SJC-11363

COMMONWEALTH vs. ANTHONY D. MAZZA.

Suffolk. December 5, 2019. - April 21, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Homicide. Practice, Criminal, Capital case, Postconviction relief, New trial, Disclosure of evidence. Evidence, Disclosure of evidence, Exculpatory.

Indictments found and returned in the Superior Court Department on August 11, 1972.

Following review by this court, 366 Mass. 30 (1974), a motion for a new trial, filed on December 23, 2009, was heard by Patrick F. Brady, J.

A request for leave to appeal was allowed by Gants, J., in the Supreme Judicial Court for the county of Suffolk.

John H. Cunha, Jr. (Charles Allan Hope also present) for the defendant.
Dara Z. Kesselheim, Assistant District Attorney, for the Commonwealth.

BUDD, J. The defendant, Anthony Mazza, was convicted in 1973 of murder in the first degree and robbery in connection

with the strangling death of Peter Armata. See Commonwealth v. Mazza, 366 Mass. 30 (1974). He filed a series of motions for a new trial over the course of thirty-five years. Before us is an appeal from the denial of his sixth motion for a new trial. The motion was predicated on newly discovered evidence consisting of a set of affidavits averring that the key witness for the Commonwealth admitted to lying about the defendant's involvement in the victim's death, and a recently discovered witness statement made to police in 1972.

A single justice of this court, acting as gatekeeper, allowed the appeal to proceed before the full court. Following briefing and oral argument, the court remanded the case for an evidentiary hearing while retaining jurisdiction. Over approximately the next five years, the defendant unsuccessfully attempted to locate relevant witnesses for the hearing. When the hearing finally went forward, therefore, the only relevant evidence submitted was in the form of affidavits and other documentary evidence, most of which was already part of the appellate record. The matter is now back before the court.

Having conducted a de novo review, we conclude that the witness statement constitutes newly discovered evidence that "would probably have been a real factor in the jury's deliberations." Commonwealth v. Grace, 397 Mass. 303, 306 (1986). We therefore reverse the order denying the defendant's

motion for a new trial, set the verdicts aside, and remand the case to the Superior Court for a new trial.

Background. 1. Trial proceedings. a. Direct examination of Robert Anderson. The case against the defendant almost exclusively relied on the testimony of Robert Anderson,[1] who was incarcerated for unspecified reasons at the time of trial. Robert testified that, on the morning of Friday, June 30, 1972, he met the defendant, whom he had known for approximately six or seven months, in the South End section of Boston. At that time, the defendant informed Robert that he needed a place to stay. Later in the day, the two met again in downtown Boston, at which point Robert informed the defendant that he could stay at Robert's apartment. The two then went separate ways.

At approximately 2:45 A.M. on July 1, Robert, having spent the evening at a movie theater and bar, returned to his apartment in the Dorchester section of Boston and found the defendant inside, wearing brown leather gloves, and standing over the body of a man Robert had never seen before.[2] The victim was lying face up on the floor, and his pants pockets had been

[1] Three brothers, Robert, Michael, and William Anderson, testified at trial. To avoid confusion, we refer to them herein by their first names.

[2] The medical examiner testified that the cause of death was asphyxiation by strangulation with a ligature, although no time of death was established at trial.

turned inside out. When Robert asked what had happened, the defendant said that there had been a struggle.

The two proceeded to discuss moving the body; the defendant suggested disposing of the body the next day, but Robert insisted that it be done immediately and agreed to help.[3] The defendant then gave Robert a watch, a ring, and the key to a Pontiac Grand Prix that was parked outside, all of which were later shown to have been the property of the victim. The defendant then tied the hands and feet of the body with cloth, and the two men moved the body into a closet in the back hallway off the kitchen.[4]

Once the body had been moved, the defendant telephoned for a taxicab and the two made plans to meet again later that morning. After the taxicab arrived, the defendant departed and Robert went to bed. Sometime after 9 A.M. that morning, Robert drove the Grand Prix to downtown Boston to meet the defendant.

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[3] On cross-examination, Robert testified that he "had to help" the defendant move the body, "because it was in [his] house," and if the body were found there, people would think that he had killed the victim.

[4] Later in his direct examination, Robert denied having moved the body into the closet and instead asserted that he was in the kitchen while the defendant moved the body to the closet. Several exchanges later, however, he stated that he did in fact personally place the body in the closet, with the defendant's help. On cross-examination, Robert testified that he "didn't go in the closet," that he was "halfway in the closet," and that he was "in the closet," and also that he did not know whether his testimony about the closet was truthful.

