UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-10672-GAO

DIANE E. FARLEY,
Petitioner

v.

LYNN BISSONNETTE,
Respondent.

OPINION AND ORDER
December 11, 2007

O'TOOLE, D.J.

The petitioner, Diane Farley, was convicted in 1994 of the first degree murder of Sally Marsceill, but her conviction was reversed on appeal because her trial counsel had been constitutionally ineffective. Commonwealth v. Farley (Farley I), 732 N.E.2d 893 (Mass. 2000). She was retried in 2002 and convicted again. Her conviction was affirmed on direct appeal. Commonwealth v. Farley (Farley II), 824 N.E.2d 797 (Mass. 2005).

The evidence against Farley is summarized in the second opinion of the Massachusetts Supreme Judicial Court ("SJC"), 824 N.E.2d at 800-802, and it is not necessary to repeat the summary here. It is sufficient to note that the evidence against her was circumstantial: she had been with the victim at the victim's house at a time when the murder could have occurred; when she left the victim's house and was picked up by a friend, the friend observed a dark stain on her pants that was consistent with a bloodstain; Farley gave three inconsistent explanations for the stain; traces of blood consistent with Farely's blood were found on the victim's body, under one of the victim's fingernails, on the victim's bedspread, and on a bathrobe that was rolled up on the floor near the front

door of the residence. Id. at 801. Statements by Farley to the police and testimony from her first trial were also admitted, and there were significant differences in her several accounts of what had happened. Id. at 802.

At trial, it was the petitioner's defense strategy to suggest that the murder had been committed by one (or both) of two other people: Michael May and Ronald James. There was evidence that May knew the victim, had been present in her residence, and, indeed, had had recent sexual relations with her. There was no evidence that he had been present during the time when Farley was at the victim's house overnight before the murder. May testified and denied killing the victim.

There was evidence that James was, at the time of the murder, a drug dealer. Although Farley did not testify at her second trial, her recorded testimony from her first trial was admitted in evidence. In that testimony she said that the night she was at the victim's house, James had come to the house to deliver drugs to the victim; that James and the victim began to scuffle and Farley attempted to intervene, receiving a stab wound in the process; that she then hid in the basement until it seemed the house was quiet and then went upstairs and discovered the victim's body. Apart from Farley's testimony, there was no other evidence, direct or circumstantial, that James had been present at the victim's residence around the time of the murder. James testified, as a prosecution witness, that he did not know the victim and had never been to her house. He also denied knowing May. That part of his testimony was impeached by a drug runner for James who testified that she had once delivered drugs to May on James' behalf.

Farley's first argument raised in this petition centers on an alleged default in the trial judge's jury instructions. At the close of evidence, the judge's instructions to the jury included the following excerpt:

> The defendant is presumed to be innocent until and unless you, the jury, decide unanimously that the Commonwealth has proved the defendant guilty of each and every element of the offense charged in the indictment beyond a reasonable doubt. *The Commonwealth does not have the burden of proving that no one else may have committed the murder*. The Commonwealth does have the burden to prove the defendant's guilt by proof beyond a reasonable doubt.

(Trial Tr. vol. 18, 133:13-22, Oct. 3, 2002) (emphasis added).

The prosecution specifically requested the italicized sentence in response to Farley's nomination of May and James as plausible culprits, and Farley specifically objected to it. Farley argues that the instruction was contrary to the principle articulated in In re Winship, 397 U.S. 358 (1970), that the prosecution has the burden of proving each element of a crime beyond a reasonable doubt. Farley contends that the instruction that the prosecution did not have to prove that the murder was not committed by someone other than Farley effectively relieved the prosecution of the full burden of proving that Farley, and not someone else, had committed the crime.

The other argument presented on this petition is that Farley's Sixth Amendment right to confront witnesses against her was violated because the trial judge limited the scope of defense counsel's cross-examination of James to only those matters about which he had testified about at Farley's first trial and permitted James to claim his privilege against self-incrimination as to matters outside the scope of his prior testimony (as to which his privilege had been waived).

