

COURT OF APPEALS OF THE STATE OF NEW YORK

People v. Shulman

6 N.Y.3d 1, 843 N.E.2d 125, 809 N.Y.S.2d 485 (2005) · Decided October 25, 2005

OPINION

People v. Shulman 843 N.E.2d 125

READ, J.

6 N.Y.3d 1 (2005) 843 N.E.2d 125 809 N.Y.S.2d 485 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ROBERT SHULMAN, Appellant. Court of Appeals of the State of New York. Argued September 6, 2005. Decided October 25, 2005.

*4 Legal Aid Society, New York City (Andrew C. Fine, Arthur H. Hopkirk, Denise Fabiano, Laura R. Johnson, Elon Harpaz, Joanne Legano Ross and Reed Smith of counsel), for appellant. *5 *6 *7 *8 *9 *10 *11

*12 Thomas J. Spota, District Attorney, Riverhead (Guy Arcidiacono, Glenn Green, Michael J. Miller, Steven A. Hovani, Anne E. Oh and Marion Tang of counsel), for respondent. *13 *14 *15 *16

*17 Committee on Capital Punishment, Association of the Bar of the City of New York, New York City (Joshua L. Dratel of counsel), for Association of the Bar of the City of New York, amicus curiae.

Chief Judge KAYE and Judges G.B. SMITH, CIPARICK, ROSENBLATT, GRAFFEO and R.S. SMITH concur.

OPINION OF THE COURT

READ, J. A jury convicted defendant Robert Yale Shulman, a confessed serial killer, of several offenses, including one count of first-degree murder for intentionally causing the death of three women in "separate criminal transactions . . . committed in a similar fashion" (Penal Law § 125.27 [1] [a] [xi]). Because the People filed a notice of intent to seek the death penalty, a separate sentencing proceeding followed (see CPL 400.27 [1]) in which the jury concluded unanimously that defendant should be executed. As is mandated, defendant appealed directly to this Court (see CPL 450.70 [1]; 470.30 [2]; see also NY Const, art VI, § 3 [b]). The death sentence is no longer at issue in this case. Defendant contends, and the People do not dispute, that developments before our decision in *People v LaValle* (3 NY3d 88 [2004]) require that the sentence of death be set aside. In *Matter of Hynes v Tomei* (92 NY2d 613 [1998], cert denied 527 US 1015 [1999]), we struck certain plea provisions from the CPL, *18 concluding that they created an unconstitutional two-tiered penalty level for death penalty cases (see *id.* at 620). Citing *People v Harris* (98 NY2d 452 [2002]), where "we set aside the death sentence of a defendant who went to trial while the plea provisions were in effect" (*People v Mateo*, 2 NY3d 383, 399 [2004], cert denied 542 US 946

[2004] [Mateo II]), defendant asserts that we are likewise compelled to set aside his death sentence. We agree. Accordingly, we have no occasion to consider any of defendant's other, now academic challenges to imposition of the death penalty in this case (see *id.* at 401; see also *Harris*, 98 NY2d at 496-497). Defendant also presses numerous grounds for reversing his convictions, to which we now turn (see CPL 450.70 [1]; 470.30 [2]; see also *People v LaValle*, 3 NY3d at 102-116; *Mateo II*, 2 NY3d at 401; *People v Culhane*, 33 NY2d 90, 94-95 [1973]). For the reasons that follow, we affirm defendant's convictions. I. At about 8:05 A.M. on December 7, 1994, an employee of the Suffolk County Department of Public Works, while traveling on Long Island Avenue from the Department's garage in Yaphank to a job site in the Town of Medford, noticed what appeared to be a brand-new blue Rubbermaid garbage can lying on its side amidst other debris at the road's edge. Stopping his pickup truck to observe the garbage can more closely, he thought to himself that "somebody had dumped a bad load of meat." Upon arriving at the job site, he told his supervisor about this discovery, and suggested that department personnel clean up the area and retrieve the garbage can for use to store their tools. On his way back from the job site to the garage later that morning, the supervisor pulled over to inspect the garbage can. He discovered a woman's remains. The victim's nude body was partially covered with plastic bags, and a white towel or bath mat was wrapped around her head. A white powdery substance, later determined to be baking soda, was visible on her remains. The victim's left leg was severed midway between the knee and groin area; both arms had been amputated; she had sustained serious blunt force trauma to the face, head, eye, nose and mouth. The victim's left arm displayed a tattoo consisting of a red heart and a banner with the name "Adrian." Despite extensive efforts by the police to find out who this woman was in life, to this day she remains identified only as "Jane Doe Medford."