The two then went shopping, and the defendant purchased several articles of clothing. Robert later drove the Grand Prix home.

b. Cross-examination of Robert Anderson. Defense counsel's cross-examination of Robert elicited divergent accounts of his interactions with the defendant on the day of the killing.[5] Among other things, as mentioned in note 4, supra, Robert gave varying versions of his involvement in hiding the body in the closet and claimed that the defendant subsequently put a lock on the closet door, although police did not observe a lock when they found the body.[6] Further, Robert acknowledged

[5] In many instances, Robert answered both "yes" and "no" to the same question posed successively, prompting defense counsel to ask him whether he simply was saying the first thing that came to mind, and whether he knew the difference between telling the truth and lying. On at least one occasion, Robert stated that he "[didn't] know" whether his prior testimony was truthful or fabricated, nor did he know the difference between telling the truth and telling a lie.

[6] Although he initially testified that he watched the defendant put a lock on the door several hours after the killing, Robert later stated that he did not in fact see the defendant affix a lock. He also asserted that the defendant bought the lock on their shopping trip and then returned to Robert's apartment on his own to put a lock on the closet door. Then, during redirect examination, Robert testified that he and the defendant went back to the apartment before they went shopping, at which point the defendant produced the lock, placed it on the kitchen table, and gave Robert the accompanying key. Finally, Robert also testified that it was possible he removed the lock from the closet door before the police arrived, but he could not be certain.

having told a friend that he "hit [the victim] too hard,"[7] although on redirect examination, Robert denied having hit the victim.

Robert admitted that he continued to drive the Grand Prix for several days. Initially, he suggested he had been unaware the car belonged to the victim because the defendant said it belonged to him. After being confronted with his prior testimony before the grand jury on that point, however, Robert admitted to knowing that the car was stolen the entire time he was driving it. The car key was eventually discarded in an incinerator at his friend Paul Clifford's apartment building after Robert observed police inspecting the Grand Prix. The key was later recovered by investigators. As for the victim's other belongings, Robert sold the watch to Clifford and gave the victim's ring to his brother William.

On July 3, police visited Robert's apartment in response to a report of a foul smell. Upon hearing police announce their presence at the front door of the apartment, Robert jumped from a second-floor rear window and ran to a subway station. He was arrested a few days later and initially charged with murder. By

[7] Corroborating this account, Robert's friend, Richard Lynch, testified that in the late hours of July 1, or early morning hours of July 2, Robert asked Lynch to help move a body that was in his apartment and told him that he had hit the man too hard.

the time of trial, however, he was facing only a charge of accessory after the fact.

c. Other Commonwealth witnesses. One other witness testified to having seen the defendant near the scene of the crime. Florence Johnson, a friend of Robert's mother, testified that at between 2:30 and 2:45 A.M. on July 1, she saw Robert and another man, whom she did not know, in front of Robert's apartment building. She described the other man as about six feet tall, thin, with dark hair, a mustache, and sideburns. At trial, she identified the defendant as that other man.

Another witness saw the victim with a man roughly matching the above description at a club at approximately 1:45 A.M. on July 1. Jerry Leonard testified that he saw the victim leaving the club with a "Latin type person," but stated that no one in the court room resembled that man.

An employee of a retail store in downtown Boston identified the defendant as having attempted to use a credit card issued in the name of the victim on July 1, 1972.[8]

Robert's two brothers also testified. According to Michael, the middle brother, the defendant was someone who had

[8] The store employee called the bank that issued the card when the defendant indicated that he did not have identification. The bank said not to return the card to the customer and to have the customer contact the bank. When the store employee relayed this information to the defendant, the defendant agreed and left the store.

been "hanging around" with Robert. He saw the defendant downtown on the morning of July 1, sitting in a Grand Prix. Michael also saw the defendant the next day, at which time the defendant approached Michael and indicated that he was looking for Robert in order to retrieve the Grand Prix.

William, the youngest brother, testified that when he went to Robert's apartment on July 2, he found Robert and the defendant there. While the defendant was in another room, Robert retrieved a key from a drawer, unlocked the closet door, and showed William the body.[9] Robert also gave William the victim's ring.

