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## State v. Moten, 187 A.3d 1080 (R.I. 2018)

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**Criminal Law.** *State v. Moten*, 187 A.3d 1080 (R.I. 2018). Without a specific objection, an issue is determined to have been waived for purposes of appeal. The trial justice serves as the thirteenth juror, considering all of the material evidence in the record and independently weighing that evidence. If, after this assessment, the trial justice reaches the same conclusion as the jury, then the verdict should be affirmed and the motion for a new trial should be denied.

#### FACTS AND TRAVEL

The altercation at issue in this case was the culmination of a long-standing rivalry between two Providence gangs, YNIC and the Chad Brown gang.<sup>1</sup> On the morning of October 22, 2014, Bruce Moten (Defendant), Henry Lopez (Henry),<sup>2</sup> and Tevin Briggs (Tevin), all members of the YNIC gang, were at the Garrahy Judicial Complex when they spoke with two other YNIC gang members who had “got into a situation”: members of the Chad Brown gang had surrounded the two men on the fourth floor of the courthouse.<sup>3</sup> About an hour after leaving the courthouse, the Defendant, Henry, and Tevin received a phone call from fellow YNIC member Antonio Fortes (Tone) informing them that Kendrick Johnson (Kendrick), a Chad Brown gang member, was at the PC Mart on the corner of Douglas Avenue and Eaton Street in Providence.<sup>4</sup> At the suggestion of the Defendant, Henry drove the Defendant and Tevin to the PC Mart to follow Kendrick.<sup>5</sup> The Defendant, Henry, and Tevin were in Henry’s black Infiniti.<sup>6</sup>

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1. *State v. Moten*, 187 A.3d 1080, 1081 (R.I. 2018).

2. Consistent with the Court’s opinion, parties will be referred to by their first names.

3. *Id.* at 1082.

4. *Id.*

5. *Id.*

6. *Id.*

When the three YNIC members arrived at the PC Mart, they noticed Kendrick, Delacey Andrade (Delacey), and Terry Robinson (Terry), all Chad Brown gang members, leaving the store.<sup>7</sup> Henry proceeded to follow Kendrick's car to the Chad Brown housing complex.<sup>8</sup> Leaving Henry at the wheel of the parked car, the Defendant and Tevin exited Henry's car with their hoods pulled up and guns in the waistbands of their sweatpants.<sup>9</sup> Upon hearing several gunshots, Henry drove to the intersection of Fillmore and Oregon Street, where the Defendant and Tevin met him "with their guns in their hands."<sup>10</sup> Henry then drove the two men to the home of one of his girlfriends, Yhaira Montanez (Yadi).<sup>11</sup>

At the direction of Henry and Tevin, Yadi drove Henry's black Infiniti to the home of Courtney Rivers (Courtney).<sup>12</sup> When Yadi returned to her home, she found the three men sitting with their guns at her kitchen table discussing the earlier incident.<sup>13</sup> During this time, the Defendant told Yadi "[i]t was either us or them" while displaying scars on his stomach.<sup>14</sup>

On April 10, 2015 the Defendant, Henry, Tevin, and Tone were all indicted in Providence County Superior Court and charged with nine felony counts: murder; discharging a firearm while committing a crime of violence, death resulting; assault with a dangerous weapon; discharging a firearm while committing a crime of violence, injury resulting; assault with a dangerous weapon; discharging a firearm while committing a crime of violence; conspiracy; and two counts of carrying a pistol without a license.<sup>15</sup> Henry entered into a cooperation agreement with the State in exchange for a fifty-year sentencing cap.<sup>16</sup> Beginning on October 4,

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* The Providence police received a report of the shooting at approximately 11:30 a.m. *Id.* Emergency personnel arrived at the crime scene to find Terry "gunned down and deceased" and Delacey injured with a gunshot wound to his buttocks. *Id.* at 1082–83. The Court noted that Henry was also dating another woman at the time of the incident. *Id.* at 1082 n.3.

12. *Id.* at 1083.

13. *Id.*

14. *Id.*

15. *Id.* at 1083–84.

16. *Id.* at 1084.

