed that the court can decide this motion based on their pleadings, the supporting materials and their oral arguments.

For the reasons set forth below, the defendant's motion will be **DENIED**.

## BACKGROUND

On March 29, 2010, at approximately 7:00 p.m., first responders arrived at the defendant's residence in response to a 911 call. There they found the defendant seated on the basement floor, holding her wife's body which was across her lap. They determined that the defendant's wife was dead and noted that her body was cold and rigid.

The first responders noticed blood and paint on and around the victim's body, and described the paint as appearing wet and fresh, not coagulated and having a "sheen" on the surface.

The time of death has been a significant contested issue at the prior trials. At both trials, the parties drew the jury's attention to the presence and appearance of the paint. The defense has suggested that the paint had been spilled, consistent with a violent struggle at the scene. The Commonwealth has suggested that the defendant poured the paint over her wife's body and that the presence of fresh, wet paint on a cold, rigid body indicates that she did so hours after the killing in an attempt to cover up the crime. During the prior trials, neither party offered expert testimony regarding the presence and condition of the paint, or its relation to the estimated time of death.

The paint at issue is Glidden EZ Track ceiling paint. Guilianelli, the Commonwealth's proposed witness, has worked as a chemist in the paint industry for twenty years and with PPG Industries, Glidden Paint's parent company, for over fifteen years. Based on his experience, Guilianelli has familiarity with the chemical composition and characteristics of Glidden Paint.

Based on discovery materials furnished by the Commonwealth,[1] and using an environmental chamber in which he could adjust temperature and humidity levels, Guilianelli conducted a "drying time study" in order to gauge the drying times and characteristics of the type of paint discovered at the scene. He has detailed his observations and findings in a report.

## DISCUSSION

The defendant argues that Guilianelli's proposed testimony is irrelevant and unlikely to fairly and accurately aid the jury in assessing the factual issues. She further argues that the

[1] Police and first responder reports of their observations and photographs taken at the scene, which included photographs of a dehumidifier which showed readings of the basement's temperature and humidity levels.

existence of a number of unknown variables and factors that could affect the paint's drying time render his opinion unreliable.

"Expert testimony is generally admissible, in the broad discretion of the judge, whenever it will aid the jury in reaching a decision, even if the expert's testimony touches on the ultimate issues that the jury must decide." *Commonwealth* v. *Woods*, 36 Mass. App. Ct. 950, 951 (1994). A necessary factor is whether the testimony is explanatory, as "[t]he role of an expert witness is to help jurors interpret evidence that lies outside of common experience." *Commonwealth* v. *Tanner*, 45 Mass. App. Ct. 576, 581 (1998).

The Massachusetts Guide to Evidence, Section 702, provides guidance as to the admissibility of expert testimony.

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if
> (a) the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case."
>
> Mass. G. Evid. § 702 (2016).

When determining the admissibility of experimental evidence, the trial judge looks to whether its probative value outweighs the possibility that the evidence will mislead or prejudice the jury. *Read* v. *Mt. Tom Ski Area, Inc.*, 37 Mass. App. Ct. 901, 903-904 (1994). An essential consideration is "whether the experiment was conducted under conditions substantially similar" to the conditions at the crime scene. *Id.* at 904. "[T]he determination whether the conditions were sufficiently similar to make the experiments of any value in aiding the jury is a matter resting in the sound discretion of the judge." (internal citations omitted) *Commonwealth* v. *Corliss*, 470 Mass. 443, 456 (2015), quoting *Commonwealth* v. *Makarewicz*, 333 Mass. 575,

592-593 (1956). The judge's decision regarding whether the conditions were sufficiently similar "will not be interfered with unless plainly wrong." *Corliss*, 470 Mass. at 456, quoting *Commonwealth* v. *Flynn*, 362 Mass. 455, 473 (1972).

Here, Guilianelli reviewed materials describing first responders' observations of the basement and photographs of the area, including photographs of a dehumidifier present in the basement on March 29, 2010. He conducted studies on Glidden EZ Track ceiling paint at the same temperature and humidity levels reflected on the dehumidifier. He also conducted studies at different temperature and humidity levels in order to account for any upward or downward variations. He documented his studies with photographs and notes of his observations, and produced a fourteen-page report detailing the results of his tests.

The defendant challenges Guilianelli's qualifications and expertise. Guilianelli has worked in the paint industry since receiving his undergraduate degree in chemistry (with a minor in physics) in 1996. From 1996 through 2000, he was employed as a chemist at Harrison Paint and then Valspar. He began his 16 year career with PPG Industries in 2000. First hired as a Chemist I, after two years he was promoted to Chemist II; both positions involved the development of new paint formulations and upgrades to existing paint formulations. He became a Senior Chemist in 2004. From 2006 through 2014 he served as Technical Manager Interior/Exterior Paints. More recently, he has held the positions of Enterprise Improvement Facilitator (2014-2015) and ChemoMetrics Engineer/Technologist (2015 to present). His curriculum vitae indicates that, among other aspects of his work, he has been involved in paint product development and upgrades, testing raw materials for paint formulations, developing new processes and test methods for raw material reliability and repeatability, and developing statistical models to test if raw materials will negatively affect product performance with shifts in

product quality. I am persuaded by his twenty years of experience in the paint industry that he is well-qualified to conduct the testing and reach the conclusions described in his report.