*19 On April 6, 1995, employees at a recycling plant in Brooklyn, which processes refuse from New York State and elsewhere, happened upon a second dismembered nude female body. The corpse was discovered on a conveyor belt, which was halted just before its contents would have been deposited into a compactor, tied into a bale and transferred to a landfill. This victim was missing her legs; her right arm was cut off at the shoulder, while the left arm, which was severed above the wrist, displayed what appeared to be a self-administered tattoo depicting two small crosses. The head and torso were stuffed in a black plastic bag; the victim's face was badly battered. She was subsequently identified as Lisa Ann Warner.

On December 11, 1995, an employee of a sheet metal company located on Old Walt Whitman Road in Melville, New York, stopped for a lottery ticket on his way into work in the morning. At about 4:00 P.M., he discovered that he had misplaced the ticket. Fearing that he might have accidentally thrown it out, the employee launched a search that ultimately led to a dumpster located in the company's parking lot. When he and a coworker began rummaging through the dumpster to find the ticket, the employee spotted what looked like a quilt and a brand-new sleeping bag, partially encased in plastic garbage bags. He nudged the sleeping bag with a piece of wood, and felt something "hard" inside it, which he assumed was a dead animal. He then enlisted

the help of another coworker, who coaxed the sleeping bag's zipper open with the piece of wood. A human foot protruded. The victim was a female; both of her hands had been cut off just above the wrist. She had suffered severe head trauma and was nude, although a blood-soaked white tee shirt was near her head as was a blue brassiere. Her left breast bore a tattoo with the name "Melani," and just below it, what appeared to be two flowers with their stems intertwined. A powdery white substance, later identified as principally calcium carbonate, was visible on her corpse. Because there was no way to fingerprint the victim, the police released a physical description and a photograph of the tattoo to the news media, and requested help from the public in identifying her. Acting on an anonymous tip, on December 13, 1995, Suffolk County Homicide Detective Joseph White went to an address in Hollis, Queens, where he talked to three women. They identified the victim as Melani, a fellow prostitute who, like them, worked Jamaica Avenue between 198th Street and Francis *20 Lewis Boulevard. Detective White eventually took statements from Camille M. and Maggie D., both of whom last saw Melani on December 8, 1995. They observed Melani, later identified as Kelly Sue Bunting, getting into an older model blue Cadillac driven by a white male. On December 14, 15 and 16, Detective White canvassed a number of area motels patronized by prostitutes, reasoning that Melani could not have been killed and dismembered in a motel room without leaving behind the conspicuous signs of a bloody encounter. He found no information to assist him in his investigation. From his conversations with several prostitutes, however, Detective White learned that a white male who drove a blue Cadillac frequently solicited them along Jamaica Avenue. This man took the women not to a motel, but to a residence in Nassau County. He lived in a room in the rear of the first floor, which was entered from the back through a screened-in porch. He would ask the women to strip and "cook" his powdered cocaine into crack, using baking soda and water. Over time, Detective White obtained consistent statements from five different women (Dawn V., Kathleen W., Roxanne L., Virginia S. and Ann H.) about this man and his habits. On January 2, 1996 and again on January 3, 1996, first Kathleen W. and then Dawn V. escorted Detective White to a house in Hicksville, where a 1983 blue Cadillac was parked in the driveway. From the license plate number, Detective White established that the car was registered to an individual who turned out to be defendant's brother. Detective White had discovered that only Sears sold the brand of sleeping bag in which Kelly Sue Bunting's corpse was wrapped. Once he learned the name of the individual to whom the blue Cadillac was registered, he contacted Sears's loss prevention office in Boston on January 4, 1996 to confirm that this brand of sleeping bag was indeed exclusive to Sears (it was) and to inquire whether this individual (defendant's brother) had "any history with Sears department stores as a customer." The Sears employee to whom Detective White spoke indicated that Sears had a record of defendant's brother at the Hicksville address, and that he was a post office employee and a member of a postal credit union, but did not have a Sears credit card. She then "asked [the detective] if [he] was aware there was a Robert Shulman at that address" in Hicksville. This was how defendant's name first surfaced in the Bunting investigation. Detective White learned that