2016, the Defendant was tried before a jury in Superior Court.<sup>17</sup> The trial lasted ten days.<sup>18</sup>

Henry testified at the trial about the fatal shooting.<sup>19</sup> Henry's testimony was corroborated by a multitude of technical evidence presented by the State.<sup>20</sup> The evidence included video footage depicting Henry, Tevin, and the Defendant entering the Garrahy Judicial Complex; video showing Kendrick's black Camry at the PC Mart; and a video from the Chad Brown housing complex depicting Henry's black Infiniti driving around the area of the crime scene, two men walking in the direction of Fillmore Street and then racing back to the Infiniti, and the Infiniti speeding down Fillmore Street.<sup>21</sup> Additionally, the State introduced cell-site data and cell phone records that further corroborated Henry's story.<sup>22</sup>

The State presented "Agent Jennifer Banks of the Federal Bureau of Investigation (FBI) Cellular Analysis Survey Team (CAST), as an expert witness in historical cell-site analysis."<sup>23</sup> After extensive research and analysis, Agent Banks determined that the "[D]efendant's phone was in or near the area of the shooting at the time."<sup>24</sup> At no point did the Defendant object to Agent Banks's testimony.<sup>25</sup>

The State also introduced the testimony of Detective Theodore Michael, a forensic cell phone examiner with the Providence Police Department.<sup>26</sup> The Defendant objected to Detective Michael's testimony, questioning his expertise in in the field of historical cell-site analysis.<sup>27</sup> The State responded, explaining that Agent Banks offered the expert testimony on cell-site analysis, while Detective Michael's testimony would encompass only the data he physically obtained from the various cell phones involved.<sup>28</sup> The trial justice overruled the Defendant's objection stating, "I'm satisfied that the

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1084–85.

22. *Id.* at 1085.

23. *Id.*

24. *Id.*

25. *Id.* at 1086.

26. *Id.*

27. *Id.*

28. *Id.*

witness has sufficient qualifications to testify in the mode that the State is going to pursue. The objection is overruled. Do you wish to have any voir dire?”<sup>29</sup> The Defendant declined to question Detective Michael about his qualifications and did not object to any portion of his trial testimony.<sup>30</sup>

At trial, the Defendant submitted the theory that it was actually Courtney, not the Defendant, who was involved in the shooting.<sup>31</sup> However, Detective Michael testified that Courtney’s cell phone was not near the crime scene at the time of the murder by using historical cell-site information contained in Courtney’s call log.<sup>32</sup> On cross-examination, the Defendant attempted to rebut Detective Michael’s testimony by asserting that someone else could have been using Courtney’s cell phone while Courtney was at the crime scene.<sup>33</sup>

At the completion of the State’s case, the trial justice “granted the [D]efendant’s motion for a judgment of acquittal on Count 9, carrying a pistol without a license.”<sup>34</sup> On October 18, 2016, the jury found the Defendant guilty of the remaining eight counts.<sup>35</sup> The Defendant moved for a new trial, arguing that Henry was the sole witness who was able to put the Defendant at the crime scene and that the State had failed to introduce any other competent evidence to prove the Defendant was one of the shooters.<sup>36</sup> The trial justice denied the Defendant’s motion for a new trial and sentenced the Defendant to two consecutive life sentences, with an additional seventy years, and a ten year suspended sentence with probation.<sup>37</sup>

The Defendant timely appealed to the Rhode Island Supreme Court (the Court), arguing that the trial justice erred by permitting Detective Michael to offer a lay person’s opinion concerning the location of Courtney’s cell phone at the time of the shooting and by denying the Defendant’s motion for a new trial.<sup>38</sup>

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 1087.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1087–88.

38. *Id.* at 1081, 1088.