Guilianelli's proposed testimony would assist the jury in understanding the evidence in this case. See *Tanner*, 45 Mass. App. Ct. at 581. Average jurors are unlikely to know at what rate paint found at the scene might be expected to dry and the effects of temperature, humidity and other environmental factors on the paint's drying time. Similarly, from their ordinary experiences jurors would likely not understand how the appearance of paint could differ if purposely poured rather than accidentally spilled onto a surface. I am persuaded that Guilianelli's professional experience and familiarity with the chemical composition and characteristics of the Glidden paint at issue in this case qualify him to testify about these issues and that such testimony could assist the jurors in understanding the significance, if any, of the paint's appearance at the time that first responders arrived at the Rintala residence.

The defendant cites a number of alleged false assumptions made by Guilianelli which she argues affect the reliability and relevance of his proposed testimony. More specifically, she points to the following unknown factors as undercutting the reliability of his observations and conclusions: (1) if the dehumidifier in the basement accurately measured the temperature and humidity on the day in question; (2) any differences in the temperature and humidity at basement floor level and in the basement air; (3) the length of time and conditions under which the canned paint was stored in the basement and if it was homogenous or had separated when it left its container; (4) the thickness of the paint on the victim's body and the floor area; and (5) comparison of the porosity of the paper Guilianelli used in his studies to the porosity of the basement floor of the Rintala residence. She challenges the methodology that Guilianelli used in

his study of and experiments with this paint, and argues that the Commonwealth has not shown that the subject matter of his testimony has general acceptance in the scientific community.

"[T]he touchstone of admissibility is reliability, and not necessarily general acceptance within the scientific community [,]"*Commonwealth v. Sands*, 424 Mass. 184, 185 (1997), and the proponent of opinion evidence based on a scientific process may demonstrate its reliability or validity by other means. *Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994). Notwithstanding these issues raised by the defendant, I am satisfied that Guilianelli's drying-test and pour/spill observations and his conclusions are the product of his professional experience with paint in general, and with the Glidden paint at issue, and that they are based on reliable principles and methods that he applied to the relevant facts of this case. The lack of evidence of general acceptance in the scientific community does not preclude admission of his testimony. The issues raised by the defendant affect the weight and not the admissibility of Guilianelli's proposed testimony. She may properly bring these issues to the jury's attention through cross-examination.

In his report, Guilianelli has described the method by which he conducted his experiments and studies of the Glidden paint. It appears that the conditions he utilized in his studies were in general sufficiently similar to conditions in the basement on the evening of March 29, 2010, so as to make his observations and conclusions of value to jury. See *Corliss*, 470 Mass. at 456; *Makarewicz*, 333 Mass. at 592-593. Furthermore, the probative value of the proposed testimony outweighs the possibility that the evidence will mislead or confuse the jury or create unfair prejudice. The Commonwealth may offer Guilianelli's testimony on the drying-time studies that he conducted and his observations of the different appearances of purposely poured and accidentally spilled paint.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that the Defendant's Motion in Limine Re: Paint Testing Evidence is **DENIED**.

Mary-Lou Rup
Justice of the Superior Court

Dated: August 23, 2016

312.

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 11 CR 0128

COMMONWEALTH

vs.

CARA RINTALA

**DECISION AND ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL AND EVIDENTIARY HEARING**

The defendant, Cara Rintala, was convicted of first-degree murder in 2016 after a jury trial. The case is before the court on her motion for new trial and an evidentiary hearing. The defendant argues that a new trial is warranted because she was afforded ineffective assistance of counsel. For the reasons below, the defendant's motion for new trial and an evidentiary hearing is **DENIED**.

## BACKGROUND[1]

The defendant and the victim, Annamarie Rintala, were married. On the night of March 29, 2010, the defendant appeared at a neighbor's door asking the neighbor to call 911 because she had found the victim lying on the basement floor of their home. When police arrived, they discovered the defendant cradling the deceased victim on the floor of their basement. The floor and victim's body were covered in a significant amount of paint.

Based on evidence obtained during the investigation, the defendant was charged with murder. The Commonwealth's theory at trial was that the defendant murdered the victim and attempted to cover up the crime scene by spilling the paint after the victim had died. The

[1] The court will limit its background to the facts relevant to the motion, with some facts reserved for the legal analysis.

defendant's first two trials ended with deadlocked juries. In 2014, before the third trial, the Commonwealth notified trial counsel that it may be calling David Guilianelli, a quality engineer for the parent company that made the spilled paint, as an expert witness. Mr. Guilianelli would offer testimony about "the manner and pace at which [the paint] dries in specific atmospheric conditions," the amount of paint spilled, and how it was spilled. In July of 2015, the Commonwealth provided trial counsel with data from a set of experiments conducted by Mr. Guilianelli concerning the different properties of the paint in question. On May 2, 2016, trial counsel filed a motion challenging the admissibility of these results, arguing that they were irrelevant and inaccurate. In late May, the Commonwealth provided trial counsel with a full report authored by Mr. Guilianelli detailing his experiments and the conclusions he drew from them. The report concluded that the paint on the victim's body had been spilled purposefully and just prior to the police arriving at the scene. On July 7, 2018, trial counsel filed another motion in opposition to Mr. Guilianelli's potential testimony, this time challenging its admissibility under Daubert-Lanigan. In this motion the defendant waived a request for a hearing. A hearing was held on trial counsel's original motion on July 8, 2018, at which neither party called any witnesses. Both motions were denied. Mr. Guilianelli testified as to his opinions at the defendant's third trial, and the defendant was convicted.