defendant had obtained a Sears *21 credit card in July 1995, although it had never been used, and that, like his brother, he was a post office employee and a member of the postal credit union. On January 4, 1996, Detective White also initiated surveillance of the Hicksville residence, and the police took photographs of a white male who left the house and of the car in which he drove away. That same day, Kathleen W. and Dawn V., the two women who had led Detective White to the house, identified these photographs as depicting the white male who solicited prostitutes along Jamaica Avenue and the blue Cadillac that he drove. On January 6, 1996, Roxanne L. likewise identified the photographs. She further informed Detective White that this man had told her that he worked the night shift at the post office; that his brother also lived in the Hicksville residence; and that he was angry at Melani for "beat[ing] him out of" some coke that she had bought for him. On January 14, 1996, Camille M., one of the women who saw Kelly Sue Bunting on December 8, 1995, selected defendant's photograph from a photo array of 10 individuals, and the blue Cadillac registered to his brother from a photo array of eight vehicles. On January 16, 1996, Detective White approached postal authorities for information about the work schedules of both defendant and his brother. A postal inspector advised him that defendant's brother worked as a mail handler at the 28th Street post office in Manhattan from 4:00 P.M. to 12:30 A.M., with Tuesdays and Wednesdays off; and that defendant worked as a mail handler at the post office in Hicksville from 10:30 P.M. to 7:00 A.M., with Sundays and Mondays off. Detective White subsequently learned from the postal inspector that defendant had not worked as scheduled on December 7, 1994 (specifically, he left work at 7:00 A.M. on December 6, 1994, and returned to work at 6:30 P.M. on December 7, 1994) and December 8, 1995. Jane Doe Medford's body was discovered on the morning of December 7, 1994; Kelly Sue Bunting was last seen alive on December 8, 1995. At about 2:28 P.M. on January 20, 1996, Detective White observed the white male previously identified by Kathleen W., Dawn V. and Roxanne L. from surveillance photographs drive another white male from the Hicksville residence to the train station. At this point in the Bunting investigation, Detective White knew that the automobile was registered to defendant's brother and, based on the information from Sears, that both defendant and his brother lived at the Hicksville address. By correlating *22 the surveilled movements of these two men with the known work schedules and work locations for defendant and his brother as well as by observing whether lights were on or off in different areas of the Hicksville residence, the police were able to ascertain that the man identified by Kathleen W., Dawn V. and Roxanne L. was defendant, and that he lived in the rear of the house's first floor. On January 25, 1996, Detective White showed the photo arrays to Maggie D., the other woman who had seen Kelly Sue Bunting on December 8, 1995. She selected defendant's photograph as depicting this individual, and the blue Cadillac registered to his brother as the car that he was driving at the time. On that same day, Detective White asked Camille M., who had selected defendant's photograph from the photo array on January 14, 1996, to look at a photo array including a photograph of defendant's brother but not defendant. She was unable to make any identification. On January 26, 1996, Detective White met with Virginia S.,

who described a white male who had picked her up in the vicinity of Jamaica Avenue in a blue Cadillac about four times, and had taken her back to his place in Nassau County. She recalled having seen a work bench or table with tools, including a hacksaw and a hammer, in the screened-in porch off his room, and observed that he "always had baking soda around to cook his drugs." She also related that this man had told her that his name was "Bob," and that she had seen items in his room with the name "Bob" on them. She selected defendant's photograph and the photograph of the car registered to defendant's brother from the photo arrays. On February 12, 1996, Ann H. recounted her single encounter with defendant to Detective White. She identified defendant and the car registered to his brother from the photo arrays. She described his room in the rear of the Hicksville residence as "filthy." At that time, defendant was assigned to work in a small security booth at the post office in Hicksville. With the assistance of postal inspectors, on March 21, 1996, Detective White and personnel from the Suffolk County Crime Laboratory gained access to this padlocked booth just after defendant completed his shift and left for the day. Crime lab personnel photographed the booth and also vacuumed and performed tape lifts. Defendant's brother often parked the blue Cadillac on a certain residential street in Hicksville near the train station *23 before taking the train into Manhattan to work. On March 22, 1996, Detective White arranged for an officer in the canine unit to check six cars (including the blue Cadillac) parked on this street with the officer's "cadaver dog," a canine certified as having successfully completed various training exercises to detect body fluids or parts or decaying flesh. The canine officer did not know in advance which car was the object of Detective White's suspicions. He walked the dog down the block past the six cars, and back up the block past five cars.[1] He informed Detective White that his dog had reacted positively to one of the cars the blue Cadillac registered to defendant's brother. On March 25, 1996, Detective White met with personnel from the crime lab to discuss their findings with respect to trace evidence recovered in connection with the bodies of Jane Doe Medford and Kelly Sue Bunting, and at the security booth where defendant worked. Trace evidence detected with both bodies included worn and debris-laden light blue carpet fibers, orange carpet fibers, cat hairs and foam padding. In addition, jute carpet backing was found on Kelly Sue Bunting's body and the wrappings in which she was enshrouded. These same five items worn and debris-laden light blue carpet fibers, orange carpet fibers, cat hairs, foam padding and jute turned up in the sweepings and tape lifts from the security booth where defendant worked. The laboratory technician told Detective White that there was a "strong associative connection" among these five items. The Suffolk County Police arrested defendant near his Hicksville residence on April 6, 1996. Detective White placed defendant in the back seat of an unmarked police car for the trip to the police station at Yaphank, and advised him of his Miranda rights, which he waived. On the way, Detective White showed defendant a photograph of Kelly Sue Bunting. Defendant made several incriminating statements while simultaneously denying responsibility for her death. Detective White and other detectives interviewed defendant at the police station. When the detectives asked him to talk about prostitutes, he replied that they hate and kill people. When they