Several police officers also testified, including one who had searched the defendant's apartment pursuant to a warrant. There, he found the victim's driver's license and bank identification card, but no physical or forensic evidence linking the defendant to the crime.

d. Defense theory. The defendant presented an alibi witness, William Atwood, who was one of three people who shared an apartment in the South End section of Boston with the

[9] At trial, Robert acknowledged using the key to open the closet door and show William the body, but said this occurred on the morning of July 1. When he was before the grand jury, however, he had testified that it occurred in the evening. When he was confronted with his earlier statement at trial, Robert "guess[ed]" that he had been lying to the grand jury and was now telling the truth.

defendant. Atwood testified that he was with the defendant, visiting various bars and restaurants, from approximately 6 or 7 P.M. on June 30, until they returned to their apartment around 2:30 or 2:45 A.M. on July 1, and eventually went to sleep. The only time they were separated during that time was for fifteen or twenty minutes sometime between 1 and 2 A.M.

At approximately 8 or 8:30 A.M. that morning, Atwood heard a knock on the window and saw Robert standing outside, as well as a Grand Prix parked at the curb. Robert told Atwood that he needed to talk to the defendant about something important, and Atwood let him into the apartment. Robert then shook the defendant awake and started "bragging" about having "convinced" a "guy to [go to] his house," who "was supposed to be gay or something like that," "and he somehow got a stocking around his neck, held it around his neck for a few minutes, let him drop to the floor, and . . . took his money, his watch and his ring, his credit cards, and threw him in the closet."[10] Robert showed Atwood the watch and the ring. He also "flash[ed] the credit cards in front of" the defendant and asked him to go shopping.

[10] According to Atwood, Robert also stated that he "beat [the victim] for . . . a 1971 Grand Prix."

The defendant then dressed and left with Robert. Later that day, the defendant returned with a new outfit.[11]

2. Posttrial proceedings. Over a period of thirty-five years following the affirmance of his convictions,[12] the defendant filed six motions for a new trial. The first motion was filed pro se in 1977, and a substitute motion, also pro se, was filed in 1978 to replace the earlier motion. The 1978 motion was based on newly discovered evidence in the form of affidavits from four individuals, all averring that while Robert was incarcerated with the affiants in the years following the trial, he admitted to having lied and framed the defendant for the murder. All four of the affidavits purported to have been

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[11] The prosecutor devoted a substantial portion of his cross-examination of Atwood to inquiring as to the sexual orientation and sleeping arrangements of the apartment's occupants. Atwood testified that the defendant typically shared a mattress on the floor with the other male roommate; in response to the prosecutor's question whether there was "something funny about that," Atwood explained that the two kept to their own sides of the mattress. Although Atwood denied that the other male roommate ever dressed in women's clothing, the Commonwealth called Robert's girlfriend for the sole purpose of establishing that the other male roommate had dressed as a woman on three or four occasions.

[12] In his direct appeal, the defendant "argue[d] no assignments of error but urge[d] only that we exercise our powers under [G. L. c. 278, § 33E,] . . . and reduce the verdict to a lesser degree of guilt. The sole reason suggested for the invocation of such a procedure [wa]s alleged to be the defendant's mental retardation and consequent diminished criminal responsibility." Commonwealth v. Mazza, 366 Mass. 30, 30 (1974).

executed in either 1976 or 1977. The 1977 and 1978 motions never were acted upon.

In 1988 and 1995, the defendant filed two additional pro se motions for a new trial, both of which were denied by the judge who had presided over the trial on grounds that the arguments, largely challenging the jury instructions, had been waived.[13]

In 2006, the defendant filed another pro se motion for a new trial, based on newly discovered evidence in the form of a statement that William had given to the police on July 10, 1972, days after the victim's body was found, in which he attributed certain inculpatory statements and actions to Robert. With the trial judge having retired, a different Superior Court judge denied the 2006 motion, without prejudice, and appointed counsel to represent the defendant on the issues presented in that motion.

In 2009, the defendant, through counsel, filed his sixth motion for a new trial based on both the inmate affidavits[14] and William's 1972 statement. In 2011, a third Superior Court judge

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[13] The defendant petitioned for leave to appeal from the denial of the 1995 motion pursuant to G. L. c. 278, § 33E. That petition was denied in 1998.

