REDACTED

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
NO. SJC-12405

ESSEX, SS.

COMMONWEALTH,
Appellee

V.

RASHAD SHEPHERD,
Appellant

ON CONSOLIDATED APPEAL FROM A JUDGMENT AND ORDERS OF THE ESSEX SUPERIOR COURT

BRIEF FOR THE COMMONWEALTH

FOR THE COMMONWEALTH:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Massachusetts General Laws

ISSUES PRESENTED

I. Whether the Court should overrule at least eight cases in the last six years that hold that Commonwealth v. Brown, 477 Mass. 805 (2017) applies prospectively, and whether prospective application of Brown's narrowing of the felony-murder doctrine violates the defendant's right to equal protection.

II. Whether the judge's instructions "propped up" the credibility of the cooperating witness, and whether the judge remained impartial and did not ask any questions or make any remarks beyond those justified to guide and control the trial.

III. Whether the trial counsel provided effective assistance of counsel.

IV. Whether the defendant is entitled to relief under G.L. c. 278, § 33E.

STATEMENT OF THE CASE[1]

On December 18, 2014, an Essex County grand jury indicted two men, the defendant Rashad Shepherd and Terrence Tyler ("Tyler"), and a woman, Monique Jones ("Jones"), charging each with murder, home invasion, and

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[1] References to Defendant's brief will be indicated by (DBr __); to Defendant's Record Appendix by volume and page as (R.[I-II] __); to Defendant's Sealed Record Appendix as (SRA __); to Defendant's Impounded Record Appendix as (IRA __); to the Commonwealth's Supplemental Record Appendix as (CA __); to the Commonwealth's Sealed Supplemental Record Appendix as (SCA __); and to the transcripts of the nine days of trial (April 4-8 & 12-15, 2016) by volume and page as ([1-9]:__).

armed assault with intent to rob ("attempted armed robbery") (RA 9-10; CA 5, 18). On March 9, 2016, Tyler, tried first (Lang, J., presiding), was convicted by a jury of first-degree felony-murder and the lesser-included offense of unarmed assault with intent to rob and acquitted of home invasion (CA 8-9). On April 15, 2016, the ninth day of trial (Welch, J., presiding), a jury convicted the defendant of first-degree felony-murder predicated on attempted unarmed robbery, see G.L. c. 265, §§ 1, 19, and acquitted him of the other charges (RA 15). Judge Welch sentenced him to life imprisonment without parole (9:25-26; RA 15) and he filed a timely notice of appeal (RA 16, 31).

The defendant's case was entered in this Court on September 27, 2017. He filed motions for new trial on March 21, 2019, September 23, 2020, and April 1, 2022, which the court denied on October 1, 2019 (Feeley, J., Judge Welch having retired), June 30, 2021 (McCarthy, J., Judge Feeley having retired), and August 30, 2022 (McCarthy, J.), respectively (RA 17-20). Appeals from the denials were consolidated with the direct appeal.

STATEMENT OF FACTS

I. Background

In the summer of 2014,[2] the victim Wilner Parisse, who was in his early thirties, occupied the second floor

[2] Unless otherwise specified, relevant events occurred in 2014.

of a triple-decker at 45 Grant Street in Lynn (the "apartment") with a roommate, Michael Menard, 37, and two pit bulls (2:161-63, 172-73; 3: 28-29).[3] There were two bedrooms and the dogs had a room of their own in which they were locked when guests or friends visited the apartment (2:166-68, 196-97). The victim's bedroom was off the kitchen at the rear of the apartment and Menard's bedroom was at the front of the apartment facing Grant Street (2:170; 3:107; CA 21). The apartment's principal means of ingress and egress was a rear door in the kitchen (the "kitchen door") leading down a flight of stairs to a first-floor exterior door in the rear of the building (2:169-70, 177-78; 3:122-23).

The victim sold marijuana from the apartment (2:163, 198, 200-201; 3:30).[4] Monique Jones, 32, was a customer who bought marijuana from the victim two or three times a week and occasionally had sexual intercourse with him (3:66, 74-77; 4:38, 40).[5] She had known the victim for about a year and a half and characterized their relationship as "friends with benefits" (3:74, 105; 4:38). The victim gave her a "family and friends discount" when he sold marijuana to her (4:39). From time to time, Jones, who was unemployed,

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[3] The building housed both 45 and 47 Grant Street.

[4] Menard, a plumber, characterized the victim as a "low-level dealer" (2:161, 198).

[5] Jones testified pursuant to a cooperation agreement (3:68).

resold the marijuana she bought from the victim at a profit (2:198; 3:67; 4:33, 39).

Jones was a long-time friend of Terrence Tyler (3:70, 73).[6] Jones was also a friend of the defendant Rashad Shepherd, who went by the nickname "City," and had known him four or five years (3:18-20, 69-70, 73-74, 88, 94; 4:37).[7] The defendant and Tyler were friends (3:70). The defendant and Tyler were listed in Jones' cellphone "Contacts" as "City" and "T.E.," respectively (3:18, 71, 73, 148-149).

Typically, Jones contacted the victim by text or cellphone call when she wanted to buy marijuana (3:76). She knew that he stored his marijuana in a backpack in a small closet in his bedroom and often had cash on his dresser (3:78, 128; 4:54, 56).

II. The Attempted Robbery and Shooting of Wilner Parisse

At the beginning of August, Tyler accompanied Jones to the apartment for Jones to buy marijuana and remained in Jones' car while she consummated the transaction (3:78-79; 4:41). Later, in the car, Tyler, desirous of "fast money," suggested to Jones, not for the first time,

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[6] Jones had dated Tyler in the past, and at the time was dating Tyler's brother, Nathan (also known as "D") (4:28). One of Jones' sisters was dating Tyler, and another of Jones' sisters had previously dated Tyler's late brother, Reginald (4:28).

[7] The defendant "h[ung] around" with Jones' siblings and was within Jones' "circle of people" (3:69-71).

that the victim was an "easy mark" for a robbery (3:79-80; 4:42, 57-58).[8] Despite Tyler's adamance, Jones demurred (3:80-81; 4:42-43). On at least three subsequent occasions, Tyler unsuccessfully importuned Jones to help him rob the victim (3:81-82; 4:43).

Around 5:00 or 6:00PM on August 15, Jones' friend Shay McMillan arrived, intoxicated, at Jones' home in Lynn (3:83-85; 4: 43). They drank cognac together (3:83-85; 4:43-46).[9] At some point, Tyler called Jones to see if she wanted to "hang out" with him (3:87). Jones and McMillan had planned to go to a bar and restaurant on Union Street in Lynn called the China Bowl, and, on the way, around 11:00PM, Jones, driving a rented Hyundai Tucson (the "car"), picked up Tyler and the defendant, who was with Tyler, on Essex Street in Lynn (3:44, 86-88, 121; 4:49, 60; 5:20). McMillan, made oblivious by intoxication, was in the front passenger seat and the defendant and Tyler got into the back seat (3:87-88).

Jones was "having a bad day" because several of her friends had been arrested and "[p]eople" were saying that she was responsible (3:89). As a result, she was "aggravated" and "stressed" in the car (3:90).[10] After

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[8] Tyler told Jones that he and his brother, Reginald Tyler, who died in 2012, had successfully robbed the victim a few years earlier (3:81-82; 4:28, 42).

[9] Jones also smoked marijuana that afternoon (3:89; 4:46).

[10] At some point after she "picked the guys up," Jones took "a couple" Percocet pills (3:89; 4:74-75).

telling Jones not to worry about what other people were saying, Tyler asked for her help to rob the victim that night (3:90; 4:48-49). The defendant, seated next to Tyler, listened to the conversation (3:90-91). Although the victim was her friend, Jones agreed to Tyler's proposal (3:82-83, 91-92).[11] Tyler and Jones discussed the "plan," which involved Jones "fooling around" (sexually) with the victim after ensuring that the exterior back door and kitchen door would be unlocked (3:93). While the victim was distracted, otherwise occupied, and in a "compromising position," Tyler and the defendant would enter the apartment and take the victim's drugs (from the closet) and money (if any) (3:93, 104-105; 4:51-54, 57-58).[12] Jones believed that they would have the advantage because two men -- Tyler

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[11] When asked why she changed her mind, Jones testified: "Um, just looking back at it now, I think I was just caught offguard [sic] maybe, just frustrated with everything that was going on. But I really -- I don't really know, but I agreed to it" (3:91-92). On cross-examination, Jones said the victim was her friend and she did not want him to be robbed (4:50). Also on cross, Jones stated that there was no discussion of reselling any drugs stolen from the victim; she had no profit motive; she wanted to help Tyler because "he was having tough times"; it was a "bad time" for her; Tyler and the defendant "took advantage" of her; she "opened the door to something that [she] didn't want any part of"; and she "made a bad decision" by agreeing to help (4:52-53). She did not want the robbery to occur and expected "no benefit" but nonetheless "went along" with it (4:69).

[12] Jones agreed with defense counsel that her role was to act as a "sex decoy" (4:61).

and the defendant -- would intimidate the lone victim, who was not "really a big man," thereby potentially avoiding any confrontation or violence (4:58-59, 96-97).[13]

Between 11:04 and 11:18PM, Jones and the victim engaged in a series of texts, initiated by Jones, arranging for her to buy $50 worth of marijuana (3:134-36; 4:63-66).[14] At 11:25PM, Jones asked the victim if he wanted to go to the China Bowl, but he declined and said she could come to the apartment afterwards (3:137-39; 4:66-67). Tyler then took Jones' phone and assumed her role in the text conversation, telling the victim at 11:35 and 11:36PM, falsely, that she (Jones) was dropping off her "homegyrl" (McMillan) and would then be "on [her] way" (3:94-95, 139; 4:67-68). About 25 minutes later, at 12:01AM (now August 16), Tyler, writing as Jones, texted the victim proposing a sex act after she finished dropping off McMillan (3:94-95, 139-140). The defendant was present for both the discussion and the

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[13] The victim was 5'9" and weighed 158 pounds at the time of his death (4:13-14). The jury, which saw the defendant at trial and had an opportunity to view Tyler, could have found that they were approximately 5'8" and 5'9", respectively (3:72-73). The jury also saw surveillance footage of the two men showing that they were physically quite fit.

[14] To the extent Jones' recollections of times varied from phone records introduced at trial, the information set forth herein was taken from the presumably more-reliable documents.

texting (3:94-95).[15]

Surveillance footage from the China Bowl revealed the following. Just before 12:15AM, Tyler, who wore long dreadlocks, entered the China Bowl by himself (3:151; Exh 34). The defendant, wearing a baseball cap, a light hooded sweatshirt, darkish pants, and light sneakers, entered the restaurant about 20 seconds later (3:151-52, 154; Exh 34).[16] The defendant went to the bar area and spent about 90 seconds greeting and chatting with friends (Exh 34). He then walked from the front to the back of the dining area, apparently looking for someone, and then left the China Bowl just before 12:18AM (Exh 34). Around 12:20:30AM, Tyler, who had been in the men's room, left the restaurant (Exh 34).

Around 12:26:45AM, Jones, wearing a white shirt and white pants, walked into the China Bowl (Exh 34).[17] After going to the women's room, she walked to the end of the dining area, sat down at a table around 12:29:30AM, and began talking to a person already seated at that table (Exh 34). Around 12:35:41AM, the defendant re-entered the restaurant and went to speak to Jones in the dining

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[15] In texts between 12:06 and 12:13AM, the victim promised that he would keep their sexual liaison private and he asked Jones to bring water and toilet paper (3:141; 4:60-61).

[16] The defendant did not dispute that he was at the China Bowl (7:17).

[17] Although she was ambulatory, the footage showed that Jones was unsteady on her feet and often swayed.

area (Exh 34). She stood up and they had a conversation during which they made gestures from which the jury could have inferred that he was pleading with her to leave and proceed with their plan to rob the victim while she was insistent on staying and enjoying herself (Exh 34). Around 12:36:22AM, the defendant walked toward the bar area and left the restaurant (Exh 34).

Around 12:38:24AM, after socializing with numerous friends, Jones left the China Bowl and, around 12:39:30AM, she met up with the defendant, who had been chatting with friends on the street outside the restaurant (Exh 34). Jones and the defendant walked away together in one direction, the defendant's friends in another (Exh 34).

At 1:03:05AM, apparently perturbed that Jones had not arrived, the victim texted her, "Playing games again. Smdh [shaking my damn head]" (3:141).

The defendant and Jones were unable to locate Tyler and called him four times: the defendant called him at 1:08:01 and 1:12:16AM and Jones called him at 1:08:06 and 1:08:21AM (3:129-131; Exhs 52, 91). The defendant's 1:12:16AM call with Tyler lasted 75 seconds, after which Tyler joined the defendant and Jones (3:97; Exh 91).

Jones then drove the defendant and Tyler to the apartment, parking a short way up the street (3:97-99).[18]

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[18] McMillan was also in the car at this point but had passed out and played no role in subsequent events (3:97-

Jones, the defendant, and Tyler again discussed the plan: the victim, as was his custom, "would leave" unlocked or slightly ajar the exterior back door and the kitchen door for her; Jones would go in first; she would leave the doors accessible behind her; and the defendant and Tyler would enter the apartment 20 minutes later by which time, by Jones' estimate, she and the victim would be engaged in sexual conduct and the victim would be at his most vulnerable (3:99-100, 122; 4:72-76, 79-81).

Jones went into the apartment around 1:23AM -- she had called the victim at 1:15:17 and 1:22:37AM -- and the defendant and Tyler stayed behind (3:100-101, 122, 131-132; Exh 52). Jones went through the exterior rear door, up the stairs, through the kitchen door, and into the bedroom, where she met the victim, who was wearing only boxer shorts (3:102-103; 4:76-77). They smoked some marijuana, and Jones, surprised that the victim was already undressed, tried to stall while awaiting the arrival of the defendant and Tyler (3:101-102). At 1:32:58AM, Jones left the bedroom and went to the bathroom to call Tyler to see "what was taking [him and the defendant] so long" (3:102-103, 132; Exh 52).[19] Tyler said they were on their way (3:103). When she returned to the bedroom, the victim locked the bedroom door behind

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100; 4:75).

[19] Although she had been in the apartment only nine minutes or so, she testified she was there for more than a half-hour before she called Tyler (3:102).

her, and Jones texted Tyler at 1:36:53AM, "He just locked the door. So I'm. Going to act like I have a play," *i.e.*, a ruse to get the victim to open the bedroom door; seconds later, at 1:36:58AM, she texted Tyler to wait (3:102-103, 106, 142-43; 4:78, 140-141; Exh 53).[20]

Jones asked the victim for a drink from the kitchen; the victim put on a shirt, unlocked the bedroom door, and immediately encountered Tyler and the defendant in the kitchen, (3:106-108; 4:81-83, 89, 105-106, 141). The victim and Tyler began to fight and Tyler pushed the victim back into the bedroom, where they "f[e]ll upon" the victim's dresser and knocked over a lamp (3:18, 21-24, 108, 127-128; 4:82-84, 88-89).[21] As Tyler retreated to the kitchen, the victim picked up a baseball bat,

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[20] Surveillance footage taken by two cameras at a nearby residence at 8 Carlton Street, which intersected Grant Street one house down from the apartment, showed the defendant (in his light-colored hooded sweatshirt and sneakers) and Tyler (with his long dreadlocks) on the street while Jones was in the victim's apartment (2:172-73; 5:71-87; Exh 81). The defendant made gestures characterized by the prosecutor in her closing argument as "fidgeting, pausing, securing something," and the prosecutor suggested, without objection, that he was "securing the gun in his waistband" (7:41-43). The Carlton Street footage also showed the defendant pulling up his pants and putting his hood over his head as he and Tyler "round[ed] a corner going into" the victim's house (7:44). The footage also showed, consistent with the phone records, that the defendant was *not* using his cellphone for this portion of time, and that Tyler was on his cellphone around 1:33AM, the time of Jones' call to him from the victim's bathroom (7:43-46).