Because her claims were "adjudicated on the merits in State court proceedings," habeas relief may only be granted if the state court's adjudication either "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Farley claims that the erroneous jury instruction was "contrary to" directly applicable established Supreme Court precedent, namely

Winship, and that SJC's conclusion that the trial court's limitation on the cross-examination of James, though error, was harmless was "an unreasonable application of" established Supreme Court precedent, namely Delaware v. Van Arsdall, 475 U.S. 673 (1986).

A. The Jury Instruction

In Winship, the Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364.

There are three sentences in the excerpt from the trial judge's instructions set forth above. The first and third sentences are indubitably correct and in full accord with Winship. Farley's argument is that the second, italicized sentence "contradicted" the other two and was "irreconcilable" with them, inevitably confusing the jury and possibly permitting them to convict Farley while still harboring a doubt about who had done the murder. (Pet'r's Mem. in Supp. of Pet. for Writ of Habeas Corpus at 10.)

The SJC was technically correct when it said that the challenged sentence was "technically correct." Farley II, 824 N.E.2d at 803. The prosecution's burden of proof in a criminal case is focused on what the evidence proves or does not prove with respect to the defendant, and the purpose of the sentence appears to have been to remind the jury of that focus. It is also true that the statement was accurate as a matter of strict logic. Proof that A was guilty does not *necessarily* require disproof that B was guilty *unless* on the evidence it is not possible for both propositions to be simultaneously true. Though neither side argued a joint venture theory because it was not in their respective interests to do so, the evidence in the case did not exclude the possibility that Farley and James acted together to commit the murder. It would have been possible on the evidence for the jury

to credit so much of Farley's prior testimony as implicated James and at the same time have been persuaded by the forensic evidence and evidence of Farley's consciousness of guilt (inferrable from her multiple inconsistencies) that Farley joined in committing the murder. The condition of the evidence was not such that the jury could only rationally have believed either that Farley was guilty to the exclusion of James or that James was guilty to the exclusion of Farley. In other words, proof of proposition A (Farley is guilty) did not require, as a strict matter of logic, proof as well of proposition B (James – or May – is not guilty), and the judge's caution to focus on the defendant was not logically, or legally, erroneous.

On the other hand, in order to conclude beyond a reasonable doubt that Farley had committed the murder, it was necessary for a conscientious jury to consider and reject the possibility that James (or May) had committed the murder alone. The defendant put that proposition before them and they could not just ignore it, because if it were true that someone other than Farley had alone committed the murder, then Farley would not be guilty. Indeed, even if the jury merely thought it *plausible* on the evidence that someone other than Farley had committed the crime alone, they could not properly convict her, because their acceptance of the plausibility that someone else had solely committed the crime must properly have left them with a reasonable doubt that Farley had done so.

The judge's statement that the "Commonwealth does not have the burden of proving that no one else may have committed the murder" was literally and legally accurate, but to the extent that it could have been taken by the jury as suggesting that evidence that someone else had committed the crime was unimportant or irrelevant, it could have had the effect of undercutting the reasonable doubt standard of proof applicable to the most essential element of the case – that it was Farley who committed the crime she was charged with. The SJC acknowledged that the challenged statement,

if considered alone, "could perhaps 'be taken as tending to downgrade the Commonwealth's burden of proof.'" Farley II, 824 N.E.2d at 804 (citation omitted). That court concluded, however, that because the trial judge had "instructed the jury several times that, in order to convict the defendant, they had to be convinced beyond a reasonable doubt that [Farley] was the person who killed the victim. . .," there was no reason to think that the jury misunderstood the full nature and extent of the Commonwealth's burden. Id.