[14] In support of his sixth motion for a new trial, the defendant included a second affidavit from one of the inmates, purportedly executed in 2009, and withdrew one of the original affidavits, thereby bringing the count to four affidavits from three inmates.

denied the motion after a nonevidentiary hearing. With respect to William's police statement, the judge was not persuaded that defense counsel, who was deceased by the time the sixth motion was filed, did not possess it prior to trial. With regard to the inmate affidavits, the judge concluded that, although the 1978 motion in which the defendant first raised the issue was never acted upon, the claim had been "waived or denied by inaction" because the defendant never sought to advance that motion for hearing and disposition by the court, and none of the subsequent motions, filed in 1988, 1995, and 2005, had relied on the affidavits.

The defendant filed a petition for leave to appeal from the denial of the sixth motion, pursuant to G. L. c. 278, § 33E, which was granted in 2012 after a single justice of this court concluded that the appeal presented "a new and substantial question." The appeal then proceeded before the full court. Following briefing and oral argument in 2014, the court remanded the case to the Superior Court for the purpose of conducting an evidentiary hearing to make findings concerning the credibility of the inmate affiants and the reliability of their affidavits, as well as findings as to whether the defendant's trial counsel was in possession of William's statement prior to trial. Mindful that, due to the passage of time, there may be challenges to locating and securing witnesses and other

evidence, the court requested that the judge report the findings back to this court within a "reasonable time."

Upon remand, the anticipated challenges were realized and a "reasonable time" turned out to be nearly five years. Over the course of that time, defense counsel kept the Superior Court apprised of the efforts being made to locate both trial counsel's original case file and the inmate affiants. Ultimately, however, those efforts proved unsuccessful.[15] In late 2018, before a fourth Superior Court judge, therefore, the hearing consisted only of the submission of affidavits and other documentary evidence, almost all of which was already part of the record in this court,[16] as well as argument by the parties.

After taking the matter under advisement, the judge issued findings of fact. As to William's police statement, she found that it did not constitute newly discovered evidence because the defendant failed to establish that defense counsel did not have possession of it at the time of trial. As for the inmate affidavits, she found that they did not evince "persuasive assurances of trustworthiness," so as to make this one of those

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[15] The Commonwealth also made unsuccessful efforts to locate the inmate affiants.

[16] The defendant did call one witness, the law partner of his current attorney, who testified about a 2008 meeting with one of the inmate affiants at a prison in upstate New York. The testimony was of little, if any, evidentiary value.

"rarest of cases" where otherwise inadmissible affidavits fall within the "narrow," constitutionally based exception to the hearsay rule recognized in Commonwealth v. Drayton, 473 Mass. 23, 32, 34, 36, 40 (2015) (Drayton I) (affidavit will be admissible, despite failure to fall within any traditional hearsay exception, provided defendant establishes both that it is critical to defense and bears persuasive assurances of trustworthiness). See Commonwealth v. Drayton, 479 Mass. 479, 486-489 (2018) (Drayton II).[17] In a footnote, she further concluded that the inmate affidavits did not qualify for admission as "third-party culprit" evidence. See Commonwealth v. Silva-Santiago, 453 Mass. 782, 800-801, 804 n.26 (2009) (discussing constitutionally based exception whereby, provided certain conditions are met, defendant may offer otherwise inadmissible hearsay tending to show third party is true culprit). See also Mass. G. Evid. § 1105 (2020). Instead, she concluded that the affidavits consisted of mere impeachment material.

Discussion. Because the motion judge did not preside over the trial or conduct an evidentiary hearing, and the only relevant evidence submitted at the evidentiary hearing conducted upon remand consisted of affidavits and other documentary

[17] Drayton I and Drayton II were decided after this case was remanded for the evidentiary hearing.

evidence, we review the denial of the motion for a new trial de novo. See Commonwealth v. Tremblay, 480 Mass. 645, 656 (2018) (appellate court in as good position as motion judge to review documentary evidence); Commonwealth v. Lykus, 451 Mass. 310, 325-326 (2008) (review is de novo where motion judge was not trial judge and took no evidence).

The defendant maintains that both William's statement and the inmate affidavits constitute newly discovered evidence warranting a new trial. "A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." Grace, 397 Mass. at 305. We conclude that, at least with respect to William's statement, the defendant has satisfied both prongs of the test.

1. William's statement. a. Substance of William's statement. Sometime in the 1990s, after the defendant learned that he should have received witness statements from the police, the defendant embarked on a close to ten-year effort to obtain relevant documents from the district attorney's office and the Boston police department pursuant to the public records law.