[21] Jones was sitting on the bed at this time (3:108, 128; 4:83-84, 87).

followed Tyler into the kitchen, and began swinging the bat at Tyler (3:108; 4:84-87, 89). Jones was now in the bedroom-kitchen doorway and saw the defendant standing next to the kitchen door (3:108-109; 4:90, 98). Tyler "bear hugged" the victim (to avoid getting hit with the bat); the two men fell to the kitchen floor and wrestled (3:109-110, 126; 4:90-91, 93, 95-96). The victim bit one of Tyler's fingers, causing it to bleed, and Tyler, looking at the defendant, began "screaming" at the defendant to help him (3:110-111; 4:93).

Jones ran to the bathroom, and, seconds later, she heard one or two gunshots (3:111-112, 126; 4:93-94, 97-98). She emerged from the bathroom and saw the victim bleeding on the floor of the kitchen (3:112; 4:98-99). She also saw the defendant and then Tyler leave the apartment through the kitchen door (4:102-103).[22] There was "a lot of blood on the floor" and Jones "called for" the victim, but he was "not moving" and "in really bad shape" (3:113; 4:103-04). Jones concluded he was deceased, grabbed her things from the bedroom -- except her cell phone, which she left on the bed -- and ran out of the apartment (3:17, 23-24, 113, 127; 4:113-114, 155).[23]

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[22] Prior to impeachment on cross-examination with her grand jury testimony, Jones had testified that the defendant had already left the apartment when she came out of the bathroom, and that she saw only Tyler leaving through the kitchen door (3:112; 4:99-100).

[23] Menard (the victim's roommate) and his six-year-

Jones sped to her car, "screaming and yelling," awakening the still-drunk McMillan, who was "coming to" in the front passenger seat (3:114; 4:108-109). Ignoring McMillan's entreaties to tell her what happened, Jones drove a short distance and kicked McMillan out of the car (3:114; 4:109).[24] Around this time, at 1:39:30AM, Tyler called Jones, but Jones, having left her phone in the apartment, did not answer (3:17, 23, 132-33). When Jones drove around a corner, Tyler ran up to the car and got into the back seat, his finger still bleeding, and Jones drove them to Boston (3:115; 4:109-111).[25] Jones did not know whether the defendant fled after leaving the apartment (4:110).

The defendant, alone, on foot, panicked, and without a ride, called Tyler at 1:44:40AM and spoke to him for 39 seconds (Exh 91). The defendant then engaged in a blizzard of phone calls for more than two hours, including (1) unsuccessful calls to Jones at 1:45:42, 1:51:04, and 2:07:45AM[26]; (2) calls to and from McMillan

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old son, who was spending the night in Menard's bedroom, remained asleep throughout the break-in, assault, and gunfire (2:164, 168, 170, 197, 203-204).

[24] The Commonwealth's attempts to serve a trial summons on McMillan were unsuccessful (5:55-56, 65-66).

[25] Tyler's blood was found on the exterior handle of the rear passenger-side door and the interior driver's-side doorframe (4:129-130; 5:21-30; 6:25-26).

[26] Sergeant Robert Avery, one of the first Lynn police officers inside the apartment, heard Jones' phone ringing at 1:51AM and saw that the display identified the caller as "City" (3:15-17, 25-26). Sergeant Avery knew that the defendant went by that name (3:17-19).

at 1:49:36, 1:54:15, 2:00:48, 2:14:01, and 2:44:07AM; (3) further calls to Tyler at 1:56:55 and 2:04:37AM; and (4) approximately 60 calls to and from persons other than Jones, Tyler, and McMillan (3:17, 23, 132-133; Exh 91).[27]

III. The Investigation

Around 1:47AM, a resident of 52 Grant Street placed a 911 call and the Lynn Police dispatched multiple units to the area of 45-47 Grant Street (2:214-216, 225-226, 231-232, 240; 3:16-17). The caller told the first officers to arrive that she heard "yelling and the noises of gunshot" from 45 Grant Street and directed them to that address (2:214, 217, 225-226). As they approached 45 Grant Street, the officers saw a man in distress on its second-floor front porch flagging them down and summoning them (2:217-218, 222). It was the victim's roommate, Menard, who let the police into the apartment (2:218).[28] The kitchen door was "wide open" (2:170, 221-223, 232-233).

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[27] The defendant was consistently using his cell phone to make calls and send texts throughout the evening, but the call to Tyler at 1:44:40AM was his first since 1:15:29AM, nearly a half-hour earlier (Exh 91). The 1:44:40AM call went through a cell-phone tower near a Lynn intersection consistent with the defendant's presence at the apartment a few minutes earlier (6:62-63; Exh 94).

[28] Moments earlier, Menard, who had gone to bed a little after 11:00PM, had been awoken by the dogs' barking and saw a police cruiser outside his window (2:167-68, 205). He was annoyed and thought that the victim had accidentally locked the dogs in their room,

The police found the victim in a pool of blood on the kitchen floor (2:218-220, 232; 4:153; 5:30-31; 6:21-23). A few minutes later, emergency medical technicians arrived and pronounced him dead (2:220-221).

The victim was shot once in the top right side of his chest (4:14-15). The bullet penetrated his aorta, the upper and lower lobes of his left lung, passed between two ribs, and exited his body on the left side of his mid-back (4:14-16, 167). The "wound path," right to left, front to back, and downward, caused his death within seconds (4:16, 20-21).[29] After leaving the victim's body, the bullet went through the screen of a kitchen window and was later found lodged in a window frame in a neighboring structure, 49 Grant Street (4:168-172, 178-180). Police found and seized a .45-caliber discharged cartridge casing on the stairwell (also referred to as the "landing" or "rear hallway") outside the kitchen door (2:233-236; 4:156, 163). Investigators determined that, based on the trajectory of the bullet, the shooter was standing by the kitchen door near the back hallway (4:174-177; Exh 61-65). This

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but, when he left his room, he found the victim laying face-down on the kitchen floor (2:168). There was a baseball bat next to the victim's right shoulder (2:191-192). After trying to rouse the victim, and seeing a bullet hole in his back, Menard went onto his front porch and, as noted, caught the attention of the officers (2:168-170, 207-208, 217-218, 222).

[29] The medical examiner was unable to determine the victim's position when he was shot (4:22-23).

was the defendant's position when Jones ran to the bathroom just before the shooting (3:108-109; 4:90, 98).[30]

In the apartment, police also found (1) small baggies of marijuana in a black backpack "affixed" to the back of the closet door in the victim's bedroom; (2) a small amount of cocaine in a small dresser next to the victim's bed; and (3) about $250 in a cigar box atop a taller dresser (2:241; 4:55; 5:67-69).

Around 8:00PM on the day of the murder, August 16, after learning from family members that the police had seized her cellphone at the apartment, Jones, heavily intoxicated, went to the Lynn police station with her mother and grandmother for an interview with Massachusetts State Police Trooper Michael Tulipano and Lynn Detective Thomas Mulvey (3:119-120; 4:24-25, 113-114, 117-122, 142-143; 5:82-83, 90). Scared to go to jail, she told them, falsely, that she had been in bed with the victim when three white masked men broke into the apartment, and she terminated the interview when it became apparent to her that the police did not find her credible (3:119-120; 4:121-122, 126-128; 5:94-96).[31] She later told Tyler that she did not think the police believed her (4:129).

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[30] Jones did not see a gun in Tyler's possession that night (3:117).

[31] Trooper Tulipano characterized Jones' behavior during the interview as "belligerent" (5:92).

Jones hired a lawyer, "decided to cooperate with the government," and, on September 9, had a "proffer interview" with investigators and prosecutors (4:25, 92, 131-134). She entered into a cooperation agreement in which, in exchange for her testimony, the Commonwealth agreed to recommend a sentence of five to seven years to resolve charges against her of murder, home invasion, breaking and entering in the nighttime with intent to commit a felony, and attempted armed robbery (3:68). She also testified in front of a grand jury on November 10, and under oath at a "prior proceeding" involving Tyler in early March 2016 (4:26-27).[32]

Police arrested the defendant on October 21 (5:62). Sometime before October 30, Tyler was arrested in Florida (5:84; Exh 76).[33] On October 30, while in custody at a house of correction, the defendant placed a phone call to his girlfriend, Chantelle Moore, in which she told him of Tyler's arrest (5:55-63).[34] The defendant's tone became downcast and the conversation was punctuated by his lengthy pauses.[35] When Moore asked him, "Why you sound so dead?", he answered, "Because I am" (Exh 76). He complained about his stomach and said he did not even

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[32] The jury were not informed that this was Tyler's trial (4:8-9).

[33] Tyler was brought back to Massachusetts on January 8, 2015 (5:84).

[34] A recording of the call was admitted as Exhibit 76.

[35] At one point, Moore hummed to herself waiting for the defendant to speak.

want to talk on the phone (Exh 76). Toward the end of the approximately 19-minute call, the defendant said that Jones and Tyler were going "to blame this whole shit on me" (Exh 76). He also stated:

> But when [Tyler] comes here [*i.e.*, returns to the Commonwealth from Florida], he's gonna try to blame everything on fuckin' [Jones] or, he's gonna try to push for everything to go every other way, push the blame everywhere but him . . . . [Tyler's] a fucking clown, like. First of all, he shouldn't even have went on the run in the first place, and then went on the run and got caught and he's gonna come back up here and start blamin' everything . . . .[36]

IV. The Defense

The defense contended, through cross-examination of the government witnesses, presentation of testimony from a neighbor of the victim, and in closing argument (see

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36 In her closing, the prosecutor argued: "[T]he most important part of that phone call is [the defendant's] demeanor and his reaction when he finds that Terrence Tyler . . . was arrested on these charges. And I would ask all of you to re-listen to make sure that that -- exactly what his words were, but something to the effect, I'm dead, my stomach's upset, I can't be on the phone anymore. What else does he do? He calls Terrence Tyler a clown. He said he shouldn't have gone on the run in the first place, and he shouldn't have gotten caught. So what we know from that statement is what the defendant thinks is that it's better to hide in plain sight because it makes you look less guilty. Additionally what you heard is the defendant saying, Those two are going to blame this entire thing on me. Not, those two are going to frame me for something that I didn't do. So why would he think or why would he be worried that . . . Tyler and Monique Jones would blame the whole thing on me? Because at this point he knows that they have something to offer that he doesn't -- that he didn't. He was the shooter" (7:50-51).

7:12-33), that Jones, Tyler, and a person other than the defendant planned and committed the botched robbery that led to the shooting. Defense counsel argued that Jones, a "coldhearted killer," was an unemployed drug-dealer motivated by a need for "product" to finance her "lifestyle," and would, obviously, make more money reselling drugs she had stolen than reselling drugs she had purchased (7:12-15). Counsel contended that the sex-decoy plan was "unrealistic" and it was a more "realistic" plan for Jones, Tyler, and a third man to bring a gun, point it at the victim to keep him "captive," and then take the drugs (7:18-19). The defense maintained that Jones and Tyler were older than the defendant and insufficiently "close" to him to take him into their confidence and trust (7:16-17). Defense counsel also pointed out various reasons why Jones' testimony was not credible, *e.g.*, she said she ran past the struggling men to the bathroom just before the shot was fired rather than simply retreat into the bedroom, where her things were, and lock the door (7:24-25).

In addition, the defendant called a witness, James Prushinski, who lived on the third floor at 7 Carlton Street in Lynn (6:93-94). At around 1:30AM on August 16, he was awakened by the noise of "loud arguing" and went to the porch at the back of his apartment, which "overlook[ed] the back of 45 Grant Street" (6:94-96). He heard two voices; one was female, the other (probably)

male (6:96-99). While "tuning into the argument," he heard "bang, bang," two gunshots, but acknowledged that in 2014 he had said he heard one gunshot (6:96, 100-101). He then heard a "shocked" male voice say, "You shot me, you shot me" (6:101).

Prushinski next saw what "looked like a female" running down the backstairs at 45 Grant Street, who, when she reached the backyard, ran toward Grant Street (6:101-103). He heard a car engine ignite, the slam of a car door, and a car drive off (6:104). He testified that about four minutes elapsed between his awakening and the door slam, but after reviewing his grand jury testimony in which he said it was "maybe ten minutes or less," he said it was "[m]aybe" six or seven minutes (6:105-106).

SUMMARY OF THE ARGUMENT

I. The defendant's claim that he is entitled to retroactive application of Brown to vindicate his state constitutional guarantee of equal protection must fail because evidence of disproportionate or disparate impact of government action on a member of a suspect class is insufficient to sustain an equal protection claim. Additionally, the defendant has no right of any kind to retroactive application of the new rule set forth in Brown, and thus prospective application of Brown did not burden the exercise of a fundamental right. To compel

retroactivity in this case as a matter of constitutional law would effectively mandate retroactive application of all defendant-favorable new rules of common law and statutory construction, as well as exercises by this Court of its supervisory authority (pp 33-51).

II. The judge's instructions did not improperly "prop up" the credibility of Jones (pp 52-56) and the judge remained impartial, limiting his questioning of witnesses and remarks to those necessary to guide the conduct of the trial and clarify various ambiguities (pp 56-74).

III. The defendant has failed to meet his burden to establish that trial counsel was ineffective for: (1) her handling of the CSLI evidence (pp 76-86); (2) promising in her opening statement that the phone records would show that the defendant was not present at the scene (pp 86-87); (3) failing to prepare the defendant and call certain witnesses (pp 87-93); (4) failing to develop evidence of Jones' motive to commit the robbery (pp 93-100); and (5) failing to request an instruction on second-degree felony-murder based on breaking and entering in the nighttime as a predicate offense (pp 100-104).

IV. The defendant is not entitled to relief under G.L. c. 278, § 33E (pp 104-106).

ARGUMENT

I. PROSPECTIVE APPLICATION OF BROWN'S NARROWING OF THE FELONY-MURDER DOCTRINE DOES NOT VIOLATE THE DEFENDANT'S RIGHT TO EQUAL PROTECTION BECAUSE HE IS NOT "SIMILARLY SITUATED" AS DEFENDANTS TRIED AFTER BROWN, THERE IS NO RIGHT TO RETROACTIVE APPLICATION OF COMMON LAW RULES, THIS COURT DID NOT ACT WITH DISCRIMINATORY INTENT OR BURDEN THE EXERCISE OF A FUNDAMENTAL RIGHT, AND RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM DO NOT PROVIDE A VALID LEGAL BASIS TO REQUIRE RETROACTIVITY IN THIS CASE.

A. The Claim.

The defendant, tried in 2016, seeks retroactive application of the higher burden imposed on the Commonwealth to prove felony-murder established in Commonwealth v. Brown, 477 Mass. 805 (2017), and a new trial at which the Commonwealth must prove malice (rather than the intent to commit the predicate felony) to obtain conviction of first-degree felony-murder (DBr 22). He argues that failure to make Brown retroactive to him (1) violates his right to equal protection of the laws; and (2) would be unfair and "unjustly perpetuate[] systemic racial injustices by disproportionately impacting Black people and people of color" (DBr 22).[37] The defendant does not assert a federal constitutional claim.

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[37] In Tyler's pending appeal in this Court, he also seeks retroactive application of Brown on the grounds that (1) his trial occurred "a mere eighteen months" later; and (2) retroactive application to him would "address[], in part, the inherent racial disparity in felony murder convictions." Tyler does *not* claim that prospective application of Brown violates equal protection.

In support of the claim, defense counsel obtained statistical information from the Department of Correction (the "DOC") and identified, through her own efforts, 130 persons convicted of first-degree murder solely by means of felony-murder and sentenced to life without parole since 1980 (DBr 24 n.3).[38] Of these, 22 are no longer serving their sentences for various reasons. Of the remaining 108, 64 (59.25%) are "Black," 21 (19.4%) are "Hispanic," 4 (3.7%) are "Asian," and 19 (17.59%) are "White." Hence, the 89 (64+21+4) Black, Hispanic, and Asian inmates constitute almost 83% of the 108 persons serving life without parole solely for felony-murder,[39] and the remaining just-over-17% are

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[38] In support of the defendant's third motion for new trial, defense counsel submitted a spreadsheet (R.II. 188-191) with a list of these 130 persons containing, *inter alia*, their names, dates of decision of their direct appeals (if any), and their "race." The first four are "Asian," the next 71 "Black," the next three "Black/Hispanic," the next 24 "Hispanic," the remaining 29 "White." At the time the spreadsheet was prepared, eight of the 130 had direct appeals pending in this Court.