## ANALYSIS AND HOLDING

On appeal, the Defendant argued that (1) the Detective's testimony severely undercut the Defendant's theory that it was Courtney, and not the Defendant, who participated in the shooting and (2) Detective Michael was neither qualified as an expert in historical cell-site analysis nor did he possess the knowledge and training to contribute a technically sound opinion.<sup>39</sup> The Court determined that the Defendant had waived the second argument regarding Detective Michael's qualifications.<sup>40</sup> The Court cited the "raise-or-waive rule," which states that "if an issue was not preserved by *specific* objection at trial, then it may not be considered on appeal."<sup>41</sup> Explaining the policy, the Court stated that "[t]his Court 'requires a specific objection so that the allegation of error can be brought to the attention of the trial justice, who will then have an opportunity to rule on it.'"<sup>42</sup>

The Court then noted that the Defendant did not raise an objection to any portion of Detective Michael's testimony, but on appeal is taking issue with the portion of Detective Michael's testimony which places Courtney away from the scene of shooting.<sup>43</sup> The Court made it clear that the Defendant cannot object to Detective Michael's testimony at the appellate level when he did not object in Superior Court.<sup>44</sup> The Court stated, "[t]he defendant is not entitled to a 'do over' simply because he is not satisfied with how his trial strategy panned out."<sup>45</sup>

The Defendant also asserted that the trial justice "erred in denying his motion for a new trial based on the weight of the evidence . . . contend[ing] that he was entitled to a new trial because the only evidence incriminating him as a principal shooter came from Henry, who, [the Defendant] alleges, had a motive to lie based upon his plea agreement."<sup>46</sup> In response, the Court explained for new trial motions based on the weight of the evidence,

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39. *Id.* at 1088.

40. *Id.* (citing *State v. Pona*, 66 A.3d 454, 468 (R.I. 2013)).

41. *Id.* (quoting *Pona*, 66 A.3d at 468).

42. *Id.* (quoting *Pona*, 66 A.3d at 468).

43. *Id.* at 1088.

44. *Id.* at 1089.

45. *Id.*

46. *Id.*

[t]he trial justice must consider, in the exercise of his [or her] independent judgment, all the material evidence in the case, in the light of his [or her] charge to the jury and pass on its weight and the credibility of the witnesses, determine what evidence is believable, and, decide whether the verdict rendered by the jury responds to the evidence presented and does justice between the parties.<sup>47</sup>

Here, the Court recognized the trial justice's detailed summarization of the evidence and emphasized that he "carefully performed his duty as a thirteenth juror, considering all of the material evidence in the record and independently weighing that evidence."<sup>48</sup> For these reasons, the Court affirmed the judgment of the Superior Court.<sup>49</sup>

#### COMMENTARY

The Court affirmed the findings of the Superior Court, in part, because the Defendant did not state a specific objection at trial and therefore was not permitted to raise the objection on appeal.<sup>50</sup> Here, the Court made it clear that unless there is a specific objection, the issue has not been properly preserved for appeal.<sup>51</sup> Strict compliance with the "raise or waive" rule<sup>52</sup> is necessary to give the trial justice the opportunity to rule on the issue<sup>53</sup> and to prevent a defendant from appealing when his trial strategy did not pan out in an attempt to seek a "do over."<sup>54</sup>

The Court also correctly decided the Defendant's second claim of error, where the Defendant asserted that the trial justice erred by denying the Defendant's motion for a new trial based on the weight of the evidence.<sup>55</sup> The Court examined the trial record and the trial justice's detailed notes—affording great deference to his credibility determinations.<sup>56</sup> The Court looked to precedent to

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47. *Id.* (quoting *McGarry v. Pielech*, 47 A.3d 271, 280 (R.I. 2012)).

48. *Id.* at 1089–90.

49. *Id.*

50. *Id.* at 1088.

51. *Id.*

52. *See id.*

53. *Id.* at 1088 (quoting *State v. Pona*, 66 A.3d 454, 468 (R.I. 2013)).

54. *See id.* at 1089.

55. *See id.* at 1089.

56. *Id.* at 1090.

justify the great deference afforded to trial justices explaining, “[w]e do not have the same vantage point as [him or her] and we are unable to assess the witness’ demeanor, tone of voice, and body language.”<sup>57</sup>

#### CONCLUSION

The Rhode Island Supreme Court affirmed the judgment of the Superior Court because the Defendant failed to state a specific objection and therefore waived the issue for appeal, and because the Court found no error on the part of the trial justice in denying the Defendant’s motion for a new trial.

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57. *Id.* (quoting *State v. Jensen*, 40 A.3d 771, 778 (R.I. 2012)).