## DISCUSSION

The defendant argues that she was denied effective assistance of counsel because her trial counsel did not obtain an expert to testify in support of the motions in limine or at trial. "To establish ineffective assistance of counsel, the defendant bears the burden of showing that there has been a serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer, and that

counsel's poor performance likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Wentworth, 482 Mass. 664, 677 (2019) (quotations omitted). See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). This requires "a discerning examination and appraisal of the specific circumstances of the given case . . . ." Id. at 96.[2]

"A judge may decide a motion for a new trial without holding an evidentiary hearing if 'no substantial issue is raised by the motion or affidavits.'" Commonwealth v. Holbrook, 482 Mass. 596, 606 (2019), quoting Mass. R. Crim. P. 30 (c) (3). "In determining whether a 'substantial issue' meriting an evidentiary hearing under rule 30 has been raised, we look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised." Holbrook, 482 Mass. at 606, quoting Commonwealth v. Stewart, 383 Mass. 253, 257-258 (1981).

A. **Motions in Limine**

Trial counsel filed a motion in opposition to the Commonwealth's intention to call Mr. Guilianelli at trial. Trial counsel argued that Mr. Guilianelli's experiments were irrelevant and inaccurate. In his affidavit, trial counsel states that he relied upon the expertise of Dr. Otto Gregory in crafting this opposition. Dr. Gregory was a social acquaintance of the defendant's parents, and an Engineering Professor in the Department of Chemical Engineering at the University of Rhode Island. However, trial counsel did not call Dr. Gregory to testify at the motion hearing because he was concerned that Dr. Gregory's relationship with the defendant's parents would render him vulnerable to impeachment.

[2] Contrary to both parties' memoranda, the more favorable review to the defendant under G. L. c. 278, § 33E is reserved for capital appeals in the Supreme Judicial Court. See Commonwealth v. Dowds, 2019 WL 5861886 at *3 n.5 (Mass. 2019).

Trial counsel did attempt to find a different expert who could rebut Mr. Guilianelli's testimony. Trial counsel's motion for funds to obtain an expert was granted by the court and he did contact such an expert. However, after further speaking with this expert, trial counsel believed that this expert would not be helpful in rebutting Mr. Guilianelli's conclusions. Trial counsel chose not to rely on this expert.

After receiving the report generated by Mr. Guilianelli, trial counsel filed a Daubert-Lanigan motion and waived any request for a hearing on that motion. Trial counsel once again relied on the expertise of Dr. Gregory in crafting this motion, which included an affidavit from Dr. Gregory detailing his concerns with Mr. Guilianelli's report. In this affidavit, Dr. Gregory opined that the results from Mr. Guilianelli's experiment were unreliable for a number of reasons. Trial counsel again did not seek to call Dr. Gregory at a hearing on this motion for fear of impeachment.

Trial counsel's actions did not "fall[] measurably below that which might be expected from an ordinary fallible lawyer," Saferian, 366 Mass. at 96. Trial counsel relied on the expertise of Dr. Gregory, a professor of engineering, in drafting both his original motion and his Daubert-Lanigan motion. He obtained an affidavit from Dr. Gregory in support of his Daubert-Lanigan motion. He explicitly made a tactical decision not to call Dr. Gregory at the motion hearing and not to have him testify at a Daubert-Lanigan hearing because he feared that Dr. Gregory would be vulnerable to impeachment by the Commonwealth. Meanwhile, trial counsel had obtained funds from the court and contacted another expert. He chose to sever ties with this expert after his investigation led him to believe that the expert's testimony would not be beneficial for the defendant. This was not "a serious incompetency, inefficiency, or inattention of counsel," and therefore did not constitute ineffective assistance. Saferian, 366 Mass. at 96.

B. **Trial**

The defendant's argument that trial counsel was ineffective because he did not call an expert to rebut Mr. Guilianelli's testimony at trial is unpersuasive. In developing his cross-examination, trial counsel once again relied on the expertise of Dr. Gregory. This cross-examination generated approximately forty pages of trial transcript, and generated an additional four pages on re-cross. This cross-examination skillfully hammered home the same point made by Dr. Arghavan Louhghalam in her affidavit attached to the defendant's motion for new trial—that Mr. Guilianelli's experiments were unreliable and his conclusions were based on lay observations and assumptions. Dr. Louhghalam's affidavit specifically notes that there was insufficient evidence from the crime scene to accurately replicate the conditions at the time of the victim's death. This was the thrust of trial counsel's cross-examination of Dr. Guilianelli at trial. Dr. Louhghalam also disputes Mr. Guilianelli's conclusion that the paint was poured, stating that the experiments he conducted were not sufficient to reach this conclusion. This was also a focus of trial counsel's cross-examination. Attempting to discredit the Commonwealth's expert by means of thorough cross-examination in lieu of calling a competing expert witness was not manifestly unreasonable in this circumstance. See Commonwealth v. Aspen, 85 Mass. App. Ct. 278, 280-281 (2014); Commonwealth v. Watson, 455 Mass. 246, 257-259 (2009). "The decision to call, or not to call, an expert witness fits squarely within the realm of strategic tactical decisions." Commonwealth v. Ayala, 481 Mass. 46, 63 (2018). This is particularly true in this case, where trial counsel had the help of an expert in determining the strategy for cross-examination. The defendant has not shown that this decision "was manifestly unreasonable when made." Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006), quoting Commonwealth v. Adams, 374 Mass. 722, 728 (1978).