[39] It is important to note there is no basis for the collective treatment of "Blacks," "Hispanics," and "Asians" as a single group for purposes of equal-protection analysis. Cf. Commonwealth v. Lopes, 478 Mass. 593, 600 n.5 (2018) ("the test [to determine whether peremptory challenges were discriminatory] . . . does not apply to challenges to members of all minority ethnic or racial groups lumped together, but applies to challenges to 'particular, defined groupings in the community'") (quoting Commonwealth v. Prunty, 462 Mass. 295, 307 n.17 (2012) (such groupings include "all African-Americans . . . or all Hispanics"), and citing Gray v. Brady, 592 F.3d 296, 305-306 (1st Cir.), cert.

White.

According to the DOC, as of December 1, 2021, there were 1,006 inmates serving life without parole for first-degree murder; as noted, 108 (just under 11%) solely for felony-murder, the remaining 898 (89%) for first-degree murder by means of deliberate premeditation and/or extreme atrocity or cruelty ("malice murder").[40] Of the 898 malice-murderers, 392 (just under 44%) are White, the remaining 505 (just over 56%) are, according to the defendant's phraseology, "people of color," that is "Black" (292/32.5%), "Hispanic" (165/18.3%), "Asian" (24/2.6%), "Native American" (13/1.4%), and "Other" (12/1.3%).

The Commonwealth does not take issue with the tenor or the accuracy of the defendant's statistics *per se*,[41] however, the precise extent of these disparities is not relevant to the issue before this Court for the reasons

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denied, 561 U.S. 1015 (2010) ("minorities," "African-Americans," and "Hispanic" jurors not part of same "cognizable group")).

[40] The 898 also include persons convicted of first-degree felony-murder since Brown in 2017 (DBr 25).

[41] There are minor flaws in the defendant's methodology. For example, the data does not account for cases, exemplified by Commonwealth v. Martin, 484 Mass. 634, 645-46 (2020), in which the Commonwealth, as a strategic matter, elected to proceed only on the theory of felony-murder despite evidence of malice. The data also does not account for cases in which there was sufficient evidence of malice and juries were permitted to consider on several theories but convicted only of felony-murder because of the lesser standard of substituted intent.

set forth infra.

B. The Common Law of Felony-Murder and the State Constitutional Law of Equal Protection.

"Felony-murder is a common-law crime" that "also falls within the province" of a statute. Brown, 477 Mass. at 822 & n.8. From at least 1863 to September 20, 2017, the law of felony-murder provided that "a person engaged in the commission of an unlawful act [was] legally responsible for all the consequences which may naturally or necessarily flow from it." Commonwealth v. Campbell, 7 Allen (89 Mass.) 541, 543 (1863). This "evolved" into a rule, long in force at the time of the defendant's trial, that "proof of actual malice was not required; a felony-murder conviction may rest on proof of constructive malice, which [was] defined simply as the intent to commit the underlying felony." Brown, 477 Mass. at 831 (Gants, C.J., concurring, with whom Lenk, Hines, and Budd, JJ., joined). This was true both of first- and second-degree felony-murder.[42]

On September 20, 2017, this Court issued Brown. In a concurring opinion, a majority of justices

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[42] "Homicide committed during the commission or attempted commission of a felony punishable other than by death or life imprisonment [was] murder in the second degree, provided that the predicate felony [was] either inherently dangerous or, if not inherently dangerous, committed so that the circumstances demonstrate[d] the defendant's conscious disregard of the risk to human life." Commonwealth v. Burton, 450 Mass. 55, 57 (2007) (quotation marks omitted).

"abandon[ed] the fiction of constructive malice" and held that conviction of the common-law crime of felony-murder required "proof of one of the three prongs of malice." Id. at 825, 832, 836 (Gants, C.J., concurring); see also id. at 827-828 (Gants, C.J., concurring) ("elements of murder liability continue[] to rest in the domain of the common law"). Thus felony-murder was "no longer . . . an independent theory of liability for murder," but, rather, "limited to its statutory role under G.L. c. 265, § 1 as an aggravating element of murder," allowing conviction of first-degree murder without deliberate premeditation or extreme atrocity or cruelty when a homicide was committed with malice "in the course of" a life-felony. Id. at 825 (Gants, C.J., concurring).[43]

Critically for present purposes, the majority ruled that the malice requirement was "prospective, applying only to cases where trial begins after our adoption of the change . . . and will have no effect on felony-murder cases already tried, including this case." Id. at 834 (Gants, C.J., concurring). This holding was based on the longstanding rule and practice that the SJC "may exercise discretion when deciding whether to apply new

[43] Under this new regime, the "sole remaining function of felony-murder will be to elevate what will otherwise be murder in the second degree to murder in the first degree," thereby "entirely eliminat[ing] the concept of" second-degree felony murder. Brown, 477 Mass. at 832 & n.4 (Gants, C.J., concurring).

rules premised on the common law, State statutes, or [its] supervisory authority retroactively to direct appeals." Commonwealth v. Concepcion, 487 Mass. 77, 82 n.10 (2021) (citing Commonwealth v. Dagley, 442 Mass. 713, 721 n.10 (2004), cert. denied, 544 U.S. 930 (2005)).

Since deciding Brown in 2017, this Court has declined to depart from Brown's prospective application of the new malice requirement eight times. See Commonwealth v. Phap Buth, 480 Mass. 113, 120 (2018); Commonwealth v. Bin, 480 Mass. 665, 681 (2018); Commonwealth v. Martin, 484 Mass. 634, 645 (2020); Commonwealth v. Chesko, 486 Mass. 314, 326-327 (2020); Commonwealth v. Tate, 486 Mass. 663, 674 (2021); Commonwealth v. Duke, 489 Mass. 649, 658 n.5 (2022); Commonwealth v. Sun, 490 Mass. 196, 224 (2022); Commonwealth v. Pfeiffer, 492 Mass. 440, 453-454 (2023).

In Martin, the defendant asked this Court to "extend the reach" of Brown to his case "as a matter of due process, equal protection, and basic fairness." Martin, 484 Mass. at 635, 644. In rejecting this claim and affirming its commitment to Brown's non-retroactivity, the Court explained:

> We made clear in Brown that felony-murder is a common-law crime; we determine its elements. We declared that, in future trials, the element of malice would no longer be satisfied simply by proof of intent to commit the underlying crime: one of the three prongs of malice would have to be proved. This was not a clarification of existing common law; it constituted a change to our common law. Nor

> was it a change to our law of criminal procedure; it was a change to our substantive criminal law. We made equally clear that our earlier felony-murder rule, which substituted the intent to commit the underlying felony for the malice required for murder, was not unconstitutional. Our decision in Brown therefore did not announce a new constitutional rule. . . . Thus, ***where we revise our substantive common law of murder, we are free to declare that our new substantive law shall be applied prospectively***, much like the Legislature may do when it revises substantive criminal statutes.

Id. at 644-645 (brackets, citations, and quotation marks omitted) (emphasis supplied). Most recently in Pfeiffer, the Court reiterated "that retroactive application of our holding [in Brown] would be unfair to the Commonwealth, because a felony-murder case might have been tried very differently if the prosecutor had known that liability for murder would need to rest on proof of actual malice." 492 Mass. at 453 (internal quotations and citations omitted).

The state guarantee of equal protection is grounded in articles 1, 10, and 106 of the Declaration of Rights. "The equal protection mandate is essentially a direction that all persons similarly situated should be treated alike." Commonwealth v. Moore, 487 Mass. 839, 848 (2021). This Court recently summarized the governing law as follows:

> For equal protection claims, where a statute either ***burdens the exercise of a fundamental right*** protected by our State Constitution, ***or discriminates on the basis of a suspect classification***, the statute is subject to

> strict judicial scrutiny. All other statutes are subject to a rational basis level of judicial scrutiny. Under strict scrutiny, a State action must be narrowly tailored to further a legitimate and compelling governmental interest and must be the least restrictive means available to vindicate that interest, while under rational basis a State action will be upheld as long as it is rationally related to the furtherance of a legitimate State interest.

Commonwealth v. Roman, 489 Mass. 81, 86 (2022) (emphases supplied). Classifications based on sex, race, color, creed, or national origin "are inherently suspect." Id. at 87 n.7, citing art. 106. A fundamental right is one "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed." Id. at 87 (brackets and ellipsis omitted). State action must "significantly interfere" with a fundamental right to merit strict scrutiny. Id. (brackets omitted).

Although most equal-protection challenges involve distinctions established by statutes and rules and/or the discriminatory application thereof, the principles generally apply to "government action." DuPont v. Commissioner of Correction, 448 Mass. 389, 399 (2007). The Commonwealth does not dispute that judicial changes to the common law are subject to equal-protection scrutiny. Cf. Watson v. Baker, 444 Mass. 487, 495 (2005) (equal protection guarantees "are directed solely to

limiting the actions of government"). Certainly, this Court could not, consistent with state and federal constitutional law, make Brown prospective for persons of a certain race or ethnicity and retroactive for others. See, e.g., Jersey Shore Medical Center-Fitkin Hosp. v. Baum's Estate, 84 N.J. 137, 144-45 (1980) ("Fourteenth Amendment of the United States Constitution applies to state common law as well as statutory law").

C. This Court's Exercise Of Its Discretion To Not Apply Brown Retroactively Does Not Discriminate On The Basis Of A Suspect Classification Or Burden The Exercise Of A Right Guaranteed By The Massachusetts Constitution.

As an initial matter, Brown's prospectivity is facially neutral, and makes no racial or ethnic classifications. Rather, it created two classes of persons: defendants (of all races and ethnicities) who were tried for first-degree felony-murder before September 20, 2017, the day Brown was decided, and those tried after that date. See Commonwealth v. Freeman, 472 Mass. 503, 506 (2015) (statute expanding jurisdiction of juvenile court made classifications by date of arraignment, not person's age).

A preliminary question unaddressed by the defendant is whether these temporally disparate classes of persons are "similarly situated." There is some authority holding and suggesting that they are not. "The mere fact that some persons were at some later date governed by a

law more favorable to them than the law which applied to the defendant is insufficient to strike down an otherwise valid statute; to hold the opposite would be either to eradicate all new statutes or to make them all retroactive." Commonwealth v. Purdy, 408 Mass. 681, 685 (1990)(finding "no legal classification sufficient to trigger equal protection analysis" because a change in the law favorable to future respondents or defendants was "insufficient to strike down an otherwise valid statute"); Commonwealth v. Tate, 424 Mass. 236, 238-241 (1997) (rejecting claim that continuing commitment of sexually dangerous person violated equal protection after legislature repealed statute authorizing such commitments); Commonwealth v. Galvin, 466 Mass. 286, 286-287, 290 n.10 (2013) (rejecting defendant's claim that failure to apply statutory reductions of mandatory-minimum sentences for certain drug offenders retroactively to persons who committed their offenses prior to the amendment but were sentenced afterwards violated right to equal protection).[44]

The same result obtains even if the purported classes in this case are considered "in the same category and in the same circumstances." Opinion of the Justices,

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[44] The Court did find as a matter of legislative intent that the reductions were retroactive. Galvin, 466 Mass. at 286-287, 290-291.

332 Mass. 769, 779-780 (1955). The defendant is not entitled to strict scrutiny of his equal protection claim. That standard applies *only* when government action involves the "discriminatory ***application*** of impartial laws" to suspect classes, which include distinctions based on "race, religion, nationality, alienage," "sex and gender," "or membership in another discrete and insular minority." Commonwealth v. Long, 485 Mass. 711, 716-17 & n.6 (2020) (emphasis supplied). Disproportionate impact, alone, does not suffice. See Commonwealth v. Buckley, 478 Mass. 861, 870-871 (2018); Washington v. Davis, 426 U.S. 229, 238 (1976) ("our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact"); U.S. v. Ronning, 6 F.4th 851, 853 (8th Cir. 2021) ("Supreme Court has made clear that disparate impact alone is insufficient to show an equal protection violation; instead, proof of discriminatory intent or purpose is required"); Commonwealth v. Watkins, 98 Mass. App. Ct. 419, 429 n.4 (2020) ("race-neutral explanation for an existing racial disparity in the Boston Police Department's use of Snapchat may ultimately defeat [an] equal protection claim").

Here, the defendant does not allege any racially discriminatory intent or purpose in the Court's decision

to make Brown non-retroactive and acknowledges that the Court "may have intended to classify people as getting or not getting the benefit of the new rule in Brown based upon the date of their trials" (DBr 32). Nor does he contend that his conviction (or that of any "Black," "Hispanic," or "Asian" person serving life without parole after conviction solely of felony-murder) was the product of racially motivated discriminatory governmental conduct or that any member of this class of persons was unlawfully convicted or sentenced.

Nevertheless, the defendant requests that the Court "reconsider whether disparate impact alone -- when proven with proper statistical data -- is sufficient to make out a state constitutional equal protection claim" as "the racial data shows that this Court's non-retroactivity decision overwhelmingly burdens the liberty interests of people of color -- and Black people in particular -- in violation of state constitutional equal protection principles" (DBr 31, 32). Although the defendant cites Commonwealth v. Grier, 490 Mass. 455, 469 (2022) and Commonwealth v. Laltaprasad, 475 Mass 692, 703-704 & n.20 (2016), for the proposition that this Court has left open whether an equal protection violation may be based on statistical proof of disparate impact, he ignores that this Court expressed skepticism that data of disparate impact alone is sufficient to support an equal protection claim. See Laltaprasad, 475

Mass. at 704 n.20 ("Although the statistical data on which the defendant relies for his equal protection claim are certainly troubling, the data alone likely would not suffice to support the claim.").

The defendant also appears to suggest, implicitly at least, that if the Court reaffirms the prospective application of Brown in the face of evidence of disparate impact on a suspect class, there becomes a viable equal protection claim because it suggests discriminatory intent (DBr 32-33). However, this would only be so if the Court declines to change prospective application of Brown precisely because of this adverse effect on a suspect class. See Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (holding that discriminatory purpose involves situations in which government "selected or reaffirmed a particular course of action *at least in part because of*, not merely in spite of, *its adverse effects upon an identifiable group*") (quotations omitted) (emphasis added).

To change the law as requested would not simply be "more protective" of liberty and equality. It would constitute a wholescale reimagining and repudiation of equal protection jurisprudence, vastly expanding its scope with far-reaching consequences by creating claims and causes of action whenever *any* governmental conduct, at *any* level, had, for *any* reason, a disproportionate

impact on the members of an identifiable group.[45] The defendant has not identified any limiting principle. Second, the fact that the defendant *identified* and *quantified* the extent of the disproportionate impact of prospective application of Brown, and *informed* the judicial branch so that it can "do the fair thing" (DBr 32) *merely restates* the untenable suggestion that disproportionate impact *alone* should suffice.

As this Court has repeatedly affirmed, and which the Commonwealth of course does not deny, "African-American[s] . . . receive disparate treatment in the criminal justice system." Commonwealth v. Williams, 481 Mass. 443, 451 & n.6 (2019) (citing studies); see also Commonwealth v. Rossetti, 489 Mass. 589, 598 n.15, 604 n.25 (2022) (noting "racial disparities in our incarcerated populations"); id. at 621 (Budd, C.J., concurring); id. at 621-622 & n.1, 627-29 (Wendlandt, J., dissenting); Commonwealth v. Sweeting-Bailey, 488 Mass. 741, 756 (2021) (Lowy, J., concurring); id. at 757

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[45] See Washington v. Davis, 426 U.S. 229, 248 (1976) ("rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes"). For a discussion of the difficulties attendant on, and the implications of, retroactive application of new rules, see Linkletter v. Walker, 381 U.S. 618, 636-637 (1965).