See G. L. c. 66, § 10. In 2005, the defendant finally received the statement William made to police.[18]

According to his statement, William visited Robert's apartment on the evening of July 1, 1972. When he arrived, he saw a "gold car with a black top" parked near the apartment and found Robert inside the apartment with an individual presumed to be the defendant.[19] While there, William received a ring from Robert as a birthday present.

William returned to the apartment the next evening, and Robert and the defendant were again present. When the defendant was in another room, Robert asked William if he would "help him move somebody from the premises." When William declined, Robert became angry, used a key to unlock the door to a closet, and showed William the body. The hands and feet of the body were tied up, and there was a "nylon stocking or something" around the mouth. Robert gave William a knife to cut the nylon stocking, but William gave it back. Robert then proceeded to cut the nylon stocking from the victim's mouth[20] and the "rope"

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[18] The statement appears to be a transcript, although it is not clear if it was prepared from a recording or by a stenographer who was present at the interview.

[19] The name of the individual was redacted; the individual's physical description roughly matched that of the defendant.

[20] The medical examiner testified that the body was found with a knotted cloth ligature around the neck, which appeared to have been cut adjacent to the knot.

from his wrists. Robert then cleaned the knife and put it in the sink. When William continued to resist helping with the body, Robert said he planned to put it in the automobile and dump it in the river. He did not tell William how the body came to be there. William then departed and never saw the body again.

b. Statement as newly discovered evidence. To demonstrate that the proffered evidence is newly discovered, a defendant must "establish that the evidence was not discoverable at the time of trial despite the due diligence of the defendant or defense counsel." Commonwealth v. Moore, 480 Mass. 799, 817-818 (2018), citing Commonwealth v. Jones, 432 Mass. 623, 633 n.6 (2000).

Whether William's statement to police constitutes "newly discovered" evidence presents a close call. Trial counsel is deceased, and his files on the defendant's case cannot be located. Although the Commonwealth has not produced any evidence demonstrating that William's statement in particular was disclosed prior to trial,[21] the Commonwealth asserts that we

[21] We do not here suggest that it was the Commonwealth's burden to demonstrate that exculpatory evidence was disclosed. See Commonwealth v. Lykus, 451 Mass. 310, 326 (2008) (defendant seeking new trial on ground prosecution failed to provide exculpatory evidence has burden of showing it was not disclosed). However, the assistant district attorney represented to the court in a prior hearing that if he were

should assume that it was because when the defendant filed a pretrial motion seeking all witness statements, the Commonwealth assented and produced some statements, as evidenced by the defendant's use of them at trial.[22] Of course, this assertion does not establish that William's statement was among those disclosed prior to trial.

The defendant submitted an affidavit asserting that neither he nor his attorney received a copy of William's statement prior to trial; however, the evidentiary value of the affidavit is limited, given the defendant's interest in the outcome of his motion. The defendant also submitted affidavits from six attorneys who, postconviction, either represented him or reviewed his case. Each averred that he or she did not see, or did not recall having seen, the statement among the defendant's materials.[23] These affidavits, too, are of limited value, as we do not know what materials the attorneys had available to them.

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aware of any evidence to suggest that the statement had been disclosed, he would have produced it.

[22] The defendant counters that his pretrial motion sought only the statements of the defendants (which at the time included Robert). We note, however, that if the defendant indeed had requested all witness statements and the Commonwealth failed to disclose William's statement, such failure would have reduced the defendant's burden on a motion for a new trial. See Commonwealth v. Tucceri, 412 Mass. 401, 407, 412 (1992). See also Brady v. Maryland, 373 U.S. 83, 87 (1963).

[23] A seventh attorney affidavit, which simply vouched for the defendant's credibility, has no evidentiary value.

Trial counsel's use of other witness statements at the trial, however, is noteworthy. A review of the trial transcripts reveals that defense counsel made thorough use of the pretrial statements of various other witnesses. For example, on cross-examination, counsel pressed Robert on many details of his direct testimony, often multiple times, and exhaustively impeached him with numerous references to his prior inconsistent statements to police. Similarly, counsel used the prior statements given to police by Johnson and Michael, two other fact witnesses, during their respective cross-examinations.