pointed out that he killed people, too, he responded that he was paying the officers' salaries, that he was a good citizen who paid taxes while the girls committed crimes and did not pay taxes, yet no one locked them up. He subsequently gave *24 four written statements in which he described the circumstances of the killings of Kelly Sue Bunting, Jane Doe Medford and Lisa Ann Warner; he agreed to give hair, blood and saliva samples. Defendant claimed that after having smoked crack with Melani, he blacked out and later awakened to find her lying face down on the floor with blood everywhere, including by her head and on both his hands; that he had used tools stored on the screened-in porch to saw off her hands "so no one could identify her"; that he wrapped her body in plastic garbage bags and two sleeping bags and put the body in the trunk of his brother's car, along with her clothes and a small brown paper bag in which he had placed her severed hands; that he discarded the paper bag in a garbage can at a fast-food restaurant and the clothes in a dumpster at another location; that he threw the body away in a dumpster at a factory near the Mid-Island post office where he once worked; that there was a lot of blood to clean up in his room, causing him to dispose of a blood-stained greenish blue carpet; and that he wished that he had cut out Melani's tattoo once he read in the newspaper that she had been identified by it. In his own handwriting, defendant also inscribed three photographs from the Bunting investigation (two of the dumpster where Kelly Sue Bunting's remains were discovered; one of her body at the morgue) with statements admitting to his dismemberment and disposal of the body, and signed his name. Defendant admitted that he had killed Jane Doe Medford in his room, and again claimed that he had blacked out after smoking crack with her, only to awaken and find her unaccountably dead and bleeding from the face and head. So that she would not be identified, he used an axe and a hacksaw to dismember her body; he threw the axe and hacksaw away in the trash afterwards; he disposed of her body parts "all over the place," and similarly discarded her belongings in various dumpsters. Because he could not dispose of her remains immediately, he sprayed her remains with an air freshener and sprinkled them with baking soda to mask the odor of decomposition. Defendant acknowledged, inscribed and signed photographs related to the killing of Lisa Ann Warner. He admitted that he killed all the victims in his room at the Hicksville residence. According to defendant, he picked up Lisa Ann Warner along Jamaica Avenue; returned to his room and smoked crack with her; blacked out and awakened to find her dead from head wounds (but he also admitted to hitting her with a hammer); dismembered her body and disposed of her body parts and clothes in different locations.

*25 When one of the detectives suggested to defendant that he should "[g]et away from the lie about blacking out, [which was] just not believable," he agreed, stating that he had not blacked out but instead had "just lost control" and sometimes felt anger and rage. He recounted that he had killed Jane Doe Medford with a baseball bat; Kelly Sue Bunting with a dumbbell; and Lisa Ann Warner with a hammer. Defendant threw out these makeshift weapons immediately afterwards because he would always think that "it's not going to happen again." He reiterated that he cut off his victims' limbs in his room and discarded their body parts in multiple locations in order to foil

identification.

Based upon information from these postarrest confessions, on April 7 and April 8, 1996 the police executed a search warrant for defendant's room, which was photographed, partially disassembled and transported to various divisions of the crime lab. There they discovered evidence of drug use, baking soda, calcium carbonate, air fresheners, carpet cleaners, and hundreds of apparent bloodstains on the walls, ceilings and surfaces of practically every freestanding item. Through DNA analyses, various stains were determined to be consistent with the DNA profiles of Jane Doe Medford, Lisa Ann Warner or Kelly Sue Bunting. II. Defendant contends, among other things, that the police lacked probable cause to arrest him; and that the trial court erred by rejecting his for cause challenges to certain prospective jurors, and abused its discretion by denying his request to question the seated jurors as to whether they had read a particular newspaper headline. Defendant also maintains that the trial court improperly instructed the jury as to the meaning of first-degree "similar fashion" murder. A. Probable Cause Defendant claims that the evidence offered by the People at the suppression hearing fell short of demonstrating *prima facie* that it was more probable than not that he committed the offenses being investigated. Probable cause "does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been . . . committed" by the person arrested (*People v Bigelow*, 66 NY2d 417, 423 [1985]). When *26 determining whether the police had probable cause to arrest, the "inquiry is not as to defendant's guilt but as to the sufficiency for arrest purposes of the grounds for the arresting officer's belief that [the defendant] was guilty" (*People v Coffey*, 12 NY2d 443, 452 [1963]; see CPL 140.10 [1] [b]). Further, while defendant invites us to look at each fact or circumstance considered by the police as though standing alone, "[t]he legal conclusion [as to whether probable cause existed] is to be made after considering all of the facts and circumstances together" (*Bigelow*, 66 NY2d at 423 [emphasis added]). A synoptic evaluation is essential because "[v]iewed singly, these may not be persuasive, yet when viewed together the puzzle may fit and probable cause found" (*id.*). Detective White testified at the suppression hearing about what the police had discovered over the course of a painstaking four-month investigation: that Kelly Sue Bunting was last seen alive in defendant's company; that Kelly Sue Bunting and Jane Doe Medford were both killed by being severely beaten about the face and head and were disposed of as trash, minus hands or limbs, suggesting a common killer; that the trace evidence associated with the bodies of Kelly Sue Bunting and Jane Doe Medford (worn and debris-laden light blue carpet fibers, orange carpet fibers, cat hairs, jute and foam padding) was also present in the security booth where defendant worked; that defendant did not work as scheduled on December 7, 1994, the day Jane Doe Medford's body was discovered, or December 8, 1995, the day Kelly Sue Bunting was last seen alive; that defendant was known to entertain prostitutes, including Kelly Sue Bunting, in his room, a relatively secluded spot entered through a screened-in porch where another prostitute had seen a work bench or table with tools, including a hacksaw and a hammer; and that several prostitutes reported that defendant always had baking