& n.1 (Wendlandt, J., concurring); id. at 759-761 (Budd, C.J., dissenting); Commonwealth v. Jackson, 486 Mass. 763, 780 n.27 (2021); Commonwealth v. Evelyn, 485 Mass. 691, 701 (2020); Buckley, 478 Mass. at 877-78 (Budd, J., concurring); Commonwealth v. Warren, 475 Mass. 530, 539-40 (2016); Commonwealth v. Gonsalves, 429 Mass. 658, 679-80 (1999) (Ireland, J., concurring).[46]

But to grant relief on the present claim would effectively compel retroactive application of *all* new rules. Given the over-representation of certain suspect classes throughout the criminal justice system and the prison inmate population, *no new rule* favorable to defendants, whether statutory, common-law, or the product of this Court's exercise of its supervisory power, will *not* have a disproportionate impact on one or more suspect classes. This would create an unworkable and undesirable regime in which, as a constitutional imperative, non-retroactivity would be permissible *only* if this Court determines that prospective application would not have a disproportionate impact.

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[46] See also Bishop, Hopkins, Obiofuma, & Owusu, Criminal Justice Policy Program, Harvard Law School, Racial Disparities in the Massachusetts Criminal System, at 1 (Sept. 2020) (the "Harvard Report") ("People of color are drastically overrepresented in Massachusetts state prisons. . . . Black and Latinx people are overrepresented in the criminal caseload compared to their population in the state."). This Court and its members favorably cited the Harvard Report in Rossetti, Sweeting-Bailey, and Jackson.

This Court identified this consequence in Freeman, 472 Mass. at 505-508, when it denied an equal protection claim based on a statutory expansion of the jurisdiction of the juvenile court providing more protection for 17-year-olds arraigned after the effective date than 17-year-olds arraigned earlier. The Court stated:

> Stripped to its essentials, the defendants' claim ***challenges the basic validity of all prospective lawmaking***. All prospective legislation [and rules] ***must have a beginning date***, and . . . the mere fact that some persons were at some later date governed by a law more favorable to them than the law which applied to the defendant is insufficient to strike down an otherwise valid statute; ***to hold the opposite would be either to eradicate all new statutes or to make them all retroactive***. It remains a general rule of statutory construction that a newly enacted penal statute is presumptively prospective. Applying strict scrutiny merely because the act affords greater protections to the liberty interests of future defendants would shear the statutory presumption of meaning.

Freeman, 472 Mass. at 507 (brackets, citations, and quotation marks omitted) (emphases added). Indeed, a contrary rule would deleteriously stifle the development of the common law.

Prospective application of Brown also does not burden or significantly interfere with the exercise of a fundamental right grounded in the state constitution (or anywhere else). See Roman, 489 Mass. at 86. Retroactive application of new substantive criminal common-law rules is not only not deeply rooted in the

history and tradition of the Commonwealth of Massachusetts or the United States, it is not a recognized right at all. Nor is it essential to liberty and justice. See id. at 87.

As demonstrated by Freeman and the other cases cited above, defendants have no right to be tried under the same substantive laws and rules as future defendants who commit the same crime. Cf. Martin, 484 Mass. at 644-45 (rejecting claim that federal and state defendants entitled to identical retroactivity rules). No defendant has a cognizable right or vested interest in the law forever remaining the same as at the time of trial. Put yet another way, the fact that the Commonwealth has a more onerous burden to convict later-tried defendants, while a "benefit" to or "protection" of future defendants, in no way *harms* defendants who were already tried and convicted in fair trials under the law as it stood at the time. Brown itself affirmed the validity and constitutionality of the substituted-intent rule. Thus, it is neither accurate nor fair to say that prospective application of Brown "burdens the liberty interests of people of color" (DBr 32).

What the defendant seeks here is undifferentiated remediation of damage caused by historical racial injustice, a different and more problematic matter. However, this Court has evinced no ambition to permit defendants who cannot show particularized victimization

of racial injustice to evade full culpability for prior criminal conduct proved beyond a reasonable doubt.[47] See Rossetti, 489 Mass. at 621 (Budd, C.J., concurring) (concern that mandatory-minimum sentences "contribute to the unjustly disproportionate rate of incarceration of Black and brown folks . . . no more enables this court to presume ambiguity where sentencing language is clear than it enables us to wholly ignore clear sentencing language").[48]

Although the defendant fails to explicitly address the level of judicial scrutiny, he appears to focus on strict scrutiny based on an alleged suspect classification. He does not even seek to meet his "heavy

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[47] An individual convicted of first-degree murder may always challenge the justice of his conviction under § 33E review, as Brown did successfully, and the defendant does here (DBr 34-35).

[48] In the cases cited supra at 46-47, and elsewhere, the courts of the Commonwealth have demonstrated their commitment to halting the perpetuation of a racially biased criminal justice system. See, e.g., Sweeting-Bailey, 488 Mass. at 771 (Budd, C.J., dissenting) ("If we have any hope of mitigating racial disparities in our criminal justice system, it is imperative that we pay close attention to the effect that our law of search and seizure has on people of color."); Long, 485 Mass. at 720-26; Statements by Supreme Judicial Court Chief Justice Ralph D. Gants and Trial Court Chief Justice Paula M. Carey in Response to the Release of Harvard Law School's Report on Racial Disparities in the Massachusetts Criminal Justice System (Sept. 9, 2020) ("This impressive report will provide us with important guidance as we work to eliminate racial and ethnic disparities in the Massachusetts criminal justice system."); Letter from the Seven Justices of the SJC to Members of the Judiciary and the Bar (June 3, 2020).

burden," Elroy E. v. Commonwealth, 459 Mass. 1, 5 (2011), of showing there is no rational basis for the prospective application of Brown. The issue is thus waived. In any event, upholding valid convictions of first-degree felony-murder and life-without-parole sentences properly imposed prior to Brown serves the legitimate state interests (as in all criminal cases) of punishment, deterrence, and protection of the public. See Commonwealth v. Plasse, 481 Mass. 199, 205 (2019); Tate, 424 Mass. at 241 ("Continued treatment of persons in the treatment center [after termination of new commitments] has not been shown to be without value."). It also serves to affirm the justifiably settled expectations of members of victims' families.

Moreover, maintaining this Court's flexibility to make new rules prospective or retroactive as occasion may demand and as it sees fit furthers the public interest in the salutary development of the common law and exercises of the Court's supervisory power. Galvin is dispositive. There the Court held that prospective application of a statutory amendment was rationally related to a legitimate State interest because beneficial treatment for future defendants was insufficient to invalidate a statute and to hold otherwise would either "eradicate all new statutes or . . . make them all retroactive." 466 Mass. at 290 n.10. The same is true here.

II. THE JUDGE DID NOT IMPROPERLY "PROP UP" JONES' CREDIBILITY WITH HIS INSTRUCTIONS AND HE REMAINED FAIR AND IMPARTIAL, ONLY ASKING QUESTIONS AND MAKING REMARKS NECESSARY TO GUIDE AND CONTROL THE TRIAL.

A. The Judge's Instructions Did Not Improperly "Prop Up" Jones' Credibility.

First, the defendant complains that the judge's instruction pursuant to Commonwealth v. Ciampa, 406 Mass. 257 (1989),[49] regarding cooperating witnesses was erroneous because it did not include the following language: "the government did not know whether [the cooperating witness] was telling the truth." Commonwealth v. Roman, 470 Mass. 85, 100 (2014) (DBr 39-42).[50] "This was not, however, reversible error, as there

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[49] The judge instructed the jury that because Jones "has a cooperation agreement," they should "treat her testimony with particular care because she has received a benefit from the Commonwealth of Massachusetts" (7:58). That instruction was proper. Ciampa, 406 Mass. at 266.

[50] After the judge's final charge, counsel requested that the judge "re-instruct on the model jury instruction on the cooperating witness. I think the Court touched upon it very briefly but not fully" (7:94). However, because counsel did not alert the judge that the additional instruction that the government did not know whether Jones was telling the truth was necessary due to Jones' single, unprompted statement during cross-examination that the cooperation agreement was predicated on her telling the truth (4:133-134; 7:94), this claim is waived. See Commonwealth v. Costa, 88 Mass. App. Ct. 750, 754 n.5 (2015)("Ordinarily, when an objection is not stated with enough specificity to preserve the claim, it is treated as waived."). Accord Commonwealth v. Keevan, 400 Mass. 557, 564 (1987) ("It is a fundamental rule of practice that where a party alleges error in a [jury] charge he must bring the alleged error to the attention of the judge in specific terms in order to give the judge an opportunity to

was no vouching by the prosecutor." Commonwealth v. Fernandes, 478 Mass. 725, 746 (2018).

Contrary to the defendant's contention, the vice identified in Commonwealth v. Meuse, 38 Mass. App. Ct. 772, 773-776 (1995), S.C., 423 Mass. 831 (1996),[51] is not present. Here, the prosecutor argued,

> Counsel just spent her entire closing argument talking about Monique Jones' credibility and telling all of you why you should not believe anything Monique Jones said. . . . Although I would suggest to you that based on her testimony alone, what she said, and her demeanor from that witness stand, that you should credit her and believe her beyond a reasonable doubt, in this specific case you don't have to. Because her testimony is corroborated by every piece of objective evidence that was presented to you during the court of trial; by the China Bowl video; by the Carlton Street video; by the phone records; by the text messages; by the cell tower information; by the ballistics; and

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rectify the error, if any").

[51] In Meuse, the prosecutor argued,

> Take a look at that plea agreement. Sure, the Commonwealth has veto power. How would you write that agreement if you were in the Commonwealth's shoes? *Who would judge [the witness's] credibility other than the Commonwealth?* The Commonwealth means not me but the State Police. Because if [the witness] is not telling the truth, *we have an army of police that can go out and corroborate every detail he is giving us*. If he gives us one wrong detail we will say: [] you are not telling the truth here. Tell us the truth. That's the bargain. If you don't that's when we will not show up for sentencing. That's the leverage we have over [the witness].

38 Mass. App. Ct. at 774 (emphasis added).

> . . . the DNA evidence

(7:34-35). Thus, the prosecutor, unlike in Meuse, did not mention the cooperation agreement or suggest she had knowledge independent of the evidence before the jury verifying the Jones' truthfulness as a witness. Cf. Ciampa, 406 Mass. at 265 ("Vouching can occur if an attorney expresses a personal belief in the credibility of a witness . . . or if an attorney indicates that he or she has knowledge independent of the evidence before the jury verifying a witness's credibility."). Rather, the prosecutor properly argued that the jury could credit Jones based on the evidence they had before them. Accordingly, there was no reversible error.[52]

Next, the defendant argues that the following instruction impermissibly told the jury to "excuse Jones' lifestyle when deciding whether or not to believe her" (DBr 42-45). The judge instructed:

> Your verdict, of course, must be based on the evidence. That includes reasonable inferences. But it's not to be based on like or dislike. A trial is not a popularity contest. It's not based on sympathy or emotion. Instead, you coolly and calmly sift through the evidence.
>
> In that regard, ladies and gentlemen, you may

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[52] The jury instruction to evaluate the credibility of cooperating witness testimony with "particular care" immediately followed instructions that the jury was to take into account a witness's interest or bias with regard to the case when evaluating credibility (7:57-58). These instructions specifically alerted jurors to the permissibility of considering a witness's motive for testifying. Fernandes, 478 Mass. at 746 n.17.

> have heard some testimony in this case, or you would disagree with the lifestyle of somebody, or you might think that you don't approve of someone's life choices. Well, ladies and gentlemen, that's not what we're here for. We're not here to judge someone's lifestyle; be it the alleged victim, Mr. Parisse, be it a witness, be it anybody involved here.
>
> What you do is you coolly and calmly sift through the evidence and determine has the Commonwealth proven the case or not

(7:60-61).[53]

As the defendant properly concedes, the judge's instruction did not specifically refer to Jones (DBr 43). He nevertheless contends that, because "Jones was the Commonwealth's star witness and the main defense was that Jones was not credible due to her 'lifestyle,'" "the jury could not have interpreted the judge's instruction any other way than referring to Jones" (DBr 43). This assertion is speculative at best.

First, there is no risk that the jury could only have understood the judge's instruction to be referring to Jones. Not only did it not mention Jones by name, but it was neutrally phrased by referring generally to "a witness" or "anybody involved here," which necessarily included the defendant. Second, the instruction

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[53] After the final charge, counsel objected and argued, "it essentially affirms through the Court's mouth the Commonwealth's theory of the case" (7:97). "Because the defendant preserved this issue at trial, [this Court] review[s] for prejudicial error." Commonwealth v. Tavares, 484 Mass. 650, 654 (2020). Although she stated, "I suppose I could move for a mistrial," she did not request a mistrial (7:97).

admonished the jury that they were to dispose of their prejudices and to not base their decision on whether they disapproved the "lifestyle" or "life choices" of anyone involved in the case. Such an instruction was, in fact, protective of the defendant as it served to ensure that the jury did not convict him merely because of his lifestyle or that of the people he associated with. See, e.g., Commonwealth v. Ramos, 31 Mass. App. Ct. 362, 368-369 (1991)("The judge did not offer [his] opinion of the credibility of witnesses and did not . . . exempt government witnesses from appraisal of their credibility. Read in their entirety, the instructions on evaluating the credibility of witnesses were even-handed and correct.").

Moreover, the instruction did not tell the jury that they were *not to consider* or that they could not draw any inferences based on the "lifestyle" of Jones (or any other witness) when weighing the evidence. Rather, it told the jury that they could not let their *disapproval* of anyone's lifestyle affect their decision. Thus, because this instruction properly conveyed that the jury was to not let their personal prejudices impact their decision, there was no error.

B. The Judge Remained Fair And Impartial And Only Asked Questions Or Made Remarks Necessary To Guide And Control The Trial.

i. The Judge's Questioning Of Witnesses Was Non-partisan And Served To Clarify The Evidence.

Next, the defendant asserts that "the theme of this trial was that the trial judge was the 'star of the show'" (DBr 44), and "indulged in pervasive inappropriate questioning and commentary" (DBr 45), citing 146 instances in which the judge questioned witnesses, as well as nine other instances in which the judge made various comments (DBr 39-62). However, when viewed in the context in which the questions and comments were made, as well as the entire nine-day trial, the defendant's complaints are much overdrawn. See, e.g., Commonwealth v. Sylvester, 13 Mass. App. Ct. 360, 365 (1982) ("The defense has marshalled the judge's comments for our consideration. So massed they depict a reign of terror. It was not as bad as all that.").

"It is well established that a judge in this Commonwealth may question witnesses to clarify and develop evidence and to avert perjury." Commonwealth v. Watkins, 63 Mass. App. Ct. 69, 74 (2005). This is true even if the questioning "may strengthen the Commonwealth's case, so long as the examination is not partisan in nature, biased, or a display of belief in the defendant's guilt." Commonwealth v. Dias, 373 Mass. 412, 416 (1977).

"There exists no quantitative test for determining whether the judge has gone beyond the bounds which the law imposes; [m]uch depends upon the nature of the proceeding." Dias, 373 Mass. at 416. "The rule is one of

reason." Commonwealth v. Hassey, 40 Mass. App. Ct. 806, 810 (1996). Claims that a judge has exceeded proper bounds must be considered "viewing the entire trial in context." Commonwealth v. Carney, 31 Mass. App. Ct. 250, 252 (1991)(disapproving of defendant's "[c]utting and pasting portions of the record to suit [his] argument" of judicial bias); Commonwealth v. Festa, 369 Mass. 419, 422-423 (1976)(judge's actions are "considered in the context of the entire trial and the charge to the jury").