Because no substantial issue has been raised, an evidentiary hearing is not necessary. See Commonwealth v. Vaughn, 471 Mass. 398, 404 (2015).

**ORDER**

Based on the above, it is hereby **ORDERED** that the defendant's motion for a new trial and evidentiary hearing is **DENIED**.

Jane E. Mulqueen
Justice of the Superior Court

DATE: December 13, 2019

Massachusetts General Laws Annotated
Massachusetts Rules of Criminal Procedure (Refs & Annos)

# Massachusetts Rules of Criminal Procedure (Mass.R.Crim.P.), Rule 24

## Rule 24. Opening Statements; Arguments; Instructions to Jury

Currentness

(Applicable to Superior Court and jury sessions in District Court)

**(a) Opening and Closing Statements; Arguments.**

(1) *Order of Presentation*. The Commonwealth shall present its opening statement first. The defendant may present an opening statement of his defense after the opening statement of the Commonwealth or after the close of the Commonwealth's evidence. The defendant shall present his closing argument first.

(2) *Time Limitation*. Counsel for each party shall be allowed fifteen minutes for an opening statement and thirty minutes for argument; but before the opening or the argument commences, the judge on motion or sua sponte, may reasonably reduce or extend the time.

**(b) Instructions to Jury; Objection.** At the close of the evidence or at such earlier time during the trial as the judge reasonably directs, any party may file written requests that the judge instruct the jury on the law as set forth in the requests. The judge shall inform counsel of his proposed action upon requests prior to their arguments to the jury. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, specifying the matter to which he objects and the grounds of his objection. Upon request, reasonable time shall be given to each party to object to the charge before the jury retires. Where either party wishes to object to the charge or to request additional instructions, the objection or the request shall be made out of the hearing of the jury, or where appropriate, out of the presence of the jury.

Rules Crim. Proc., Rule 24, MA ST RCRP Rule 24

Current with amendments received through July 15, 2020

**End of Document**

Massachusetts General Laws Annotated
Massachusetts Guide to Evidence 2020 Edition (Refs & Annos)
Article VII. Opinion and Expert Evidence

# MA Guide to Evidence Section 702

## Section 702. Testimony by Expert Witnesses

### Currentness

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if

**(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

**(b)** the testimony is based on sufficient facts or data;

**(c)** the testimony is the product of reliable principles and methods; and

**(d)** the expert has reliably applied the principles and methods to the facts of the case.

MA Evidence Guide Section 702, MA R EVID Section 702
Current with amendments received through July 15, 2020

**End of Document**

94 Mass.App.Ct. 1122
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH
v.
Beth L. DIANTONIO.

17-P-1601
|
Entered: February 14, 2019

By the Court (Rubin, Maldonado & Lemire, JJ. [1] )

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** A jury convicted the defendant, Beth L. Diantonio, of assault and battery, G. L. c. 265, § 13A (a). In this consolidated appeal, the defendant challenges (1) the sufficiency of the Commonwealth evidence to support a conviction, (2) the judge's denial of her motion for a new trial, which was premised on the judge's failure to inform counsel before closing arguments that he would be instructing on consciousness of guilt, and (3) trial counsel's performance. We conclude that, although the evidence was sufficient, the order denying the motion for a new trial must be reversed because the judge's failure to notify trial counsel of his intention to instruct on consciousness of guilt prior to summations resulted in prejudicial error. See Commonwealth v. Degro, 432 Mass. 319, 332 (2000).

Discussion. 1. Sufficiency. The defendant contends that the Commonwealth's case deteriorated when (1) the prosecution witnesses offered differing accounts of how many times the defendant struck the victim, (2) the photographic evidence did not amply depict the location of the victim's

injuries, (3) an officer on the scene testified that he observed no injuries on the victim when he interviewed her after the altercation, and (4) the defendant and her boyfriend testified that it was the victim who punched the defendant, and not the converse. We are not persuaded.

At trial, the Commonwealth proceeded on the theory that the defendant committed a harmful battery. As such, the Commonwealth was required to prove that the defendant (1) touched the victim, (2) intentionally, (3) without any right or excuse, and (4) "with such violence that bodily harm is likely to result." Commonwealth v. Geordi G., 94 Mass. App. Ct. 82, 85 (2018), quoting Commonwealth v. Eberhart, 461 Mass. 809, 818 (2012). The Commonwealth supported this theory with the testimony of the victim and two other witnesses, who together testified that the defendant grabbed the victim, threw her to the ground, and punched her repeatedly. This evidence, viewed in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), is sufficient. See Commonwealth v. Gray, 85 Mass. App. Ct. 85, 86-88 (2014) (evidence that defendant punched victim's head repeatedly sufficient to prove harmful battery).

Deterioration occurs when the Commonwealth's evidence "is later shown to be incredible or conclusively incorrect." Commonwealth v. O'Laughlin, 446 Mass. 188, 203 (2006), quoting Kater v. Commonwealth, 421 Mass. 17, 20 (1995). The defendant asserts that the evidence she presented drastically differed from the Commonwealth's evidence, and did just that. We disagree. The defendant's evidence "simply tended to contradict the Commonwealth's evidence; it did not show it to be 'incredible or conclusively incorrect.' " O'Laughlin, supra at 204, quoting Kater, supra. Even the absence of photographic or police corroboration of the victim's injuries, while potentially diminishing of the strength of Commonwealth's case, did not render the Commonwealth's evidence conclusively incorrect. Accordingly, no deterioration occurred.

***2** 2. Consciousness of guilt instruction. The defendant also asserts that the judge abused his discretion in denying her motion for a new trial because the consciousness of guilt instruction lacked an evidentiary basis and, further, because he gave it without providing the defendant notice of his intention to so instruct prior to closing arguments. [2]

We review the denial of the motion for a new trial to determine whether it was "an abuse of discretion that produces a manifestly unjust result." Commonwealth v. Pingaro, 44 Mass. App. Ct. 41, 48 (1997). A judge commits an abuse of discretion by making " 'a clear error of judgment in weighing' the factors relevant to the decision ... such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014), quoting Picciotto v. Continental Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008).

A judge is within his discretion to instruct on consciousness of guilt when "there is an 'inference of guilt that may be drawn from evidence of flight, concealment, or similar acts.' " Commonwealth v. Morris, 465 Mass. 733, 738 (2013), quoting Commonwealth v. Stuckich, 450 Mass. 449, 453

(2008). "In the case of flight, the evidence must be probative of the defendant's feelings of guilt concerning the crime of which [s]he is accused." Commonwealth v. Villafuerte, 72 Mass. App. Ct. 908, 908 (2008). Here, both the victim and others testified that after the victim screamed for someone to call the police, the defendant left the scene of the incident with her boyfriend. The jury could have viewed her departure from the scene before the arrival of police as evidence of her guilty consciousness. See Commonwealth v. Prater, 431 Mass. 86, 97 (2000). Even if there were other "possible explanations for a defendant's flight, it is for the jury to decide if the defendant's actions resulted from consciousness of guilt or some other reason." Id. Accordingly, the judge acted within his discretion in deciding that an instruction on consciousness of guilt was warranted. See id.

That said, "[a] trial judge must inform counsel of his proposed instructions before final argument." Degro, 432 Mass. at 332. A judge's failure to do so, rises to prejudicial error when, as was the case here, "the defense [is] undermined ... because 'the critical role of good argument was vitiated.' " Commonwealth v. Thomas, 21 Mass. App. Ct. 183, 187 (1985), quoting United States v. Viserto, 596 F.2d 531, 539 (2d Cir.), cert. denied, 444 U.S. 841 (1979).

Here, the defendant's summation did not focus on the defendant's flight from the scene. In contrast, the prosecutor labeled the defendant's flight "probably the most important evidence" in the trial. The contrast was particularly critical here because the trial came down to a credibility contest between the witnesses on each side. The unannounced instruction made it possible for the jury to accept, without challenge by the defendant, the prosecutor's claim that the defendant believed herself to be guilty of the battery in stark contradiction of her defense. Cf. Commonwealth v. Woodbine, 461 Mass. 720, 732-738 (2012) (defendant prejudiced by inability to test officer's credibility with suppressed statement he had used to refresh recollection before trial). In our view, the error significantly undermined the defense, and a new trial is warranted. [3]

***3** Order denying motion for new trial reversed.

Judgment reversed.

Verdict set aside.

## All Citations

94 Mass.App.Ct. 1122, 123 N.E.3d 802 (Table), 2019 WL 612597

Footnotes

1 The panelists are listed in order of seniority.

2 Although the defendant did not argue in her written motion for a new trial that the instruction lacked an evidentiary basis, this was a live issue at the hearing on the motion and the judge mentioned it in his written ruling. Therefore, we do not consider this issue waived.

3 Because the same challenges to trial counsel's performance are "unlikely to arise at retrial," we do not address the defendant's ineffective assistance of counsel claim. Commonwealth v. Esteves, 429 Mass. 636, 641 (1999).

210 N.C.App. 759
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME.
THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of North Carolina.

STATE of North Carolina
v.
Monty Wood POTEAT.

No. COA10–934.
|
April 5, 2011.

***1** Appeal by defendant from judgment entered 17 November 2009 by Judge Richard D. Boner in Lincoln County Superior Court. Heard in the Court of Appeals 13 January 2011.

**Attorneys and Law Firms**

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

**Opinion**

CALABRIA, Judge.

Monty Wood Poteat ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of first-degree murder. We find no error.

*I. Background*

Defendant was in a relationship with Vicki Foxx ("Foxx") from 2001 until 2006. The couple lived together in Foxx's home during this time. In 2002, Foxx filed for a Domestic Violence Protective Order ("DVPO") against defendant. However, Foxx later voluntarily dismissed this DVPO. In 2006, after Foxx filed for another DVPO against defendant ("the 2006 DVPO"), defendant moved out of Foxx's home. In November 2006, Foxx's friend Lawanna Morton ("Morton") moved into Foxx's home because her own home had been damaged in a fire.

Defendant violated the 2006 DVPO on three separate occasions. On 4 October 2006, Deputy Kasey Cornwell ("Deputy Cornwell") of the Lincoln County Sheriff's Department ("the Sheriff's Department") arrested defendant for one of the violations. During this arrest, Deputy Cornwell noticed two firearms, a rifle and a .32 caliber pistol ("the pistol"), in defendant's apartment. Defendant claimed they belonged to the owner of the apartment building, Bobby Motz ("Motz"). At that time, Motz confirmed to Deputy Cornwell that he owned the firearms. However, Motz later admitted that the firearms belonged to defendant. Deputy Cornwell recorded the serial numbers of the rifle and the pistol.