soda on hand in his room, and that the bodies of Kelly Sue Bunting and Jane Doe Medford were sprinkled with a white powdery substance.[2] These multiple points of correspondence between defendant and the killings of Kelly Sue Bunting and Jane Doe Medford were evidence that it was more probable than not that defendant was the perpetrator. Accordingly, the police had a sufficient basis to arrest defendant.

*27 B. Jury Selection

We focus upon four of defendant's jury selection claims. In three of these four claims, defendant argues that the trial court erred by rejecting his for cause challenges under CPL 270.20 (1) (b) to prospective jurors who, he asserts, possessed "a state of mind that [was] likely to preclude [them] from rendering an impartial verdict based upon the evidence adduced at the trial"; in the remaining claim, defendant contests the trial court's rejection of his for cause challenge under CPL 270.20 (1) (c). Noting that he exhausted his peremptory challenges, defendant argues that he is entitled to a new trial if the trial court committed any errors (see CPL 270.20 [2]). We find no error.

1. Prospective Juror S.C.

S.C. worked as a corrections officer on Rikers Island. In response to a question on the written juror questionnaire asking what life without parole meant to him, he wrote "3 hots and a cot, free medical, \$50[,]000 a year wasted." When asked about this answer during voir dire, S.C. said that he "was just being sarcastic," and that "3 hots and a cot" was "[a] saying" he had picked up at Rikers Island, which made him "feel pretty foolish now that [defense counsel] read it back to [him]." He repeatedly assured the trial court and the parties that he could be fair and impartial. Defendant assigns error to the trial court's rejection of his for cause challenge to S.C., arguing that S.C.'s representations of fairness and impartiality "lacked candor," and that his "cavalier manner" rendered him unfit to serve. By denying defendant's challenge, however, the trial court found S.C. to be truthful. As we observed long ago, "it was for the [trial] court to say, from the whole examination of the juror, including his appearance and demeanor, whether he was fit and competent to perform fairly and impartially" (People v Carolin, 115 NY 658, 659 [1889]; see also People v Johnson, 94 NY2d 600, 613 [2000] [determination of whether prospective juror is qualified is "committed largely to judgment of the Trial Judge with his peculiar opportunities to make a fair evaluation" (internal quotation marks omitted)]). Here, the trial court took "into consideration all of the answers that [the juror] provided to the Court and his willingness to put aside whatever his personal opinions might be and take the law as the Court gave it to him," and denied the challenge. The trial court acted within its discretion in making this determination.

*28 2. Prospective Juror S.R.

According to defendant, S.R. voiced doubt about whether she could put a preexisting opinion regarding defendant's guilt, premised on media accounts, out of her mind. To support his claim, defendant points to isolated passages of voir dire where S.R. responded to his questions probing her ability to put her opinion aside by stating that "I think I can" or that she would "try." Those

responses, standing alone, did not render S.R. unfit to serve. As we have noted, words like "think" or "try" are "not. . . talismanic word[s] that automatically make[] a statement equivocal" (*People v Chambers*, 97 NY2d 417, 419 [2002]). S.R.'s other answers dispelled any doubt about her ability to deliberate impartially (see *People v Johnson*, 94 NY2d at 615 ["in considering whether a challenge for cause should have been granted, we must look not to characterizations or snippets of the voir dire but to the full record of what the challenged jurors sworn to speak truthfully actually said"]). The court concluded the voir dire by asking S.R. if she would want a juror with her "state of mind" to sit on a case in which either she or a loved one was on trial (compare *People v Chambers*, 97 NY2d at 419 [noting that "an additional question or two at voir dire would easily dispel any doubt as to equivocation, assure an impartial jury, and avoid the delay, and risk, of appeals"]). S.R. unhesitatingly answered "Absolutely." In light of that response as well as her many other assurances of impartiality, the trial court had ample basis for rejecting defendant's for cause challenge to S.R. (compare *People v Torpey*, 63 NY2d 361, 367 [1984] [trial court erred by denying the defendant's for cause challenge to a prospective juror who stated, among other things, "that it would 'probably not' be fair to the defendant to have somebody with her state of mind on the jury"])).