The question is "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard," Victor v. Nebraska, 511 U.S. 1, 6 (1994), when the challenged statement is considered within the context of the charge as a whole. See United States v. Akinola, 985 F.2d 1105, 1112 (1st Cir.1993); accord United States v. DeMasi, 40 F.3d 1306, 1317 (1st Cir. 1994). The answer is no.

In the first place, the challenged statement is sandwiched between two completely accurate and orthodox statements of the prosecution's burden. More importantly as a matter of context, in his instructions the judge later repeatedly emphasized the prosecution's burden to prove the defendant guilty beyond a reasonable doubt:

- "Whether the evidence is direct or circumstantial, the Commonwealth must prove the defendant guilty beyond a reasonable doubt from all the evidence in the case." (Trial Tr. vol. 18, 120:6-9, Oct. 3, 2002.)

- "The defendant in this case as in every criminal case is presumed to be innocent. You as jurors must bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witness or indeed of presenting any evidence whatsoever. The legal presumption of a defendant's innocence is not an idle theory to be discarded or disposed of by the jury by caprice, passion or prejudice." (Id. at 131:22-132:7.)

- "The defendant has an absolute right not to testify since the entire burden of proof in this case is on the Commonwealth to prove that the defendant is guilty. It is not up to the defendant to prove that she is innocent." (Id. at 133:24-134:5.)

- "You must determine whether the Commonwealth has proved its case against the defendant solely on the testimony of the witnesses and the exhibits." (Id. at 134:17-20.)

- "The Commonwealth must prove to you beyond a reasonable doubt that the defendant committed an unlawful killing." (Id. at 136:13-15.)

- "The burden of proof is on the Commonwealth to prove beyond a reasonable doubt the defendant unlawfully killed the deceased." (Id. at 137:8-11.)

- "The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge made against him [sic]." (Id. at 145:4-7.)

- "I've told you that every person is presumed to be innocent until he or she is proved guilty, and that the burden of proof is on the Commonwealth." (Id. at 145:19-22.)

- "The charge is proved beyond a reasonable doubt if after you have compared and considered all of the evidence, you have in your minds an abiding conviction to a moral certainty that the charge is true." (Id. at 145:14-18.)

- "It is not enough for the Commonwealth to establish a probability, even a strong probability that the defendant is more likely to be guilty than not guilty." (Id. at 146:1-5.)

As the SJC concluded, taken as a whole the instructions made clear that the Commonwealth bore the burden of proving every element beyond a reasonable doubt – including whether it was in fact Farley who committed the crime. In sum, the SJC correctly identified and applied the pertinent legal principle. Its decision was not contrary to Winship.[1]

B. Cross-Examination of James

Farley also claims that her rights under the Sixth Amendment's Confrontation Clause were violated when the trial judge allowed James to claim his Fifth Amendment privilege with respect to two potentially incriminating questions that had not been raised at the first trial and thus, the judge determined, were not within the scope of James's waiver of his privilege. The first question asked about James' employment at the time of trial in 2002; counsel's purpose was to elicit evidence that

[1] The petitioner challenged the instruction only under the "contrary to" aspect of the habeas review standard.

James was selling illegal drugs. The second question pertained to his relationship with Sarah Zene, who testified that she had once delivered drugs to May for James; the purpose was to impeach James's denial that he knew May.

The SJC concluded that the first question was properly precluded by reason of James's invocation of his privilege against self-incrimination, because his current activities were not the subject of his testimony at the first trial almost a decade earlier. In any event, the court noted that the fact that he was still dealing drugs at the time of his testimony in the second trial was conceded by the prosecution in its closing argument to the jury, essentially mooting the issue. Farley II, 824 N.E.2d at 805. As to the second question, the SJC agreed with Farley that the cross-examination of James had been unduly limited, but further concluded that, because Zene gave equivalent evidence in her testimony, the error in limiting the cross-examination was harmless. Id. at 805-806.