In January 2007, defendant lived in a home with two other men, which was located approximately a ten-minute walk from Foxx's home. Defendant's final violation of the 2006 DVPO occurred on 1 January 2007, when defendant walked across Foxx's property. When Morton and Foxx discovered that defendant was on their property, Morton, who was a part-time deputy with the Sheriff's Department, confronted defendant while Foxx called 911.

Two weeks later, on 15 January 2007, Foxx awoke at 5:30 a.m. As Foxx got ready for her job at the Robert Bosch Tool Company ("Bosch Tool"), she heard Morton coughing behind Morton's closed bedroom door. Foxx left for work at 7:15 a.m.

That same day, defendant's roommate woke up at 6:15 a.m. and noticed that defendant was not home. Defendant returned home at 6:30 a.m., took a spotlight outside, then re-entered the home five to ten minutes later. Defendant left the home again at approximately 7:00 a.m. and did not return until between 7:30 a.m. and 8:00 a.m. When defendant returned home, his roommate noted that defendant was out of breath and immediately "washed up for about thirty minutes, and washed the clothes that he had on and throwed them in the dryer."

***2** While Foxx was at work, she received a call from Morton's friend Ann Sadler ("Sadler"). Sadler had been unsuccessfully attempting to contact Morton throughout the day and became concerned that something was wrong. Foxx asked Sadler to drive by her home to see if Morton was there. When Sadler did so, she found Morton's vehicle parked outside. Sadler knocked on the front door of the home, but no one answered.

Sadler then drove home and called Foxx at work. Foxx told Sadler that she would leave work as soon as she could. Foxx left work at 3:00 p.m. and got home approximately 25 minutes later. When she arrived, she unlocked the door and called out Morton's name as she walked to her room. Foxx entered Morton's room and began to pull back the sheets on Morton's bed when she found Morton's body covered in blood. Foxx immediately called 911 and ran to a neighbor's house in search of help. When emergency personnel arrived, they determined Morton was dead. The cause of Morton's death was multiple gunshot wounds to the head.

Lincoln County Medical Examiner Jeffrey Lee Paysour ("M.E.Paysour") was called to Foxx's home to examine Morton's body. When M.E. Paysour performed an initial physical examination of Morton's body at 8:45 p.m., he discovered that Morton's body was in full rigor mortis. Based upon this observation, M.E. Paysour determined that Morton had been dead for at least eight to ten hours. He estimated Morton's time of death as 7:30 a.m.

Deputy Justin Lee Frye ("Deputy Frye") of the Sheriff's Department was one of the officers who investigated Morton's death. Deputy Frye was familiar with the history of domestic violence between defendant and Foxx because Foxx's home was located in his patrol area. As a result, he considered defendant a suspect in Morton's murder. Deputy Frye went to defendant's home to arrest him on an outstanding warrant for defendant's most recent DVPO violation. However, defendant was not at home. Later that evening, defendant turned himself in to law enforcement for violation of the DVPO.

A few days later, law enforcement officers searched defendant's property. A pistol was recovered thirty yards behind defendant's home, where it was buried under leaves, wrapped in a towel, and inside a plastic bag. The pistol was confirmed to be the same one that Deputy Cornwell previously identified during defendant's October 2006 arrest.

Defendant was arrested and indicted for first-degree murder. While incarcerated and awaiting trial, defendant spoke with a cell mate, Tarrie Allen Aiken, Jr. ("Aiken"), about Morton's murder. Defendant told Aiken, in detail, how he had entered Foxx's house and shot and killed Morton with a .32 caliber pistol. Defendant additionally stated to Aiken that he shot Morton in the head multiple times in order to ensure she was dead, and that he covered her with a sheet after the shooting.

Defendant was tried by a jury beginning 9 November 2009 in Lincoln County Superior Court. At trial, the State entered into evidence, over defendant's objection, Foxx's attendance record from Bosch Tool for 15 January 2007. Deputy Frye testified that when he heard there was a murder at Foxx's home, he initially thought defendant was a good suspect. Robert Woodward ("Woodward"), another of defendant's cell mates, also testified about defendant's bizarre behavior while in jail. On cross-examination, Woodward told defendant's counsel "even if I did attempt to kill a police officer, at least they're not a helpless woman, like your client did ." M.E. Paysour additionally testified, without objection, that, based upon the state of rigor mortis of Morton's body, he estimated her time of death as 7:30 a.m.

***3** On 17 November 2009, the jury returned a verdict finding defendant guilty of first-degree murder. The trial court sentenced defendant to life imprisonment without parole in the North Carolina Department of Correction. Defendant appeals.