3. Prospective Juror T.V.

Defendant claims that the trial court should have granted his for cause challenge to T.V., which was based on this prospective juror's acknowledgment during voir dire that he had read a newspaper article about jury selection in the case. When prospective jurors filled out written questionnaires two months before voir dire, the trial court instructed them not to read media accounts of the case. Defendant now argues that T.V.'s supposed disregard of this instruction showed that he would not *29 have been able to comply with future instructions, thereby rendering him unfit for service. T.V. did nothing warranting exclusion under CPL 270.20 (1) (b). T.V.'s forthright acknowledgment that he had read the article displayed not a wanton disregard of a court order, but rather an honest misunderstanding of what the trial court had instructed. The record shows that T.V. incorrectly believed that only articles detailing the underlying facts of the crimes charged were off limits. Nor does the rest of the voir dire show that the juror was unwilling to follow the trial court's instructions. T.V. gave every indication that he could be impartial. When instructed further on the scope of the trial court's direction not to read media accounts of the case, T.V. stated that he would comply.

4. Prospective Juror J.C.

Defendant claims that J.C. should have been excluded under CPL 270.20 (1) (c), which provides a for cause challenge when a prospective juror "is related within the sixth degree by consanguinity or affinity to" certain enumerated persons, including "counsel for the people." We disagree. Prior to the commencement of trial, J.C.'s brother-in-law (the brother of J.C.'s wife) had been employed as a prosecutor by the Suffolk County District Attorney's Office. While there, he had worked in the Homicide Bureau and had attended a single meeting regarding the investigation of defendant,

which occurred prior to defendant's arrest. At no point did the brother-in-law make any court appearances in defendant's case. In fact, the brother-in-law resigned from the office and moved to Nevada shortly after defendant's arrest and months before the start of jury selection. We decline to define "counsel for the people" as encompassing the tangential relationship presented here.

C. Midtrial Publicity The trial court repeatedly cautioned the seated jurors that, while they were permitted to read newspapers during the trial, if they saw a headline mentioning the case they were not to read the associated article. The trial court also committed to save all trial-related articles as court exhibits so that the jurors might read them once the trial was over if they so chose. At the beginning of a Monday court session, the trial court thus created as a court exhibit an article about the trial appearing *30 in Newsday the previous weekend. The headline on the article read "Link to 2 More Victims." The article appeared following the Friday testimony of the People's forensic serologist, in which blood matches to Kelly Sue Bunting, Jane Doe Medford and Lisa Ann Warner were discussed. Thus, a reader seeing only the headline might have thought that it referred to testimony that the jury had heard. Anyone reading the article, however, would have learned otherwise. The article discussed facts that were not before the jury, reporting that defendant faced charges in Westchester County for two murders in addition to the three of which the jury was aware, and that blood evidence found in his room matched that of two missing women, one of whom was last seen with defendant in Manhattan. After some housekeeping measures were taken care of, defense counsel asked to be heard with regard to this court exhibit. Stating that he was "not sure exactly what the headline said," counsel asked the trial court to read it aloud. After being handed the exhibit, the trial court stated that "[t]he headline reads, Link to Two More Victims." Upon hearing the headline, defense counsel made the following application: "Your Honor, I would ask the Court to inquire of the jurors and make sure that none of them have read the headline inadvertently or [that] anyone discussed with them what appeared in the newspaper with respect to the [Newsday] article "I think it was very, very prejudicial and potentially very damaging to [defendant] if the jurors by some way indirectly or directly found out about the information that's contained not in the article but just the headline, which is an extremely provocative headline, and I would ask the Court to make some inquiry of the jury with regard to this exhibit" (emphasis added). In response, the prosecutor expressed a misgiving that, by querying the jurors about the headline, "all it really is doing is calling attention to the article." As the prosecutor put it: "there's been articles written about the case since the hearings began and not with respect to any particular article would we specifically ask the jurors if they read a particular article and read a particular *31 headline, and I just think all it does is really highlight the article and . . . peak [sic] their curiosity." After this exchange, the trial court noted that the "subheadline on the article reads, Prosecutor[:]
Blood in Shulman's Home Matches Women"; and that "[a]lthough I suppose that someone can read it and speculate that there [were] some additional victims, it, nevertheless, is somewhat neutral." As previously noted, the article appeared during the examination of the People's forensic serologist, who had given testimony regarding blood