Here, the defendant has grossly overstated the judge's involvement in the trial by claiming that the judge questioned so many witnesses so extensively that it "habituated" the jury to take their cues on factual issues from the judge (DBr 46-60). Indeed, the defendant's general claim (at DBr 45, 50-51) that significance should attach to the number of judicial questions (146)[54] ignores that the standard is not "quantitative." Commonwealth v. Campbell, 371 Mass. 40, 45 (1976). See United States v. Fernandez, 480 F.2d 726, 736-737 (2d Cir. 1973)("numbers alone do not furnish a handy tool with which to gauge a claim that a judge's conduct improperly has shifted the balance against a defendant.").[55] Rather, when viewed in context it is

[54] The defendant lists the number of questions asked by the judge of each witness: Jones (60), Menard (7), Avery (5), Pierce (1), Grivetti (3), Cote (12), Kastor (3), Owen (4), Depres (3), Tulipano (6), Duval (18), Leal (10), and Prushinski (9) (DBr 47, 50-51).

[55] The questions here are different in number and

abundantly clear that the judge was acting properly within his role to clarify and develop the evidence, and that the number and tenure of his questions to various witnesses cannot fairly be characterized as "acting as [the] prosecutor" or "habituat[ing] the jurors to take their cues on factual issues from him" (DBr 48, 52). See, e.g., "that's on the first floor that's the outside?" (2:18); "just because you know somebody [due to your role as a police officer] doesn't mean that they're in some sort of police trouble?" (3:18); "Detective, again the difference between the two thumb drives?" (3:41); "Two gunshot defects . . . In other words, holes?" (4:14); "And the revolver doesn't eject the cartridge but -- the semi-automatic does? (4:166); "Even when dead and embalmed, let's say the inside of the -- of his cheek you could get some DNA from?" (5:16); "There's a small area that's been identified where everyone's DNA is unique, unless you're what? An identical twin?" (5:38); "So Carlton intersects with Grant Street? (5:76); "Like a with a septillion, how

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character than those in Fernandez. There, on cross-examination of a defense expert, the judge asked 112 questions to the prosecutor's 133, and defense counsel's six questions on re-direct were followed by 103 re-cross questions by the judge. Id. at 737 n.19. The questions, moreover, were "lengthy" and often "angry" and telegraphed the judge's incredulity -- e.g. "You're smart enough to know that there is such a thing as answering a question."; "Do you like to assume things when they fit your purposes?" Id. at 737, 742.

many zeros is that? (6:22)[56]; "In other words, you just don't know the answer" (6:46); "Does it refresh your memory as to -- as you sit here today, do you remember how many voices you heard?" (6:98).

The defendant specifically takes issue with the judge's questioning of Jones and Officer Withrow, arguing that it "assisted the prosecutor's case" (DBr 48-49). He claims that the judge "elicited new facts from Jones" that the defendant was awake and was present during Jones and Tyler's planning; went to the victim's house after the China Bowl; participated in the discussion about leaving the door open; Tyler yelled for help towards the defendant; and that Jones never saw Tyler with a gun that night (DBr 48).[57] However, the

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[56] Concededly, some of the judge's questions to forensic DNA analyst, Duval, regarding who discovered DNA were not necessary to develop the evidence (see 6:16-17). However, the defendant's fleeting claim that the judge's questions "chattily boosted the credibility of [Duval]" (DBr 51), lacks merit. Not only did counsel not cross-examine Duval, but Duval's credibility and testimony that the blood in Jones' car matched Tyler's DNA was not challenged at all, and in fact was part of the defense that Jones and Tyler were the assailants along with an unidentified third person (6:25; 7:13-18, 27-28, 32). Moreover, where these questions did not touch on any substantive aspect of Duval's testimony. Thus, there was no substantial likelihood of a miscarriage of justice.

[57] Commonwealth v. Hassey, on which the defendant relies (DBr 48), presents a useful contrast. There, the rape defendant claimed that the sex was consensual and that the victim contrived the allegation because the defendant owed her money. 40 Mass. App. Ct. at 807-808. The defendant called his friend, who testified to the

record does not reflect anything more than the judge's attempt to clarify who was present and participating in the conversation and the nature of the plan (see 3:91, 92-93, 94, 95, 97, 99).[58] As in Dias, 373 Mass. at 416, while this testimony strengthened the Commonwealth's case, the judicial questioning was not improper.

Similarly unavailing is his claim that the judge's questions to Officer Withrow, clarifying that he had not seen McMillan since he was tasked with serving the trial summons to her, following the prosecutor's questions regarding what steps he had taken in attempting to serve her (5:55, 56-57), "was prejudicial because it suggested

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victim's statement that, having not been repaid, "she would try to get him any way possible she could." Id. Following the attorneys' examination, *and over objection*, the judge questioned the witness at length about why he had not brought such exculpatory information to police before. Id. at 809-810. The Appeals Court reversed where 1) the inquiry "went beyond clarification or straightening out of seemingly errant testimony," as the witness' testimony "was not confusing"; 2) the judge had not established the required foundation for this inquiry, which 3) damaged the credibility of an important defense witness; and 4) "the judge said nothing in his instructions that dulled the sting of his examination." Id. Here, the judge's questions served to clarify the evidence, the defendant did not object, and the lines of inquiry were not verboten.

[58] In particular, the judge sustained counsel's objection to Jones' characterization that the defendant "seemed like he was aware" of her plan with Tyler, and instructed Jones that she could only testify to "what [she] observed" and clarified that she observed that the defendant did not say anything, react, and was not asleep (3:91).

the trial judge believed the police had done all they could to locate McMillan and therefore the jury shouldn't hold her absence against the Commonwealth" (DBr 49-50).[59] In his questioning, the judge did not state or otherwise suggest that Officer Withrow had exhausted all avenues to locate McMillan or that he believed that was the case.[60]

Indeed, his claim that the judge's questions aided the Commonwealth overlooks that the inquiry focuses not on the witness' answers, but on whether "the examination is [] partisan in nature." Festa, 369 Mass. at 422 (emphasis added). See Commonwealth v. Gomes, 54 Mass. App. Ct. 1, 6 (2002) (no substantial risk in judge's unobjected-to questioning, in which Commonwealth witness made only in-court identification of defendant).

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[59] Counsel did not request a missing witness instruction (see 6:110-124).

[60] In any event, counsel adeptly established on cross-examination that Withrow did not do everything within reason to locate McMillan, and in fact, could have easily spoken to her brother, who was present in the courtroom two days prior (5:61-62). The defendant fails to state why this "was ineffective to counter the prejudice" (DBr 50). Indeed, beyond counsel's cross-examination, the defendant ignores that Trooper Tulipano testified to other unsuccessful efforts police made to locate McMillian (5:65-66), and that any testimony from McMillan would likely be of minimal value (to the Commonwealth or the defendant), where there was evidence that McMillan was heavily intoxicated on the night of the murder and was "passed out" drunk in Jones' car after leaving the China Bowl until Jones roused her and kicked her out of the car after the murder (3:87-88, 97-100, 114; 4:75).

Contrast Commonwealth v. Sneed, 376 Mass. 867, 869 (1978) (judge's questions made jury "aware that [he] did not believe the witness" where "he addressed a series of inadmissible questions concerning [the defendant's] failure to testify at prior district court proceedings," and "later emphasized this 'failure' in his charge to the jury"). Here, as shown, the judge acted within his "[]power[]" to clarify issues or develop trustworthy testimony. Commonwealth v. Paradise, 405 Mass. 141, 157 (1989).

ii. The Judge's Interactions With Witnesses Did Not Serve To Demonstrate His Partiality To The Commonwealth's Case.

Next, the defendant contends that the judge impermissibly engaged in "chummy, irrelevant banter" with three Commonwealth witnesses which served to "focus[] the jury's attention on the likeability of the Commonwealth's witnesses and engender[] juror sympathy towards them" (DBr 52-54). Specifically, he points to the judge's interchanges with: Menard regarding the worst card to draw in the game of Candy Land (2:165-166)[61]; Owen regarding the circumstances of her broken leg (5:17-18); and Leal, whom the judge thanked for traveling from Kansas (6:28).

While these unobjected-to pleasantries may have been better left unsaid, the judge's comments were

[61] Menard testified that he had been playing Candy Land the night of the murder with his son (2:165).

innocuous and would not have seized the attention of the jury in the manner the defendant now contends. Indeed, when viewed in context of the entire trial, it was likely abundantly clear to the jury that the judge by nature was courteous and folksy in his interactions with people, whether it be with the jurors, witnesses,[62] the attorneys, or courtroom staff (see, e.g., 2:111-112; 6:16-17; 6:93; 7:64). That alone is not enough alone to establish prejudice. Importantly, Menard, Owen, and Leal were uncontroversial witnesses at trial. Menard, the victim's roommate, only testified to the layout of the apartment, the presence of their two pit bulls, that they generally locked their doors, and to finding the victim in the kitchen (2:162, 168, 170, 174, 179). Owens, a forensic scientist, merely testified about her processing of Jones' vehicle and was not subjected to cross-examination (5:18-33). Leal, the Sprint keeper of the records who also testified about cell towers, provided useful testimony to the defendant during cross-examination that a person's call may not necessarily

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[62] Notably, the judge was equally courteous and pleasant to the sole defense witness, James Prushinski, as he was to the other witnesses at trial. For example, just as he had made an exception for Owen in allowing her to sit while testifying, he similarly made such an exception for Prushinski, and had the following exchange with him when he came to the stand:

THE COURT: You all set there?
THE WITNESS: All set.
THE COURT: Great. Okay. Please proceed.

(7:92-93).

connect with the closest tower and that two people standing next to one another may connect with different towers (6:28, 30, 49-50) -- testimony that the defendant necessarily would want credited by the jury.[63] See Commonwealth v. Lucien, 440 Mass. 658, 664–665 (2004)(judge's "folksy" interaction with witness did not create a substantial likelihood of a miscarriage of justice where the witness was "not a key witness" and "[t]he absence of an objection suggests the lack of any prejudice from the judge's practice, and refutes the defendant's claim on appeal that the judge was endorsing Richards's testimony").

iii. The Judge's Use Of Himself In Examples To Explain Various Legal Concepts Did Not Demonstrate Impermissible Judicial Bias In Favor Of The Commonwealth.

Finally, the defendant claims he was prejudiced by six unobjected-to instances in which the judge used himself as an example in jury instructions to explain various legal concepts because these "self-aggrandizing statements" "made it more likely that the jury would believe Jones due to interpreting his instruction not to judge Jones' lifestyle as a judicial endorsement of her credibility" (DBr 54-60).[64] Although the defendant

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[63] See infra, § III.A. for an in-depth discussion relating to CSLI witnesses and evidence.

[64] See supra, § II.A. for a discussion regarding why the judge's "lifestyle" instruction could not reasonably be viewed as a judicial endorsement of Jones' credibility and was entirely proper.

repeats this claimed prejudice multiple times, he fails to articulate how the judge using himself in examples to explain legal concepts correlates to an elevated risk that the jury would view his "lifestyle" instruction as a judicial endorsement of Jones' credibility. Indeed, such a claim is entirely speculative. The speculative nature of this claimed prejudiced is bolstered by the "total absence of any objection from experienced defense counsel." Commonwealth v. Fitzgerald, 380 Mass. 840, 849 (1980) ("the total absence of any objection from experienced defense counsel cannot be ignored in our attempt to determine the collective effect of comments and questions from the judge"). In any event, the judge's use of himself in various examples did not create a substantial likelihood of a miscarriage of justice.

First, the defendant's claim that the judge's statement that he was going to "retake the stand" to read the reasonable doubt instruction was prejudicial because it "suggested to the jury he was acting as a witness in the trial" (7:64-65) (DBr 55-66), requires multiple leaps of conjecture. It is not reasonable to suggest that the jury would have seized upon this fleeting statement, let alone viewed it to have the import the defendant now would give it.[65]

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[65] Similarly, the defendant's claim that the judge's interaction with the court officer during the final charge in which he stated, "Okay, how am I doing so far?" and the court officer's response, "Excellent," and the

The defendant next takes issue with the judge's use of himself in an example on how to assess a witness's credibility (DBr 56-57). He stated:

> [Y]ou are to take all things into account, ladies and gentlemen, to determine do you believe a witness. I suggest that you do this every day. You do it so often you don't even know you're doing it. You're doing it subconsciously. Let's say if you were out on the Lawrence Common right outside the courthouse, and you were walking around on a pleasant spring day like today. The sun is shining and everything. And I came up to you and I say, what a miserable wet, rainy day this is. Now you would not believe me because you have contrary evidence. You would probably say, you know, I think – I thought that judge had a screw loose, now I really know that that judge is crazy. Because you have contrary evidence to what I would be saying to you. You can see the sun is shining. You can see it's actually a nicer day than it had been recently. And you would say, I don't believe this person. You do the same thing here, ladies and gentlemen. There's no magic to it.

(7:58-59). The defendant's claim that this instruction suggested to the jury that "unless they had contrary evidence from their own direct experience, they should believe Jones" (DBr 56), is completely unsubstantiated. This instruction did not mention Jones, nor did it use any facts similar to those in the case. Thus, is it

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judge's statement, "Excellent. Okay" (7:64-65), was prejudicial because it "ma[de] certain that the jury looked to him to lead them on how to decide the credibility of Jones" (DBr 55-56), is tenuous. When viewed in context of the entire trial and the judge's general demeanor and temperament, there is no risk that the jury would view this as anything other than an off-hand folksy comment.

dubious that the jury would make this inferential leap. See, e.g., Commonwealth v. Thomas, 439 Mass. 362, 366 (2003) (judge properly "describe[d] various factors commonly used to make credibility determinations" and "the factors that the judge described were not skewed toward either party, but were neutral"). Moreover, in context, it is clear that the judge was providing an innocuous example to explain to the jury that they use their common-sense every day to evaluate people's credibility.

Similarly unavailing is the defendant's claim that the judge improperly aligned himself "with the victim in this case" merely because he made himself the victim in the hypothetical[66] he used to explain the legal concept of when an item is within the possession or control of someone (DBr 59). This is especially so where the judge made himself the defendant/perpetrator in other

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[66] The defendant specifically complains that the judge "expressly equated himself with the victim in this case" in the following hypothetical:

> The fourth element that the Commonwealth has to prove beyond a reasonable doubt is that the defendant took the money or other property from the possession or control of Mr. Parisse, that includes the – any property that's within Mr. Parisse's control. Doesn't have to actually be on his person or something. For example, the keys to my car aren't on me. They're in my lobby. But still they're that's within my immediate area or control. Someone robbed me of my keys, you know, pound me up here on the bench, ran in and took my keys from my lobby, that would be a type of robbery

(7:84).

hypotheticals, including his examples of assault and assault and battery during his instruction on armed assault with intent to rob (7:90-91)[67] and different scenarios in which he would or would not be considered a joint venturer (7:71-74). Importantly, the facts in all these examples did not closely track the facts of the case, further diminishing any risk that the jury could somehow view the judge to be aligning himself with the victim (or any party) in this case.

Equally futile is the defendant's claim that the judge impermissibly distanced himself from the defendant (in contrast to his alignment with the victim) during his limiting instruction that the jury should not infer that the defendant was guilty merely because he was held pretrial (DBr 54-56).[68] Although the judge's comment that

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[67] In this example, the judge provided scenarios in which he punched or attempted to punch the clerk in the nose (7:90-91).

[68] When the defendant's jail calls were introduced, the judge instructed:

> Obviously, if you or somebody you know doesn't have the money to come up with bail, well, you're stuck there, even though you're not guilty of anything. So it would be really unfair to hold that – some adverse inference to someone simply because he couldn't make bail, that they happened to be at the House of Correction. Obviously, if I was suddenly arrested on some charges and bail was set, I would hope that my wife would come in with money and make my bail promptly so that I'm not there at all. So people with means don't necessarily end up at the House of Correction because they can make bail. But just because someone can't make bail, you can't hold that against them. You've got to understand

he would hope that his wife would post his bail if he were arrested was better left unsaid (5:58-59), taken in context, the clear import of this instruction was that a person's inability to make bail should not be held against them and there should be no inference that they are guilty. Based on the tenure of this instruction, which was to protect the defendant from unfair inferences, it is unlikely that the jury would have viewed the judge's comment as prejudicially distancing himself from the defendant. Accord Commonwealth v. Kapaia, 490 Mass. 787, 805 (2022) ("[w]e ascribe a certain level of sophistication to the jury") (citation omitted).