*II. Business Records Hearsay Exception*

Defendant argues that the trial court erred by admitting into evidence a printout of Foxx's 15 January 2007 attendance record from Bosch Tool. We disagree.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen.Stat. § 8C–1, Rule 801(c) (2009). While hearsay is typically inadmissible as evidence under N.C. Gen.Stat. § 8C–1, Rule 802 (2009), the Rules of Evidence provide a number of exceptions to this general rule, including an exception for "Records of Regularly Conducted Activity" pursuant to N.C. Gen.Stat. § 8C–1, Rule 803(6). This rule provides for the admission in evidence of:

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen.Stat. § 8C–1, Rule 803(6) (2009). Our Supreme Court has established the following test for determining the admissibility of a computerized record pursuant to this rule:

> The rules of evidence governing the admissibility of computerized business records should be consistent with the reality of current business methods and should be adjusted to accommodate the techniques of a modern business world, with adequate safeguards to insure reliability. We therefore hold that printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court

> that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

*State v. Springer,* 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973).

In the instant case, the State attempted to admit Foxx's attendance record during the testimony of Ronald Travis ("Travis"), Foxx's supervisor at Bosch Tool. Travis had been working at Bosch Tool for thirty-two years. Travis testified that all employees at Bosch Tool have a security badge containing a computer chip inside it. Employees are required to scan the badge in front of a time clock at the beginning and end of each shift. This information is then recorded by the time clock. Travis identified Foxx's attendance record for 15 January 2007, which was dated 16 January 2007 and indicated that she had worked seven hours and for the last hour of her shift had taken one hour of vacation. The State then attempted to enter Foxx's attendance record into evidence. Defendant's counsel objected, and the trial court sustained the objection. The State then continued to question Travis in order to lay an adequate evidentiary foundation for the time sheet:

***4** Q. [the State]: All right. Let me ask you a few more questions about this.

A. [Travis]:Yes, sir.

Q. This record, the time clock record, how can you tell that's Vicki Foxx's?

A. It has Vicki Foxx's name on it. The badge that she has and the chip in the badge identifies her as that person.

Q. All right. Have you looked at records like this before?

A. Yes, sir.

Q. Is this typical of the records in your thing [sic]?

A. Yes, sir.

Q. Does it appear to be the records that are kept on every employee that you have, right there?

A. This looks exactly like a valid attendance record for Robert Bosch Tool.

Q. All right, sir.

[The State]: Again, I'll move to introduce these into evidence, Your Honor.

[Defendant]: Objection.

THE COURT: All right. [The attendance record] is admitted.

Travis's testimony and the attendance record itself demonstrate that Foxx's attendance record met the three requirements set forth in *Springer.* Travis testified that all employees scanned their security badge at the beginning and end of every shift, and this information was recorded by the time clock. Thus, the attendance records were generated in the regular course of business. The attendance record itself indicated that it had been generated on 16 February 2007, the day after Foxx worked, and it was therefore unnecessary for Travis to testify that the attendance record was made near the time Foxx scanned her badge. *See State v. Wilson,* 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985) ( "[I]f the records themselves show that they were made at or near the time of the transaction in question, the authenticating witness need not testify from personal knowledge that they were made at that time."). Travis, who had worked with Bosch Tool for thirty-two years, was familiar with the attendance records and how they were generated; he explained that Foxx's security badge contained a unique identification chip which the time clock used to record the hours she worked and identified Foxx's time sheet as a typical attendance record at Bosch Tool. Therefore, the document was admissible under N .C. Gen.Stat. § 8C–1, Rule 803(6), and the trial court properly overruled defendant's objection. This argument is overruled.

*III. Opinions of Defendant's Guilt*

Defendant argues that the trial court erred by allowing two witnesses to offer their opinions that defendant was guilty. Specifically, defendant contends that the trial court erred by permitting: (1) Deputy Frye's testimony that he initially thought defendant might be a good murder suspect; and (2) Woodward's testimony on cross-examination that "even if I did attempt to kill a police officer, at least they're not a helpless woman, like your client did." We disagree.

Initially, we note that defendant failed to object to either statement at trial. Thus, defendant's argument is reviewed only for plain error. *State v. Taylor,* 362 N.C. 514, 543, 669 S.E.2d 239, 263 (2008).

***5** [T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said the ... mistake had a probable impact on the jury's finding that the defendant was guilty.

*State v. Odom,* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill,* 676 F.2d 995, 1002 (4th Cir .1982)).

> Therefore, the test for "plain error" places a much heavier burden upon the defendant than [the burden] imposed by N.C.G.S. § 15A–1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

*State v. Cummings,* 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000).

As defendant correctly notes, this Court has held that it is error for witnesses to "offer their opinions of whether defendant was guilty." *State v. Carrillo,* 164 N.C.App. 204, 210, 595 S.E .2d 219, 223 (2004). However, the statement made by Officer Frye, that he "thought maybe that at that point in time, if it was in fact a murder, that [defendant] might be a good suspect at that point in time," did not constitute such an impermissible opinion. Frye did not offer an opinion that defendant murdered Morton but rather an opinion that, based on his prior history, defendant would "be a good suspect," who warranted further investigation. Thus, Frye's testimony was not improper.

In addition, Woodward's statement was made in response to cross-examination from defendant's counsel. "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Gobal,* 186 N.C.App. 308, 319, 651 S.E.2d 279, 287 (2007). This argument is overruled.

*IV. Expert Testimony Estimating Time of Death*

Defendant argues that the trial court erred by admitting M.E. Paysour's testimony estimating Morton's time of death as 7:30 a.m. We agree, but find that the error did not rise to the level of plain error.

Initially, we note that defendant failed to object to Paysour's estimation of Morton's time of death. Thus, we again review defendant's argument only for plain error. *Taylor,* 362 N.C. at 543, 669 S.E.2d at 263.