matches to the three victims. The trial court therefore declared that: "I am inclined to go along with the prosecutor's view, that if I were to inquire of the jurors about this, that I would simply be highlighting it for them and might, in fact, invite them to inquire from other people who may have read the paper or even to go back and look at the paper themselves, so I'm inclined to deny defendant's request at this time." Defendant now argues that the trial court erred by not asking the jurors if they had read the headline or heard about the article's contents from other people.[3] In particular, defendant contends that the trial court was required to survey the jurors on these points, following a three-part test devised by United States Court of Appeals for the Second Circuit for a federal trial court to apply when faced with jurors' exposure to potentially prejudicial midtrial publicity. The Second Circuit most recently discussed this three-part test in *United States v McDonough* (56 F3d 381 [2d Cir 1995]). As articulated by the court, the inquiry is: "first, to determine whether the coverage has a potential for unfair prejudice, second, to canvass the jury to find out if they have learned of the potentially prejudicial publicity and, third, to examine individually exposed jurors outside the presence of the other jurors to ascertain how much they know of the distracting publicity and what effect, if any, it has had on that juror's ability to decide the case fairly" (id. at 386, quoting *United States v Gaggi*, *32 811 F2d 47, 51 [2d Cir 1987], cert denied 482 US 929 [1987]). In *McDonough*, an article highly critical of the defendant and skeptical about his prospects on the witness stand appeared in a local newspaper the day before he was scheduled to testify. Describing the article as "poisonous" (56 F3d at 385), the District Court embarked upon the three-part test at the defendant's behest. The defendant disputed whether the court had taken sufficient measures to ascertain whether exposed jurors remained able to decide the case fairly, as required by the third prong of the three-part test. Reviewing the lower court's decision for abuse of discretion and affording it deference, the Second Circuit concluded that the District Court had acted reasonably in evaluating juror impartiality, and affirmed the conviction. We need not consider whether we would adopt the three-part test of *McDonough* in a similar case because this case is different. The trial court correctly described the ambiguous headline as "somewhat neutral"; it certainly was not "poisonous." We have afforded trial courts wide flexibility in determining what, if any, steps are required to assure a defendant's right to a fair trial in light of the particular midtrial publicity and circumstances encountered, subject to appellate review for an abuse of discretion (see *People v Moore*, 42 NY2d 421, 433-434 [1977], cert denied 434 US 987 [1977] [trial court did not abuse its discretion by refusing to take corrective measures requested by defendant to guard against potential prejudice from media reports appearing during jury selection]). Of course, in every case "the facts must be examined to determine the nature of the material placed before the jury and the likelihood that prejudice would be engendered" (*People v Brown*, 48 NY2d 388, 394 [1979]). Here, the trial prosecutor identified a very significant consideration militating against the midtrial voir dire requested by defendant, which the trial court found to be persuasive; namely, that inquiring about the headline would inevitably focus the jurors' attention on something that there was no indication any of them had seen, and might well

foster infelicitous speculation. This was especially so because the trial court had not asked the jurors about any of the many past headlines or news accounts relating to the trial. In short, we conclude that the trial judge did not abuse his discretion when he declined to survey the jury as requested by defendant.

***33 D. First-Degree "Similar Fashion" Murder**

Penal Law § 125.27 (1) (a) (xi) provides that "[a] person is guilty of murder in the first degree when . . . "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person; and . . . "the defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan." Defendant argues that the trial court erred by rejecting his request to instruct the jurors to disregard his postmortem conduct (specifically, the mode of dismembering and discarding of his victims' bodies) when determining whether he committed first-degree "similar fashion" murder.[4] The gist of defendant's claim is that "similar fashion" relates solely to the killing acts underlying the first-degree murder charge, not to the entirety of each "separate transaction." As defendant put it at trial, the element of "similar fashion" can be established only by reference to the "nature and type of injuries" inflicted and the "instrumentality that was used or not used" when committing the crime. He asserts that plain language compels this construction of the statute, as does the Legislature's avowed goal of creating a death-eligible crime sufficiently narrow to pass constitutional muster. We disagree.