Nor did the judge's use of himself in a hypothetical in which his "brother-in-law" commits a bank robbery and various scenarios of when he could or could not be found a joint venturer with him create a substantial likelihood of a miscarriage of justice (7:71-74) (DBr 57-58). First, the judge's layman's example using himself and his brother-in-law in what would or would not constitute a joint venture was mechanism to keep the jury engaged as he explained a complicated legal concept.[69] Contrary to the defendant's claim, this

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that
(5:58-59).

[69] There is no merit to the defendant's claim that the judge's hypothetical implied that the defendant was "crazy and dumb" like his brother-in-law (e.g., "And I think he's crazy enough to do it" (7:71); "I'm going to

instruction did not impermissibly track the facts of the case merely because it involved a robbery; one of the predicate felonies (DBr 57). While the judge's hypothetical did involve a robbery, the similarities between his hypothetical and the facts of the case end there. The judge's hypothetical involved a bank robbery in which the judge, as a potential joint venturer, either knew about his "brother-in-law's" plan ahead of time (7:71), was present by the scene (7:72), or was present by the scene and willing and able to act as a getaway driver (7:73), while this case involved a home invasion, the attempted robbery of drugs from the victim's room, and the fact that the defendant was present in the home and shot the victim. Commonwealth v. Gumkowski, in which this court found the judge's hypothetical too "closely mirrored the circumstances of the defendant's case," serves as a useful contrast. 487 Mass. 314, 332 (2021). There, not only was each fact in the judge's hypothetical analogous to a fact in the case, but it also

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the ice cream parlor across the street and see if he actually is dumb enough to actually try to rob the bank" (7:72)) (DBr 58-59). Although the Commonwealth's theory was that the defendant was the principal in that he was the shooter, the genesis and driving force behind the home invasion and attempted robbery, and thus the true principal of the joint venture to commit these crimes, was Tyler, not the defendant. Moreover, when viewed in context, and in light of all the other instructions, no reasonable juror would have interpreted the judge's hypothetical as being disparaging to the defendant. Accord Kapaia, 490 Mass. at 805.

"illustrat[ed] to the jurors how they could find the defendant guilty" based on circumstantial evidence. Id. By contrast, here, not only did the hypothetical not mirror the facts of the case, but it also illustrated to the jury multiple examples of how they could find the defendant not guilty.

Second, this hypothetical did not highlight the fact that the defendant did not testify and thus could not "tell the jury the 'backstory' of how and why he came to be on the surveillance video near the scene of the shooting" (DBr 57). Nowhere in this example was there a suggestion that the defendant had to explain his intent or motivations. Rather, the judge was merely explaining various scenarios in which he could or could not be considered part of the joint venture based on his *actions*. Importantly, the judge's instructions clearly informed the jury that "circumstantial evidence" is "often used when determining what someone's state of mind might be, what their intent might be" and that "one inference that you cannot draw anything from is the fact that the defendant did not testify here" (7:61, 64).

In any event, the judge mitigated any possible prejudicial effect from anything he may have said or done during the trial by instructing the jury, "you are the sole, exclusive judges of the facts of this case. No one else is. You are the ones who decide what to believe, what's a reasonable inference. . . . Don't think that I

have made up my mind on the facts of this case. That's not my job. . . . Your job is to determine the facts of the case" (7:55). Although the defendant contends that this instruction was insufficient because it failed to specifically state the jury was not to be influenced by anything he, as the judge, may have said or done (DBr 62), he ignores that this instruction is similar to the instruction in Dias, which this Court approved of as "serv[ing] to overcome any possible prejudicial effect which might have derived from the judge's questioning." 373 Mass. at 417 ("judge instructed the jury that 'it is your function and yours alone to determine factually what happened. It is your province and yours alone to determine what part all, or part, or none of the story that any witness or the opinion of any witness is expressed that you are going to believe and follow. This is your function, not mine'").

Finally, here, the record establishes that the jury was not overborne by any of the judge's actions or remarks as they acquitted of two charges and rejected two of the three predicates for felony-murder (R.I 15, 28-30). See, e.g., Commonwealth v. Rosa, 422 Mass. 18, 29 (1996) ("The jury in this case were quite discerning. . . . [T]hey . . . distinguished between theories . . . of murder. It is at best purely speculative to think that the jury were misled as to their responsibility to find proof beyond a reasonable doubt" by the judge's

instruction on circumstantial evidence). Accord City of Boston v. United States Gypsum Co., 37 Mass. App. Ct. 253, 259-260 (1994) ("While the judge may have made an occasional gratuitous or improper remark in front of the jury, we do not think that, in the context of these lengthy proceedings, a sufficient basis appears to support the city's claim that it was deprived of a fair and impartial trial.").

In sum, the judge's conduct could not have led the jury to believe that he was biased or otherwise prejudiced the defendant.

III. THE DEFENDANT HAS FAILED TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.[70]

In reviewing a claim of ineffective assistance in a case of murder in the first degree, this Court applies the more favorable standard of review of a substantial likelihood of a miscarriage justice, pursuant to G. L. c. 233, § 33E. See Commonwealth v. Vargas, 475 Mass. 338, 358 (2016). Under this standard, this Court "consider[s] whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion." Id. "Under

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[70] The defendant raised the claims below in three motions for new trial (R.I 32-89, 299-340; R.II 132-172), all of which were heard and denied by judges other than the trial judge (R.I 281-296; R.II 405-410, 569-573).

this standard, the defendant bears the burden of demonstrating both error and harm." Commonwealth v. Seino, 479 Mass. 463, 473 (2018).

"If the record reveals sound tactical reasons for counsel's decisions, an ineffective assistance of counsel claim will not succeed." Commonwealth v. Gonzalez, 443 Mass. 799, 809 (2005); Commonwealth v. Don, 483 Mass. 697, 704-705 (2019) ("tactical decisions of trial counsel due deference"). Where, as here, the defendant failed to produce an affidavit from trial counsel in support of his motions for new trial, the defendant has not shown that counsel's decisions were anything but reasoned tactical decisions. See Gonzalez, 443 Mass. at 809 n.10 ("It is significant that there is no affidavit from trial counsel to inform us of his strategic reasons for these decisions"). Accord Commonwealth v. Diaz, 448 Mass. 286, 289 (2007) (a claim on ineffective assistance of counsel without an affidavit from trial counsel is in its "weakest form," because it is "bereft of any explanation by trial counsel for [their] actions and suggestive of a strategy contrived by a defendant viewing the case with hindsight"). "[O]nly strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent" rise to the level of manifestly unreasonable." Commonwealth v. Kirkland, 491 Mass. 339, 346 (2023) (quotation and citation omitted).

Under this rubric, all the defendant's claims must fail and the motions for new trial were properly denied.

A. Defense Counsel Was Not Ineffective With Her Handling Of The CSLI Evidence.

The defendant claims that trial counsel was ineffective for: failing to retain the services of a CSLI expert to contradict the Commonwealth's CSLI witnesses (DBr 62-68); failing to object to the technical testimony by the Sprint keeper of the records (DBr 68-69); and failing to object to Exhibits 93 and 94 (diagrams illustrating the cell tower and directional sector the defendant's cellphone connected to an hour before the murder and just after the murder) as non-business records (DBr 70-72).

First, it was a reasonable tactical decision to rely on cross-examination to highlight the limitations of CSLI in lieu of an expert who could not offer blockbuster testimony and would have essentially reiterated the general proposition elicited by counsel on cross-examination; that CSLI is not precise. Presenting expert testimony could have risked highlighting the CSLI evidence before the jury, and in correlation, counsel's perceived import of that evidence. Notably, not only did counsel's deft cross-examination of both CSLI witnesses effectively neutralize the potency of the Commonwealth's CSLI evidence, but it also provided valuable evidence for the

defendant that directly supported the theory of defense. See Commonwealth v. Sena, 441 Mass. 822, 826 (2004)("defense counsel effectively cross-examined the Commonwealth's witnesses, eliciting their opinions on aspects of the forensic evidence that might be consistent with the defense version").

Through questioning of Leal,[71] counsel firmly established that a phone call may not go to the geographically closest tower based upon a variety of factors, such as weather, line of sight issues, and physical obstructions, and that nothing in the phone records would reflect whether a phone was caused to bypass the closest towers before connecting with the tower reflected in the records (6:49-50, 51). In fact, during counsel's questioning, Leal conceded that a phone call "might not reach the first tower or the second tower or even a third tower until it could find a phone tower that was available to receive the call" (6:49). He also agreed that "if two people were standing next to each

[71] Leal was the keeper of the records from Sprint (6:27). He had worked for Sprint for approximately thirteen years, eight years as a subpoena analyst and approximately five years as a records custodian (6:27-28). In terms of his training, he explained, "the training is hands-on training through the evolution of my tenure at Sprint. I have had training, but it's not really formal training. It is job related. It's things that I have to know in order to do my job" (6:29). He stated that he had testified "several times in Massachusetts as well as over 200 times throughout the United States" regarding cell tower information (6:29-30).

other and making a phone call at the same time . . . the cellphone tower that might receive the calls might not necessarily be the same cellphone tower" (6:49-50). During her cross-examination of Kardoos,[72] counsel established that CSLI could not give the exact location of the defendant's cellphone within the 120-degree sector (6:68, 70-71). Counsel adeptly used Exhibit 94 to her advantage to illustrate this point to the jury (6:67-68). Indeed, as Judge Feeley[73] found, Kennedy's[74] affidavit did little more than highlight that CSLI lacks precision and provides a broad area within which a phone could have been located (R.I 291).[75] Accordingly, it was

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[72] Kardoos, a Trooper with the Massachusetts State Police, testified that he was part of the Technical Surveillance Unit and worked with the Violent Crimes Task Force doing historical cellphone analysis (6:52). His training for cellphone analysis included, "a 40-hour course conducted by a company called Engineering Technologies Solution. Pioneers in radio communication and radio intercept technology," and "attend[ing] several training sessions conducted by the FBI Cellular Analysis Survey Team" (6:53).

[73] Judge Feeley decided the first motion for new trial as the trial judge had retired (R.I 284).

[74] The defendant's proffered CSLI expert from his first motion for new trial (R.I 91-97).

[75] Contrary to the defendant's claim, Judge Feeley did not "credit" Kennedy's affidavit that the trial testimony of the Commonwealth's CSLI witnesses was "not scientifically accurate" (DBr 64, R.I 93-95). Rather, Judge Feeley found that while Kennedy's affidavit "does a fine job of pointing out ***claimed*** 'scientific inaccuracies' . . . [it] does not point out how accurate evidence would have assisted [the] defense" (R.I 290) (emphasis added). Far from crediting Kennedy's affidavit that the science proffered by the Commonwealth's witnesses was invalid, Judge Feeley merely found that

not manifestly unreasonable to rely on cross-examination to highlight the limitations regarding the accuracy and usefulness of CSLI.

Nevertheless, the defendant contends that Judge Feeley erred by overlooking Kennedy's diagram, which showed the coverage pattern of a cell tower could be a "cardioid" and thus much larger and "non-directional,"[76] when finding "that it was always clear to the jury that CSLI does not pin-point an exact location" (DBr 64-65; R.I 97, 291).[77] Contrast Commonwealth v. Hall, 485 Mass.

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even had Kennedy's proffered testimony been offered to challenge the science relied on by the Commonwealth's witnesses, it would not have "assisted [the] defense in any measurable way beyond the effective cross-examination conducted by . . . counsel" (R.I 290-291).

[76] Kennedy only ever averred that in order "to guarantee complete coverage with no missing gaps, sector antennas must partially overlap each other," and therefore "the most common coverage pattern is cardioid" (R.I 93, ¶ 8); not that coverage patterns had to be a "cardioid" shape. Moreover, even considering Kennedy's diagram illustrating the "cardioid" coverage pattern (R.I 93, 97), the fact that coverage areas may overlap beyond a straight 120-degree sector does not mean that a cellphone could be connecting from any direction within 360-degrees of the tower. Even given any overlap in the coverage areas per sector, such overlap is still consistent with a cellphone connecting to the tower from within a general direction. Thus, Kennedy's affidavit failed to show that coverage pattern of a cell tower is "non-directional" (Cf. DBr 65).

[77] It is also for this reason that counsel was not ineffective for failing to consult with an expert. Consultation with an expert would have added little to counsel's cross-examination. The general principle from Kennedy's affidavit is that CSLI coverage areas can be broad. Counsel effectively highlighted the breadth and lack of precision of CSLI for the jury.

145, 158-159 (2020) (witness overstated precision of CSLI data where witness said defendant was "right at the top of the driveway"). The defendant ignores, however, that even if the coverage area could be larger[78] and not be delineated by a clean pie-wedge pattern, Kennedy's affidavit failed discount the fact that at the operative times, the defendant's phone could have been in the general area of the murder scene. See, e.g., Commonwealth v. Clements, 36 Mass. App. Ct. 205, 209 (1994) (failure to consult with and present an expert on sexual abuse of children was not ineffective because although expert's testimony may have allowed defendant to peck away at clinical methodology of the Commonwealth's expert witness, this would have resulted, at most, in marginal attack on the Commonwealth's witness).

Indeed, the failure to challenge the CSLI evidence, beyond the fact that it was not precise and could not pin-point the exact location of the defendant's phone, was not inconsistent with the defense. The defense was that the defendant parted ways with Jones and Tyler at

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[78] Neither Leal nor Kardoos testified to the range of the coverage area of a cell tower, let alone suggested that a cellphone could *only* connect to a cell tower if it were in extremely close geographic proximity to that tower. Counsel's cross-examination highlighted that a person's phone need not be in close geographic proximity to the cell tower it connects with by eliciting that a phone may bypass multiple towers before connecting to one (6:49).

the China Bowl and was not in the apartment at the time of the murder (7:17-18, 20-21). It was made explicitly clear by counsel that CSLI could not establish that the defendant was at the address of the murder (6:68). Importantly, Exhibit 94, which highlighted the phone call made just minutes after the murder, clearly included the China Bowl restaurant within the coverage area (R.I 188). Based on this diagram, jurors could have properly inferred that the defendant stayed at the China Bowl restaurant after Jones and Tyler left and did not participate in the attempted robbery or murder.[79]

The defendant also claims that counsel should have objected to Exhibits 93 and 94[80] being offered into evidence because they did not qualify as business records because they were generated by Kardoos in anticipation of litigation and "went far beyond inputting raw data into a mapping program and letting an algorithm process a result" (DBr 70-72). This ignores, however, that the defendant's call detail records included not only the cell tower his cellphone connected

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[79] Although there was evidence that the China Bowl itself closed at 1:00AM, there was also evidence that people often socialized outside the restaurant (3:96).

[80] Exhibit 93 places the defendant within a certain 120-degree sector at 12:42AM, which included the China Bowl restaurant (R.I 186). At trial there was not and really could not be any dispute that the defendant was at the China Bowl at that time based on clear video footage from the establishment that places him on scene (Exh 34). As discussed supra, Exhibit 94 was not inconsistent with the defense.

with, but also which sector and the azimuth of that sector. The drawing of the pie-wedge by Kardoos was an accurate reflection of the information contained in the properly admitted business records.[81] See Commonwealth v. Bin, 480 Mass. 665, 679–680 (2018) (judge did not abuse discretion in allowing the introduction of trooper's reports and charts summarizing properly admitted CSLI records, which included a map in which he had "placed certain information pertaining to certain calls" "using a specific computer program to do so").