The admissibility of expert opinion testimony is governed by N.C. Gen.Stat. § 8C–1, Rule 702, which states that "[i]f scientific, technical or other specialized knowledge will assist the trier of

fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen.Stat. § 8C–1, Rule 702(a) (2009). Our Supreme Court has formulated the following test for evaluating the admissibility of expert testimony: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *State v. Ward,* 364 N.C. 133, 140, 694 S.E.2d 738, 742 (2010). In the instant case, defendant challenges only the first requirement, that the method of proof is sufficiently reliable as an area for expert testimony.

> ***6** Determining the reliability of a method of proof is "a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony." In order to determine whether an expert's area of testimony is considered sufficiently reliable, "a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two." Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable.

*Id.* at 140, 694 S.E.2d at 742–43 (internal citations omitted).

Defendant did not attempt to challenge the validity of M.E. Paysour's opinion before the trial court. On appeal, defendant cites as the basis of his argument various studies and treatises which appear to indicate that the use of rigor mortis, standing alone, is not a sufficiently reliable method of determining time of death. However, none of the information cited by defendant was presented to the trial court. This Court has previously rejected a similar argument because "[a] defendant cannot establish an abuse of discretion by the trial judge based on scientific literature never provided to that judge." *State v. Anderson,* 175 N.C.App. 444, 449, 624 S.E.2d 393, 398 (2006). Consequently, it is unnecessary for this Court to determine the validity of the use of rigor mortis to determine time of death. Defendant's argument, which is based upon scientific literature not presented to the trial court, cannot demonstrate that the trial court abused its discretion by allowing M.E. Paysour's testimony.

Nonetheless, defendant has identified a deficiency in M.E. Paysour's opinion. M.E. Paysour testified repeatedly that he examined Morton's body at 8:45 p.m. and that, as a result of this examination, he determined that Morton had been dead at least eight to ten hours. Thus, according to M.E. Paysour, Morton had been dead since at least 10:45 a.m. to 12:45 p.m. However, while M.E. Paysour's estimate allowed for Morton's body to have been in full rigor mortis for up to an additional twenty-six hours, there is nothing in M.E. Paysour's testimony to indicate why he placed Morton's time of death at 7:30 a.m., approximately fifteen hours prior to his examination. While M.E. Paysour testified that rigor mortis can vary based upon temperature or muscle mass, he did not identify either of those factors as a basis for his estimate. Instead, on cross-examination, M.E. Paysour testified specifically that he did not consider the temperature inside or outside Foxx's

home when he examined Morton's body. Moreover, M.E. Paysour did not testify that he considered any other factors in reaching his determination of Morton's time of death. Since it is unclear from his testimony what other factors besides Morton's state of rigor mortis, if any, were used by M.E. Paysour to bring his estimate of Morton's time of death outside the initial eight-to-ten-hour window predicted by Morton's state of rigor mortis, his method of proof for determining Morton's time of death cannot be said to be sufficiently reliable to be admissible at trial under Rule 702. Thus, the trial court abused its discretion by admitting M.E. Paysour's estimate of Morton's time of death.

***7** However, even though M.E. Paysour's testimony was erroneously admitted, "defendant has the burden of showing that the error constituted plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop,* 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). Defendant has not met his burden in the instant case.

The State presented evidence that, after he was arrested, defendant told his cell mate, Aiken, in detail, that he surreptitiously obtained a key to Foxx's house, that he used that key to enter Foxx's house and shoot Morton repeatedly in the head with a .32 caliber pistol, and that he covered Morton's body with a sheet. Foxx discovered Morton's body covered by a sheet, and a .32 caliber pistol was found hidden in the land surrounding defendant's home. The pistol had been previously identified as belonging to defendant, as it was the same pistol that had been recorded by Deputy Cornwell when he had previously arrested defendant. Defendant had previously had a confrontation with Morton two weeks prior to her murder. Finally, several witnesses testified that defendant made threatening statements regarding Morton, including a statement that he would kill Morton if he ever got the chance. Considering this evidence, we cannot conclude that but for M.E. Paysour's testimony, a different result would have been reached at defendant's trial. This argument is overruled.

## *V. Cumulative Errors*

Defendant argues cumulative errors deprived him of a fair trial. Since defendant has failed to identify any errors that occurred during his trial under the applicable standard of appellate review, we necessarily find no cumulative error. *See State v. Roddey,* 110 N.C.App. 810, 816, 431 S.E.2d 245, 249 (1993). This argument is overruled.

## *VI. Conclusion*

The trial court properly admitted Foxx's attendance record for 15 January 2007 under N.C. Gen.Stat. § 8C–1, Rule 803(6). The trial court did not err by allowing Deputy Frye to testify

that he thought defendant was a good suspect for Morton's murder as this was not an opinion that defendant was guilty. Moreover, the trial court did not err by allowing Woodward to express an opinion regarding defendant's guilt because the opinion was elicited during defendant's cross-examination of the witness. Finally, the trial court erred by allowing M.E. Paysour to testify about his estimate of Morton's time of death. However, since defendant did not object to this estimate and failed to show that a different result probably would have been reached but for the error, this error did not constitute plain error.

No error.

Judges GEER and STEPHENS concur.
Report per Rule 30(e).

**All Citations**

210 N.C.App. 759, 711 S.E.2d 531 (Table), 2011 WL 1238039