*34 Defendant's proposed construction to have "caused the death of two or more additional persons . . . when committed in a similar fashion" is linguistically awkward. "[C]ommitted in a similar fashion" more naturally relates back to "separate criminal transactions," the immediately preceding phrase. "Relative or qualifying words of clauses . . . ordinarily are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to others more remote, unless the intent of the statute clearly indicates otherwise" (McKinney's Cons Laws of NY, Book 1, Statutes § 254). Legislative history further supports this reading of the statute. The Assembly Codes Committee Bill Memorandum explains that subparagraph (xi) of Penal Law § 125.27 (1) (a), the death penalty statute's serial murder provision, "makes an intentional killing first degree murder when the defendant has committed two or more additional intentional killings within a 24 month period in separate criminal transactions that were committed in a similar fashion or pursuant to a common scheme or plan" (Mem of Assembly Codes Comm, Bill Jacket, L 1995, ch 1 [emphasis added]).

From a commonsense perspective, there is no reason to hold that similarity must be shown by the killing act alone. Indeed, in *People v Mateo* (93 NY2d 327, 333 [1999] [Mateo I]),[5] we declined to adopt a comprehensive definition of similarity, because "[t]o do so . . . would ignore the relative nature and contextual considerations inherent in any analysis and application of the 'similarity' element" (id.). Thus, we anticipated that "similar fashion" could, depending upon the

circumstances of an individual case, encompass more than just the actual killing acts. Further, we specifically pointed out that, although Mateo shot all his victims, his various killings were not undertaken in a "similar fashion" because: "the murder victims were of different ethnic and racial backgrounds and ranged in age from 16 to 20. A .45 caliber handgun, a .38 caliber handgun, a .25 caliber handgun, and a sawed-off shotgun were the varied weapons used to commit these murders. The motives for each shooting differed, as did the *35 wounds inflicted by defendant upon his victims. Moreover, the locations of these multiple killings were different" (id.). The factors that we enumerated go well beyond the "nature and type of injuries" inflicted and the "instrumentality that was used or not used" when committing the crime, which defendant asserts should delimit similarity. Postmortem conduct may well be relevant.[6] What counts is the similarity of the conduct, not whether it occurred before or after the victim's death. In all three murders underlying this case, defendant brought the women to the room where he lived and killed them by repeatedly beating them about the face and head with a heavy, blunt object, variously, a baseball bat (Jane Doe Medford), a dumbbell (Kelly Sue Bunting) and a hammer (Lisa Ann Warner). Defendant used such force that he split the victims' skulls open. Afterward, defendant hacked off the victims' hands or limbs and disposed of the bodies in garbage receptacles. To inhibit identification of his victims, one of whom remained unidentified at trial, defendant threw away their severed hands or limbs, again as trash, in locations away from the spots where he disposed of their bodies. There was, in short, sufficient evidence for the jury to convict defendant of first-degree "similar fashion" murder. We have considered defendant's remaining challenges to his conviction, and conclude that they also lack merit. Accordingly, the judgment of County Court should be modified by vacating the sentence of death imposed upon conviction of murder in the first degree, and remitting to County Court for resentencing in accordance with CPL 470.30 (5) (c) and Penal Law §§ 60.06 and 70.00 (5) and, as so modified, affirmed. Judgment modified, etc.

NOTES

[1] Someone had entered and driven one of the cars away in the meantime.

[2] Defendant contends that a Frye hearing was required to show the reliability of the dog-scent evidence presented at the suppression hearing. Because there were sufficient facts and circumstances to establish probable cause without this evidence, we need not address defendant's argument.

[3] Defendant's application at trial focused solely on the headline. Moreover, defendant has never expressed any concern that the jurors, in disobedience of the trial court's instructions, might have read the article.

[4] As for the actual charge, the trial court informed the jurors that, to convict for first-degree murder, they had to find eight elements, including that the three murders were committed in a similar fashion. As to that discrete determination, the trial court instructed the jurors that:

"[b]y way of guidance, I offer you the following legal definitions to aid you in your determination on this element. "When a series of crimes are committed in a similar fashion, they have a similar

modus operandi. "Modus operandi refers to the method used in the commission of the crime. "When crimes have a similar modus operandi, their method of commission is said to follow a repetitive pattern. A pattern is a reliable sample of traits, acts or other observable features. "Similar means merely corresponding. Resembling in many respects, somewhat like, having a general likeness, although allowing for some degree of difference."

[5] We handed down our opinion in *Mateo I* after defendant's conviction; however, the parties and trial court considered the lower court opinions, which we subsequently affirmed, although with somewhat different reasoning.

[6] An extensive literature addresses the phenomenon of serial murder (see e.g. Steven A. Egger, *Serial Murder: An Elusive Phenomenon* [Praeger 1990]; Donald J. Sears, *To Kill Again: The Motivation and Development of Serial Murder* [Scholarly Resources Inc. 1991]; Ronald M. Holmes and Stephen T. Holmes, *Serial Murder* [Sage Publications, Inc., 2d ed 1998]). Although the cases discussed in these books disclose great variety in homicidal behavior patterns, including methods of murder, postmortem mutilation of victims often earmarks the serial killer.