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[81] Exhibits 91 (the defendant's Sprint call detail records) and 92 (Sprint cell site location records) were properly admitted as business records via Leal (6:33-34, 42), and Kardoos testified that he generated Exhibits 93 and 94 based on the data contained in Exhibits 91 and 92 (6:54-55). Kardoos explained that in generating the diagrams, he "import[s] those tower records . . . which puts little points on the map based upon latitude and longitude described by Sprint. So Map Point will make a geographical depiction of that latitude and longitude" (6:58). He explained "the tower record also includes who manufactured the antenna," which determines the "sector configuration" (6:57). The records provided by Sprint established that Lucent antennas are used and that the cell towers are "divided up into three equal [120-degree] sectors" (6:57). He then explained, "if you look at a certain call, Sprint will identify which azimuth or direction that the cellphone made contact with the tower. From there I can draw a picture [by adding a line plus or minus 60-degress on either side of the azimuth because] . . . again, we use 120-degree slice of the pie . . . to describe it and to draw it" (6:59, 61, 64). Moreover, Kardoos clarified that the pie-wedge, including drawing the lines "70 percent of the distance to the next tower" is "just an approximation" (6:62) (Cf. DBr 71). He never stated that the coverage area was limited to only 70 percent of the distance to the next cell tower.

Accord Commonwealth v. Carnes, 457 Mass. 812, 825 (2010)("Summaries of testimony are admissible, provided that the underlying records have been admitted in evidence and that the summaries accurately reflect the records"). Consequently, an objection on this basis would have been futile.

In any event, the CSLI evidence was not likely to have influenced the verdict.[82] As discussed supra, the CSLI evidence was not particularly damaging to the defendant. Moreover, the defendant overstates the import of this evidence. It was far from the "linchpin" of the Commonwealth's case as it was entered solely as cumulative and corroborative of other evidence. The prosecutor mentioned CSLI in a single paragraph in her lengthy closing argument that spanned eighteen transcript pages, citing it merely as a small portion of

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[82] It is for this reason counsel was not ineffective for failing to object to Leal's technical testimony on sector directionality and that cellphones generally connect to the closest open cell tower based on a lack of foundation regarding his qualifications to so testify (6:29, 30, 39-41) (DBr 68-69). Moreover, his general descriptive testimony was comparable to the undisputed facts judicially noticed in Commonwealth v. Augustine, 467 Mass. 230, 238-239 & n. 31 (2014) (Augustine I) and Commonwealth v. Augustine, 472 Mass. 448, 449 n.1 (2015)(Augustine II) ("In essence, historical CSLI provides a record of the base stations, also referred to as cell sites or cell towers, to which a particular cellular telephone connected during any calls made or received within the period governed by the order. [ ]The data can be used to approximate the location of a cellular telephone handset that was active at a particular time.").

the mosaic of the other evidence at trial that was much more probative of the defendant's guilt (compare 7:47 with 7:33-51). See Commonwealth v. Vazquez, 478 Mass. 443, 446 (2017) (CSLI records not likely to have influenced the verdict where "records were not a significant part of the prosecution's case and were both cumulative and corroborative of other evidence").

The Commonwealth's case was centered around Jones, whose testimony directly placed the defendant at the scene of the murder and inferentially as the shooter. The China Bowl video, the Carlton Street video, the phone records, and the ballistics evidence all served to corroborate Jones and were far more probative of the defendant's guilt than the CSLI evidence. See Commonwealth v. Fernandes, 492 Mass. 469, 492 (2023) ("Although the CSLI and related testimony were consistent with the Commonwealth's theory of the case, they were merely cumulative and corroborative of [the cooperating witness's] testimony, which placed the defendant at the scene.").

The China Bowl video established the defendant, Jones, and Tyler were all at the restaurant at the same time just before the murder and that the defendant left with Jones (Exh 34). The Carlton Street video,[83] which

[83] Surveillance footage was taken by two cameras at a nearby residence at 8 Carlton Street, which intersected Grant Street one house down from the apartment (5:71-87; Exh 81).

the jury could readily find depicted the defendant and Tyler based on their distinctive clothing as seen in the China Bowl video, showed the defendant making gestures that the jury could find was consistent with securing something in his waistband before he turned the corner with the Tyler (Exh 81). The footage also showed, consistent with the phone records, that the defendant was not using his cell phone for this portion of time, and that Tyler was on his cell phone around 1:33AM, the time of Jones's call to him from the victim's bathroom (Exh 52, 81, 91). Indeed, the Carlton Street video was stronger, better evidence than the CSLI as it placed the defendant in direct proximity to the murder scene mere minutes before the murder.[84]

The phone records similarly provided a strong inference of the defendant's involvement where they established that the defendant was not using his phone at the time of murder and then immediately after the murder repeatedly called Jones, Tyler, and McMillan, who had been in Jones' car (3:17, 23, 132-133; Exh 91). See Commonwealth v. Javier, 481 Mass. 261, 280 (2019) ("the telephone call logs were consistent with an inference that the defendant and his friends were in close contact throughout the afternoon, and then stopped calling each

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[84] Of course, the CSLI could not -- precisely because of its lack of precision as highlighted for the jury -- "prove that [the defendant] proceeded from Carlon Street into the Grant Street residence" (Cf. DBr 64).

other for the fifteen minutes immediately before the shooting, because they were together at the crime scene"). The ballistics trajectory evidence served to corroborate Jones' account that as she ran to the bathroom, Tyler, who was struggling with the victim on the floor, called for help from the defendant, who was standing by the doorway, and seconds later, she heard gunshots (3:110-111, 126; 4:93-94, 97-98). Accordingly, any error regarding the CSLI evidence could not have impacted the verdict. See Vazquez, 478 Mass. at 445-446 (verdict will not be disturbed where Court is "substantially confident that, if the error had not been made, the jury verdict would have been the same").

B. Counsel Was Not Ineffective For Promising In Her Opening Statement That The Phone Records Would Show The Defendant Was Not Present At The Murder Where She Effectively Used The Phone Records In Her Closing To Argue As Much.

Next, the defendant claims that counsel was ineffective because she did not deliver on her promise in her opening statement that the phone records would show that the defendant was not present on scene at the time of the murder (2:141) (DBr 74-76). The defendant's claim is not accurate. Counsel effectively marshalled the phone records in her closing, arguing, "the phone records just don't lie" (7:20). She used the phone records to suggest that the murder occurred at approximately 1:45AM, highlighting that Jones' and

Tyler's phone records showed that Tyler was calling Jones at 1:39AM, inferably just before the murder, and the 911 call for shots fired was not placed until 1:47AM (7:20-21). She argued that based on this timeline, the defendant's phone records, which showed that the defendant called Jones at 1:44AM, three minutes before the 911 call, established that the defendant could not have physically been with Jones at the time of the murder since he was trying to get in touch with her at the time (7:20-21). This was a reasonable and compelling argument supported by the evidence. See, e.g., Fernandes, 492 Mass. at 492 ("Through cross-examination, defense counsel suggested that cell phone calls between the defendant and [co-defendant] showed that they were not together").

C. The Defendant Has Failed To Establish That Counsel Was Ineffective In Preparing A Defense.

i. Failure To Show The Defendant Discovery And Prepare Him To Testify.

Next, the defendant asserts counsel was ineffective for failing to provide him with discovery and to adequately prepare him to testify (DBr 77-79). He argues, without support, that it "was error" for Judge Feeley to discredit his affidavit and find that the defendant had failed to establish counsel's performance was deficient or that he was in anyway prejudiced (DBr 78). His argument ignores the basic tenet that

Judge Feeley was entitled to discredit the defendant's self-serving conclusory affidavit. See Commonwealth v. McWilliams, 473 Mass. 606, 621 (2016)("[A] motion judge may reject a defendant's self-serving affidavit as not credible."). Accord Commonwealth v. Rice, 441 Mass. 291, 304 (2004) ("[B]ecause there is no affidavit from trial counsel, the defendant's assertions about what counsel did not do is speculative and need not be considered.").

The defendant's claim that counsel failed to visit him enough prior to trial and failed to provide him with the Carlton Street video and jail calls, thus depriving him of the ability to make a rational decision to not testify (DBr 78), is undermined by his affidavit. By his own admission counsel met with the defendant in person seven times during his seventeen-month incarceration and spoke with him on the phone "numerous times" about the case, including the discovery he claims to have not received (R.I 98 ¶2, 99 ¶¶3-4, 100 ¶5). Moreover, he admits in his affidavit that he knew about, and had discussed, the Carlton Street video with counsel before trial and had spoken with counsel about the possibility of testifying in light of all the evidence (R.I 101 ¶6). Further, in his grand jury testimony, [redacted] (SCA 34-38). There is no claim that the defendant did not have access to those minutes. Indeed, the defendant fails to state what he could have done, or

could have done differently, if he had viewed the video and heard his own jail calls prior to trial.

The only proffer by the defendant of what his testimony would have been is his bare bones assertion that he was not present on scene at the time of the murder (R.I 101 ¶7), an argument that did not require the defendant's testimony, and one that counsel effectively made throughout trial. Through cross-examination of the Commonwealth's witnesses counsel was able to paint a picture of Jones as an unsavory character who would do anything, including frame the defendant, to avoid prosecution, and used the ballistics evidence to further undermine Jones' version of events (7:25-26, 29). She also made a compelling argument that, based on timeline of events, the defendant's phone records established that he was not with Jones at the scene of the murder because he was calling her during the operative time (7:20-21). The defendant has failed to articulate how his testimony would have meaningfully added to this theory. Indeed, by the defendant's own admission, the Carlton Street video was highly probative of his guilt and would have been difficult to explain (R.I 101-102, ¶¶8-10). There was no need for the defendant to be subjected to harmful cross-examination or impeachment evidence where this defense theory could be, and was, adequately developed by counsel through other witnesses. See, e.g., Commonwealth v. Wallis, 440

Mass. 589, 599 (2003) ("defendant's decision not to testify, in light of the evidence, could have been a 'wise tactical choice' to avoid what would in all likelihood have been a devastating cross-examination of the defendant"). Counsel's cross-examination of witnesses and use of the forensic evidence provided excellent fodder for her closing argument and directly supported the theory of defense.

ii. Failure To Prepare And Call Certain Defense Witnesses.

The defendant also faults counsel for failing to follow his direction to investigate, call, and prepare certain witnesses (DBr 79-81). This claim is similarly unavailing.

The defendant contends that counsel should have called Tyler[85] and McMillan[86] as witnesses during the

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[85] Tyler had been convicted of first-degree murder roughly two months before the defendant went to trial where his theory of defense was that the defendant was the guilty party. It can be inferred that not only would Tyler have properly exercised his Fifth Amendment privilege but, if he had chosen to testify, would have directly implicated the defendant.

[86] First, there was evidence at trial that police made multiple unsuccessful attempts to serve McMillan with a subpoena for trial, and that her brother, who was present during the trial, refused to provide her address (5:55-56, 65-66). Second, there was evidence that McMillan was heavily intoxicated on the night of the murder, was "passed out" drunk in Jones' car after leaving the China Bowl until Jones roused her and kicked her out of the car after murder (3:87-88, 97-100, 114; 4:75). Thus, any testimony from McMillan would likely be of minimal value.

defendant's case (R.I 99, ¶4). There is nothing on this record to demonstrate that either of these witnesses, neither of whom provided an affidavit in support of this motion, would have provided a substantial benefit to the defendant had they testified. See Commonwealth v. Collins, 36 Mass App. Ct. 25, 30 (1994)(no ineffective counsel shown in failure to call specified witnesses where defendant failed to produce affidavits from witnesses to show what testimony would have been and that their testimony "would likely have made a material difference").

The defendant also contends that counsel was ineffective when she failed to call [redacted], arguing that Layton would have provided valuable impeachment evidence against Jones. More specifically, the defendant claims that [redacted] would have testified that [redacted] (DBr 80-81). However, "[e]ven using the more favorable standard of review under § 33E, a claim of ineffective assistance based on failure to use particular impeachment methods is difficult to establish. Trial counsel does not necessarily provide ineffective assistance by not prob[ing] every inconsistency." Commonwealth v. Norris, 483 Mass. 681, 687 (2019). "[A]bsent counsel's failure to pursue some obviously powerful form of impeachment available at trial, it is speculative to conclude that a different

approach to impeachment would likely have affected the jury's conclusion." Id. Here, there was no such likelihood where the potential impeachment evidence proposed by the defendant was extremely minimal and counsel had the opportunity to elicit from the responding officers that they did not hear anything unusual when they came upon the scene just moments after the shooting.[87]

Finally, the defendant argues that had counsel prepared Prushinski more thoroughly, he would have seemed more credible on the witness stand (DBr 79-80). There is no basis for this argument. Prushinski testified consistent with his grand jury minutes that [redacted] (Compare 6: 99-100, 101-102, with SRA 7, 8, 10, 14). Counsel easily and adeptly refreshed his memory on all relevant points (6:97-98, 100, 102, 106). Additionally, the defendant fails to explain how counsel's failure to elicit that [redacted] (SRA 11; R.I 347), would

[87] During cross-examination of Officer Figueroa, counsel elicited that the only thing the officer noticed when pulling onto Grant Street was a man on his bicycle (2:224). He did not notice an "intoxicated woman stumbling up the street" (2:224), which contradicted Jones' testimony that she had kicked McMillan out of the car minutes after the murder (3:114).

have aided the defense. There was no dispute that Jones was present at the scene and the defense theory was that Jones, Tyler, and another man committed the crime as a joint venture, not that Jones did it by herself.

Accordingly, the defendant has failed to meet his burden to establish that counsel's performance was deficient or that he was prejudiced in anyway.

D. Counsel Was Not Ineffective For Failing To Use Certain Evidence To Impeach Jones' Testimony That She Did Not Intend To Profit From The Robbery Where, Even If Jones Did Intend To Profit From The Robbery, Such Evidence Would Have Had No Effect On The Jury's Determination Whether The Defendant Participated And Shot The Victim.

On July 6, 2014, 41 days before the murder, Lynn police responded to Jones' apartment after receiving a "disturbance call with possible gunshots" (R.I 546-555). After encountering Jones outside and her boyfriend, Joshua Dixon, in the basement, officers conducted a protective sweep and recovered "a loaded firearm and cocaine" (R.I 546-555). Jones became belligerent with police and was arrested for disorderly conduct, while Dixon was arrested after police determined he had five outstanding warrants (R.I 550). Dixon was ultimately charged with possession of the cocaine and loaded firearm (R.I 551).[88] While Dixon was held pretrial trial

[88] During a phone call at the police station, Dixon "openly stated," on a recorded line and in the presence of officers, that the gun and cocaine belonged to him (R.I 550).

on these charges, before ultimately pleading guilty (R.I 563), he made a series of jail calls to Jones and his mother (R.I 361-530).[89] The defendant alleges these recorded jail calls show that the gun and drugs belonged to Jones and that Jones needed money the day before the murder for Dixon's bail (DBr 81-84).[90]

The defendant claims that counsel was ineffective in failing to use Dixon's jail calls, to "show that Jones wasn't a helpless onlooker, but instead was a gun-toting drug dealer needing fast money who was lying about [the defendant's] involvement in this crime to cover up that she shot [the victim] herself" (DBr 82). He contends that because Jones specifically rebuffed counsel's questioning regarding her financial motive to rob the victim by stating, "I wasn't in it for a profit or to resell the drugs" (4:53), the defense "ended up with no evidence that Jones was a gun-toting drug dealer in need of money" (DBr 82).

This Court has stated time and again that, although

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[89] Recordings of Dixon's jail calls were provided to the defendant in discovery as they were subpoenaed to the grand jury and entered in evidence at the presentment (R.I 348-349).

[90] While in custody, and a day before the murder, Dixon and Jones spoke about the $5,550 he needed for bail, and Jones assured him that she would acquire it before the next court date on September 5, 2014 (R.I 379-386, 408-409, 410). In other calls, Dixon complained to his mother that Jones was unappreciative and that he had "stayed and took the hit" when the police arrived (R.I 470-471, 472-473, 475, 478, 487, 490, 497-498, 510, 511, 535).

a "defendant is entitled to reasonable cross-examination of a witness for the purpose of showing bias . . . failure to use particular methods of impeachment at trial rarely rises to the level of ineffective assistance of counsel." Commonwealth v. Goitia, 480 Mass. 763, 769-770 (2018). Even when counsel fails to avail himself of a "powerful impeachment tool," reversal is required *only* when the error "***must have been likely*** to have influenced the jury's conclusion." Id. at 769 (emphasis supplied).