Here, the petitioner argues that the SJC unreasonably applied Supreme Court precedent when it decided that the error was harmless beyond a reasonable doubt. In essence, the petitioner argues that the SJC failed to appreciate the greater "damaging potential" of having James himself acknowledge on cross-examination his false direct testimony and link to Michael May as compared to having Sarah Zene testify, as part of the petitioner's case-in-chief, to the same substantive matters. (Pet'r Mem. in Supp. of Pet. for Writ of Habeas Corpus 13.)

A federal habeas court may find that a state court's application of federal precedent is "unreasonable" if "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams v. Taylor, 529 U.S. 362, 413 (2000); see also Horton v. Allen, 370 F.3d 75, 80 (1st Cir. 2004) ("To be an unreasonable application of governing law, the state court's determination must not only be incorrect but also be objectively unreasonable.").

In Delaware v. Van Arsdall, 475 U.S. 673 (1986), the Supreme Court established a two-step analysis for determining whether a Confrontation Clause violation has occurred. First, the court must determine "whether the limitation prejudiced the examination of that particular witness. In other words, absent the limitation, would the jury have received a 'significantly different impression' of the witness's credibility?" DiBenedetto v. Hall, 272 F.3d 1, 10 (1st Cir. 2001) (citing Van Arsdall, 475 U.S. at 679-80). If so, then the court must determine whether the error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18, 24 (1967). Van Arsdall, 475 U.S. at 684; see also DiBenedetto, 272 F.3d at 10. With respect to the second step, the Supreme Court instructs that:

> Whether such an error is harmless…depends upon a host of factors….includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684.

The SJC concluded that the excluded cross-examination was "cumulative" of Sarah Zene's testimony. Farley II, 824 N.E.2d at 806. Zene testified:

> [Petitioner's Counsel]: Now, Ms. Zene, tell us how you came to meet Michael May.
> Zene: Raphael [James' nickname] has asked me one time to deliver some drugs to him. He had come out there in a truck. I took –
> [Petitioner's Counsel]: Let me back up. Raphael asked you to deliver some drugs?
> Zene: To Michael. I took it to him. Michael took the drugs and just took off and he didn't give me the money.
> …
> [Petitioner's Counsel]: Did you report that to Raphael?
> Zene: Yes, I did.
> [Petitioner's Counsel]: What was his reaction?
> Zene: His reaction was, don't worry about it, he'll get it later.

(Trial Tr. vol. 17, 17:11-18:16, Oct. 2, 2002.) Her testimony parallels the proffer made by the petitioner's trial counsel at sidebar during James' cross-examination:

> The Court: How about an offer of proof. Just that he knows her? I was going to stop it there.
> [Petitioner's Counsel]: Ms. Zene is a former drug runner for this individual who will testify in this court, or I expect her to testify. She knows that Mr. James and Mr. May knew each other, and that he provided drugs to Mr. May.

(Trial Tr. vol. 14, 50:11-18, Sept. 27, 2002.) On this record, it cannot be said that the SJC's determination that the testimony was cumulative and therefore exclusion of the testimony was harmless was "objectively unreasonable." See Bui v. DiPaolo, 170 F.3d 232, 243 (1st Cir. 1999) ("[I]t suffices that the state court generally articulates and applies tenets that can reasonably sustain its judgment.").

Furthermore, the petitioner's counsel was able to cross-examine James on a variety of other topics, impeaching him with evidence of a criminal conviction and with prior inconsistent statements. See United States v. Berrio-Londono, 946 F.3d 158, 161 (1st Cir. 1991) (finding no error in limitations of cross-examination because defense counsel had "ably developed a number of facts that could have led the jury to question [the witness's] credibility and motives"). In light of these considerations, the SJC's decision finding the error harmless beyond a reasonable doubt was not an unreasonable application of Van Arsdall.

C. Conclusion

The SJC's decision was not "contrary to" Winship nor an unreasonable application of Van Arsdall, and the petitioner's petition for a writ of habeas corpus must therefore be DENIED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge