

MASSACHUSETTS SUPREME JUDICIAL COURT

Commonwealth v. Lao

460 Mass. 12 (2011) · Decided June 13, 2011

SUMMARY

The Massachusetts Supreme Judicial Court affirmed the defendant’s conviction for deliberately premeditated murder. The court rejected challenges concerning hearsay evidence, a late-disclosed witness and references to a prior trial, the prosecutor’s closing argument and timeline chart, the requested Bowden instruction, and the deliberate-premeditation instruction. The court also declined to reduce the degree of guilt or order a new trial under G. L. c. 278, § 33E.

CASE DETAILS

COURT	Massachusetts Supreme Judicial Court
WRITING FOR THE COURT	Spina, J.
JURISDICTION	Massachusetts
DECIDED	June 13, 2011
DISPOSITION	affirmed
PROCEDURAL POSTURE	The defendant appealed from his conviction of deliberately premeditated murder after a retrial. He challenged evidentiary rulings, denial of a mistrial, the prosecutor's closing argument, refusal to give a Bowden instruction, and the deliberate-premeditation instruction.
STANDARD OF REVIEW	Unpreserved evidentiary and closing-argument claims were reviewed for a substantial likelihood of a miscarriage of justice. The denial of a motion for a mistrial was reviewed for abuse of discretion, requiring a showing that no conscientious judge acting intelligently could have taken the view expressed. The court conducted plenary review of the record under G. L. c. 278, § 33E.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Lao v. Commonwealth

TOPICS

- criminal procedure
- hearsay
- jury instructions
- appellate procedure
- standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the victim's statements to her daughter concerning the defendant's attempt to run her over and the events causing her distress were improperly admitted.
2. Whether the trial judge abused his discretion by denying a mistrial or motion to strike based on a witness's late-disclosed and changed testimony and references to the defendant's prior trial.
3. Whether the prosecutor's closing argument and timeline chart misstated the evidence or improperly urged conviction on a burden less than proof beyond a reasonable doubt.
4. Whether the defendant was entitled to a so-called Bowden instruction concerning alleged inadequacies in the police investigation.
5. Whether the jury instruction on deliberate premeditation was legally adequate.
6. Whether the record warranted relief under the Supreme Judicial Court's power under G. L. c. 278, § 33E.

HOLDINGS

1. Although the prosecutor's question improperly called for speculation about the defendant's state of mind, the victim's answer was admissible as an excited utterance when viewed as describing the event causing her crying and screaming. The admission did not create a substantial likelihood of a miscarriage of justice.
2. The trial judge did not abuse his discretion in denying the defendant's motion for a mistrial or motion to strike. The defendant failed to show bad faith, a discovery violation, or prejudice resulting from the late disclosure and the witness's testimony.
3. The prosecutor's closing argument was grounded in the evidence, did not misrepresent testimony, and did not improperly diminish the reasonable-doubt standard. The timeline chart was a permissible aid to the argument and was not shown to be inaccurate.
4. The defendant was not entitled to a specific Bowden instruction. Bowden permits a defendant to present evidence and argument concerning inadequacies in the police investigation but does not create a defense, an element, or a requirement that the judge give a particular instruction.
5. The deliberate-premeditation instruction was not erroneous because the judge gave the approved instruction from the Model Jury Instructions on Homicide.

KEY QUOTATIONS

“Bowden does not create a “defense” in the sense that it creates an element of proof that the Commonwealth must prove or disprove beyond a reasonable doubt, such that a particular instruction is required.” (23)

“Whether the evidence was incriminating, exculpatory, or both, where, as here, there has been disclosure but no evidence of bad faith, the question becomes whether the defendant had sufficient time to adjust to the disclosure in shaping and preparing his defense.” (20)

FACTUAL BACKGROUND

The victim and the defendant, her estranged husband, had separated, and the victim told their daughter that she intended to file for divorce and that her boyfriend would move into her apartment. The defendant had previously controlled and physically abused the victim and had threatened to kill her if she left him. The victim was found strangled in her apartment on May 2, 2000, after witnesses placed the defendant and his white van near the apartment during the relevant period. The defendant claimed an alibi involving a Home Depot purchase and work at a client's home in Waltham, but the prosecution argued that a gap in the timeline allowed him to commit the murder.

PROCEDURAL HISTORY

The defendant's first murder conviction was affirmed. His motion for a new trial based on ineffective assistance of appellate counsel was denied; the Supreme Judicial Court reversed and ordered a new trial. After retrial, the defendant was again convicted of deliberately premeditated murder. The Supreme Judicial Court affirmed the judgment and declined under G. L. c. 278, § 33E, to reduce the degree of guilt or order a new trial.

DISPOSITION

affirmed

CASES CITED

- Commonwealth v. Wright, 411 Mass. 678, 681 (1992)
- Commonwealth v. Millyan, 399 Mass. 171, 183 (1987)
- Commonwealth v. King, 436 Mass. 252, 255 (2002)
- Commonwealth v. Perez, 405 Mass. 339, 345 n.8 (1989)
- Commonwealth v. Medeiros, 395 Mass. 336, 351 (1985)
- Commonwealth v. Bys, 370 Mass. 350, 361 (1976)
- Commonwealth v. Lam Hue To, 391 Mass. 301, 311-312 (1984)
- Commonwealth v. Ira I., 439 Mass. 805, 809-811 (2003)
- Commonwealth v. Hamilton, 426 Mass. 67, 70 (1997)
- Commonwealth v. Vaughn, 32 Mass. App. Ct. 435, 441-443 (1992)
- Commonwealth v. Arsenault, 361 Mass. 287, 299-300 (1972)
- Commonwealth v. Qualls, 440 Mass. 576, 583-584 (2003)
- Commonwealth v. Drayton, 386 Mass. 39, 52 (1982)
- Commonwealth v. Marquetty, 416 Mass. 445, 452 (1993)
- Commonwealth v. Kozec, 399 Mass. 514, 516 (1987)
- Commonwealth v. Toro, 395 Mass. 354, 360 (1985)
- Commonwealth v. Guy, 454 Mass. 440, 446 (2009)
- Commonwealth v. Cook, 419 Mass. 192, 202-203 (1994)
- Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980)
- Commonwealth v. Boateng, 438 Mass. 498, 507 (2003)

- Commonwealth v. O'Brien, 432 Mass. 578, 590 (2000)
- Commonwealth v. Avila, 454 Mass. 744, 767 (2009)
- Commonwealth v. Williams, 439 Mass. 678, 687 (2003)
- United States v. Whitney, 524 F.3d 134, 138-139 (1st Cir. 2008)
- Commonwealth v. Nardi, 452 Mass. 379, 397-398 (2008)
- Commonwealth v. Lao, 443 Mass. 770 (2005)
- Commonwealth v. Lao, 450 Mass. 215, 216-217 (2007)

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