In stark contrast, trial counsel made no reference to William's prior statement during his cross-examination. In fact, the cross-examination of William was limited to three questions: where he lived; whether he had discussed the case with Robert; and whether he had discussed the case with his mother. The Commonwealth argues that counsel made a conscious, tactical decision not to cross-examine William rigorously because his direct testimony, specifically that Robert showed William the victim's body and offered William the victim's ring, supported the defense's theory that Robert was the true culprit. However, this argument rings hollow. Defense counsel would not have been limited to using the statement for impeachment purposes. He also could have used it to refresh William's

recollection of other pertinent details of Robert's treatment of the body and plans to dispose of it, just as he used the prior statement of Robert's other brother, Michael, to refresh his recollection concerning the whereabouts of the defendant on July 1, 1972. Indeed, William's statement contained highly inculpatory details of Robert's handling of the victim's body, details that were not mentioned in William's testimony and that would have been particularly beneficial to the defendant's case. In view of the manner in which trial counsel employed prior statements when cross-examining other witnesses, it is difficult to conceive of a tactical reason for failing to make similar use of William's statement.[24]

Although the question whether William's statement to police constitutes "newly discovered" evidence is a close call, this is not a case where the only evidence of absence is the absence of evidence. As discussed supra, there are several pieces of relevant, circumstantial evidence, including the defendant's affidavit, the affidavits submitted by his various postconviction counsel, and a record revealing experienced trial

[24] We further note that trial counsel was a well-known and highly regarded member of the bar who, as reflected by his performance during this trial, knew his way around a court room. Had he been in possession of William's statement, it is highly probable, based on his treatment of other witnesses, that he would have used the statement in an effort to elicit details that further incriminated Robert.

counsel's skillful use of other witness statements. Viewed separately, no one piece of evidence is particularly persuasive. When viewed as a whole, however, a more compelling picture emerges. In light of the unique circumstances of this case, therefore, we conclude that the defendant has sustained his burden of establishing that defense counsel did not have William's 1972 police statement prior to or, for that matter, at trial, and, thus, that it constitutes newly discovered evidence.

c. Effect of newly discovered evidence on outcome. In determining whether newly discovered evidence casts real doubt on the justice of a conviction, we need not predict "whether the verdict would have been different"; instead, we must decide "whether the new evidence would probably have been a real factor in the jury's deliberations." Grace, 397 Mass. at 306. See Commonwealth v. Bonnett, 482 Mass. 838, 844 (2019). In so doing, we look both at the nature of the new evidence and the strength of the Commonwealth's case. See Grace, supra (strength of case against defendant is relevant in assessing effect of newly discovered evidence).

The theory of the defense was that Robert was the killer. William's statement provided details that would have strongly bolstered that theory because it demonstrated that Robert had control over the victim's body and belongings, and had a plan for disposing of the body. According to William, Robert gave

William what turned out to be the victim's ring, and later asked William to help dispose of the body. After William rejected Robert's request for assistance, Robert disclosed his plan to dump the body in the river. Robert also had access to the victim's body by way of a key. And Robert demonstrated an apparent ease with the body when he cut the nylon stocking from the victim's mouth and the rope from the victim's wrists. Finally, William reported that the defendant was not present when Robert discussed the body of the victim with, or showed the body to, William.

Moreover, and significantly, the case against the defendant was far from overwhelming. Robert, an admitted participant in handling, controlling, and plotting to dispose of the victim's body, was the only witness who maintained that the defendant was guilty of murder. Outside of Robert's testimony, the Commonwealth's case against the defendant consisted of an eyewitness identification of the defendant near the scene on the same night as the killing, and the defendant's subsequent possession of the victim's driver's license and bank identification card and attempted use of his credit card.

Given the weaknesses in the Commonwealth's case, William's statement, which offers a "material and credible . . . measure of strength in support of the defendant's position," Grace, 397

Mass. at 305, "would probably have been a real factor in the jury's deliberations," id. at 306.

Where the defendant did not have possession of the statement prior to trial and could not have been expected to uncover it through reasonable pretrial diligence, there is "a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial." Id. There is, thus, a real chance that "justice may not have been done." Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001).

2. Inmate affidavits. In light of our decision with respect to William's witness statement, we need not consider whether the defendant waived his arguments with respect to the inmate affidavits or whether those affidavits amount to newly discovered evidence. Nor do we here consider whether the affidavits would be admissible under one or more exceptions to the hearsay rules. Those evidentiary matters can be resolved at any subsequent retrial of this case.

Conclusion. The order denying the defendant's motion for a new trial is reversed. The defendant's convictions of murder in the first degree and robbery are vacated, the verdicts are set aside, and the case is remanded to the Superior Court for a new trial.

So ordered.