As Judge McCarthy-Neyman[91] properly found (R.I 408-409), that cannot fairly be said here. The theory of the claim -- that evidence Jones possessed a gun and some quantity of drugs on July 6, 41 days before the shooting,[92] and was "desperate for cash" on the day of

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[91] Judge McCarthy-Neyman decided the defendant's second and third motions for new trial (R.II 405-410, 569-573).

[92] The Dixon jail calls would likely have had little evidentiary force on this point if they were admissible at all. The conversations between Dixon and his mother, in which he said the drugs and gun belonged to Jones, were statements made by Dixon to his mother while angrily and bitterly complaining about Jones' failure to bail him out of jail. The jury may well have taken the evidence with a grain of salt, given a son's natural inclination not to portray himself to his mother as a gun-toting drug dealer, but, rather, as a gentleman protecting the woman he loved. The absence of repeated similar statements to Jones is glaring: while begging and pleading with her to get his bail money, he did not insist that she owed him because the gun and drugs belonged to her (see R.I 379-386, 396, 406, 430, 460-461). Additionally, while it is true that in one of the calls Dixon told Jones, "I've already proved I'll go to

the shooting, would have induced the jury to find both that Jones shot the victim and the defendant was not involved at all -- is, on its face, unsound. These factors certainly would have had a rational tendency to show that Jones participated in a drug-rip, and there was no dispute that she did, but they say little about the role she might play.

The relevant question was not whether Jones "had access to or knowledge of firearms," Commonwealth v. Pierre, 486 Mass. 418, 424 (2020), but, rather, whether the defendant had access to or knowledge of firearms, a matter about which the Dixon jail calls say nothing. Thus, the defendant's theory of relevance of the Dixon jail calls is too remote or speculative for its absence to constitute ineffective assistance.[93]

Moreover, the defendant overstates the impeachment

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jail for you" (R.I 465), that statement occurred during a discussion of how Jones might convince her family to lend her money for Dixon's bail (R.I 464-465). The context makes clear that Dixon was suggesting that she tell her family he was taking the rap for her as an inducement for them to provide money for his bail.

[93] The defendant also cursorily argues that his third motion for new trial based on newly discovered evidence of Jones' November 29, 2021 arrest -- seven years *after* the murder -- for firearm related charges was erroneously denied because it "showed that the evidence of Jones' dangerous gun-toting and drug-dealing available pretrial was critical to a fair trial" (DBr 83). Apart from the simple reason that "events . . . occur[ing] posttrial . . . do not qualify as newly discovered evidence," Commonwealth v. Hernandez, 481 Mass. 189, 196 n.12 (2019), his third motion was also properly denied for the reasons articulated supra.

value of evidence of Jones' motive to commit the crime. What mattered was not so much *why* she agreed to commit the crime, but, rather, that she *did agree and did commit* the crime. Any connection between the urgency or reason for her need of money and an incentive to fabricate the defendant's participation is tenuous at best. Whether she needed money for groceries, bills, her children's upkeep, to maintain her "lifestyle," or to pay Dixon's bail, her incentive to minimize her participation and blame another or others was constant. In other words, the identity of the "driving force" behind the robbery, whether it was Tyler or Jones, was not relevant to the principal question before the jury: were Tyler and Jones accompanied by the defendant or by someone else? Indeed, the Dixon jail calls would not have revealed any specific reason why Jones would have intentionally and falsely identified the defendant as a participant.[94]

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[94] The trial record, the motion for new trial, nor the defendant's brief identifies any rationale explaining why Jones would frame the defendant (Cf. DBr 82-83). There was no evidence of any hostility between them, or that Jones was protecting someone else. Additionally, when Jones made her proffer to police inculpating the defendant, she was facing possible indictment for murder and other very serious charges, and obtained a highly favorable deal. That deal would have fallen apart, with potentially severe adverse consequences for Jones, had she falsely implicated the defendant, who, *for all Jones knew at the time*, might have had an airtight alibi. Indeed, at the time of the proffer, Jones was unaware of the China Bowl footage, which investigators had not yet obtained, showing Jones and the defendant together, and of the Carlton Street footage placing the defendant with

In addition, evidence that Jones needed money for Dixon's bail would have been cumulative of other evidence that Jones lacked and needed money, and thus the absence of cross-examination based on the Dixon jail calls was in no wise prejudicial. See Commonwealth v. Watt, 484 Mass. 742, 764 (2020) ("assuming an investigation would have turned up additional impeachment material demonstrating that [the witness] was untruthful, it would have been cumulative of the ample information trial counsel already had available and used effectively"). Counsel extensively cross-examined Jones on her family and financial situation at the time.[95]

Hence "defense counsel's cross-examination of [Jones] provided a substantial basis for defense counsel to plant the seed with the jury that" Jones was not forthcoming about her motive to commit the robbery.

Tyler near the apartment just before the shooting (3:37-41, 59; 5:82).

[95] Her cross-examination revealed to the jury that Jones (1) lived in section eight housing in Lynn with her daughter and, from time to time, her sister, and, from time to time, her boyfriend Nathan (Tyler's brother); (2) was unemployed and had Crohn's disease; (3) owned a car and had to pay car insurance; (4) had to pay for utilities and her phone bill; (5) paid for food with the assistance of food stamps; (6) had to buy clothes for and otherwise care for her daughter, who was 15 or 16, with help from the Department of Children and Families; (7) was "able to go out and drink[] and enjoy [her]self and party on other occasions"; and (8) bought marijuana from the victim at a discount both for her own use and for profitable resale (4:29-33, 38-39).

Goitia, 480 Mass. at 771; see also Commonwealth v. Rivera, 482 Mass. 259, 269 n.15 (2019) (counsel not ineffective by failing to impeach witness with prior inconsistent statement when witness already impeached through other means). Counsel then "effectively utilized [Jones's] testimony in [her] closing argument" (7:14-15). Commonwealth v. Lawton, 82 Mass. App. Ct. 528, 537 n.8 (2012); see also Watt, 484 Mass. at 764 ("shortcomings" of witness "thoroughly exposed" in defense closing, "especially with regard to his credibility and dishonesty").[96] Thus, even if the basis and strength of Jones' motive to commit the robbery were somehow connected with her identification of the defendant as a participant, the jail calls were not a "powerful impeachment tool" that "must have been likely to have influenced the jury's conclusion." Goitia, 480 Mass. at 769. The defendant has not met "the stringent standard required for claims of ineffective assistance premised on a failure to impeach a witness."

[96] It is also worth remembering that "[j]urors are not stupid." U.S. v. Rosario-Camacho, 733 F. Supp. 2d 227, 247 (D.P.R. 2010); see also U.S. v. Johnson, 319 U.S. 503, 519 (1943) (Frankfurter, J.) (rejecting "tacit assum[ption] that juries are too stupid to see the drift of the evidence"). Given their "ability to deploy collective common sense and life experience to judge credibility accurately," Commonwealth v. Leiva, 484 Mass. 766, 780 (2020), the jurors may very well have viewed Jones' profession of ignorance as to why she ultimately acceded to Tyler's plan, and her denunciation of any intent to reap financial reward (3:91-92; 4:50-53, 69), as unconvincing and credulity-straining.

Commonwealth v. Lee, 483 Mass. 531, 545 (2019).

E. Counsel's Decision To Not Request A Second-Degree Felony-Murder Instruction Based On Breaking And Entering A Dwelling In The Nighttime Was A Reasonable Strategic Decision Consistent With The "All-Or-Nothing" Defense Theory.

Finally, contrary to the defendant's claim that "counsel had no strategic reason for her failure to request the same predicate for a second-degree felony murder instruction as given in the Tyler trial" (DBr 73), the decision to not request such an instruction, after having the night to think about it, was reasonable in light of the "all-or-nothing" defense theory.

On April 12, 2016, after the close of all the evidence, the parties met, outside the presence of the jury, for a charge conference (6:110-125). During the conference, the judge asked whether either party was requesting a second-degree felony-murder instruction (6:115-116). The Commonwealth, who ultimately announced it would only be going forward on a felony-murder theory, did not request such an instruction (6:115). Counsel, who did not submit written instructions, told the court "in an abundance of caution, given the way the evidence came in, that it would be appropriate to do so" (6:116). Counsel, however, did reference that she had Tyler's jury instructions in front of her and acknowledged that the theories of the case were quite different in the two

trials (6:115). The judge questioned whether there would be an appropriate second-degree predicate based on the evidence in the defendant's trial and counsel asked to think about the theory overnight (6:118-119).[97]

When the parties returned on April 13, 2016, the judge began by discussing his research and rulings on the merger issue raised by counsel the day prior and the Commonwealth's decision to formally withdraw its theory of deliberate premeditation (7:3-5). Once both issues were discussed, counsel indicated that she did not have anything that needed to be addressed (7:5). Closing arguments commenced soon after, during which counsel argued strenuously that Jones could not be credited and that the defendant was not at 45 Grant Street at the time of the murder (7:10-33). After both parties concluded their final arguments and the Court gave its final instructions, counsel raised numerous objections, one of which was remedied by the Court (7:94-97). She, however, never raised an objection to the Court's failure to provide a second-degree felony-murder instruction (7:94-97).

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[97] Counsel did not "struggle to answer" the question as the defendant claims in his brief (6:118-119)(cf. DBr 73). And, contrary to the defendant's claim, it was the judge and not defense counsel who offered the possibility of unarmed robbery as a second-degree predicate before realizing, through discussion with the Commonwealth, that it would not qualify as a predicate (6:116-118) (cf. DBr 73).

In the present case, counsel's decision[98] not to go forward with a second-degree felony-murder instruction was entirely reasonable considering the facts and the theory of defense. Indeed, declining to press for such an instruction is consistent with an "all-or-nothing" strategy, which Massachusetts appellate courts have found to be within the bounds of reasonable tactical decisions. Commonwealth v. Roberts, 407 Mass. 731, 737 (1990)(trial judge must, "on request," when the evidence permits, instruct on a lesser included offense, but counsel may permissibly pursue an "all or nothing" defense and decline instruction); Pagan, 35 Mass. App. Ct. at 791 (it was "far from" manifestly unreasonable to forgo manslaughter instruction where primary defense was that defendant was not involved in setting fatal fire); Commonwealth v. Gonsalves, 56 Mass. App. Ct. 506, 513 (2002)(intentional choice by trial counsel to base defense on one theory and not another is a "strategic choice" entitled to deference).

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[98] Because the defendant did not provide an affidavit from counsel, the court can find on this record the decision to not press a second-degree felony-murder request was a strategic decision. See Gonzalez, 443 Mass. at 809 n.10 ("It is significant that there is no affidavit from trial counsel to inform us of his strategic reasons for these decisions"). The record supports that the failure to request a second-degree felony-murder instruction was a strategic choice rather than an oversight where counsel had the night to think about whether there would be a predicate, and even if there were, whether such an instruction would be prudent in light of the defense.

Here, the "all-or-nothing" strategy was reasonable where there was ample independent evidence, which counsel argued to the jury, that Jones and Tyler committed the attempted robbery and felony-murder together,[99] whereas evidence of the defendant's role relied heavily upon Jones' testimony (7:20). Counsel's decision to attack the credibility of Jones[100] and argue that the defendant was not present on scene was completely understandable and shrewd. Further, based on the defendant's affidavit and representation of his potential testimony, it was the theory the defendant wanted presented at trial (R.I 101, ¶ 7). Accordingly, counsel was not ineffective for declining to request a

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[99] This included that Jones and Tyler were part of an "inner circle," to the exclusion of the younger defendant, based on familial and romantic relationships (7:13-14); Jones and Tyler had a monetary motive in contrast to the defendant who had a steady job (7:14-15); and Jones and Tyler are consistently in phone contact with one another on the day of the murder (7:15, 17).

[100] Counsel argued the "sex decoy" plan was not a reasonably realistic plan (7:18-19, 21-22); Jones' claim that she ran to the bathroom when the victim was confronted by Tyler rather than retreating back to the victim's room where all of her personal items were was incredible (7:24); the ballistics evidence contradicted Jones' claim that Tyler was struggling on the ground just before she heard the gunshot (7:26); the phone records established that the defendant was not present during the murder because he was calling Jones' phone at the operative time (7:20-21); and "Jones was handsomely paid of her testimony" because "[s]he got a five to seven year state prison sentence offer in exchange for her testimony" instead of a possible life sentence without parole (7:29).

second-degree felony-murder instruction where doing so would have been inconsistent with the theory of defense.

IV. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER G.L. C. 278, § 33E, IN LIGHT OF THE STRONG EVIDENCE OF HIS GUILT.

This Court must review the whole case on the law and the facts to ensure that the verdict is not against the weight of the evidence and is consonant with justice. G.L. c. 278, § 33E. The reviewing court's powers under Section 33E are extraordinary, and, as such, they are to be used sparingly. Commonwealth v. Schnopps, 390 Mass. 722, 726 (1984); Commonwealth v. Dalton, 385 Mass. 190, 197 (1982).

Importantly, "[t]his case is not one where the . . . conviction 'appears out of proportion to the defendant's culpability.'" Commonwealth v. Colon, 483 Mass. 378, 394-395 (2019) (quoting Brown, 477 Mass. at 824). Brown held that "participat[ion] on the 'remote outer fringes' of [a] joint venture" made second-degree murder "more consonant with justice." 477 Mass. at 824. That cannot be said here. Not only was there substantial evidence of the defendant's awareness and agreement to partake in the plan, but also that he in fact was the participant who shot the victim.

Indeed, the evidence established that he was present and listening to Tyler's and Jones' conversation about robbing the victim and that the plan involved Jones engaging in sexual acts with the victim, and that while

distracted and in a "compromising position," Tyler and the defendant would enter the apartment and take the victim's drugs (3:90-91, 93, 104-105; 4:51-54, 57-58). The China Bowl video shows the defendant urging Jones to leave, inferentially, so that they could proceed with their plan to rob the victim (Exh 34), while the Carlton Street video showed that the defendant, in his light sweatshirt and light sneakers (seen in the China Bowl video), was present in the area, just moments before the murder (Exh 81). In the Carlton Street video, the defendant appeared to be manipulating something at his waistband and then repeatedly pulling up his pants as he walked with Tyler towards 45 Grant Street, creating the reasonable inference that he was securing the gun he used to shoot the victim (Exh 81). Once inside 45 Grant Street, and after Tyler began to fight with the victim, Tyler looked at the defendant standing by the kitchen door and screamed for him to help (3:108-108, 110-111; 4:90, 93, 98). The trajectory of the bullet was consistent with being shot from the defendant's position at the time Tyler yelled at him to help (3:108-109; 4:90, 98, 174-177; Exh 61-65). See Fernandes, 478 Mass. at 738-739 (no relief under § 33E where circumstantial evidence of defendant's participation as a joint venturer in shooting).

Accordingly, the evidence clearly established that the defendant acted with conscious disregard during the

attempted commission of a life felony during which the victim died and the verdict was not "out of proportion to his culpability" necessitating reduction of the verdict or, in the alternative, a new trial. See, e.g., Commonwealth v. Selby, 426 Mass. 168, 172 (1997) ("There was uncontradicted evidence that the defendant entered the dwelling house of another, carrying a loaded gun, with the intent of committing a robbery. Based on these circumstances, which were known to the defendant, a reasonably prudent person would have known that according to common experience there was a plain and strong likelihood that death would follow from the contemplated act.").

CONCLUSION

For all the foregoing reasons, Defendant's convictions should be affirmed, and Defendant should not be granted relief pursuant to G. L. c. 278, § 33E.

Respectfully submitted
FOR THE COMMONWEALTH,

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September 2023

ADDENDUM

Table of Contents

G.L. c. 265, § 1. Murder.

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

G. L. c. 278, § 33E. Capital Cases; Review By Supreme Judicial Court.

In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean: (i) a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CRIMINAL
NO. 2014-01550

COMMONWEALTH

vs.

RASHAD A. SHEPHERD

MEMORANDUM AND DECISION ON DEFENDANT'S MOTION FOR NEW TRIAL

On April 15, 2016, defendant Rashad A. Shepherd ("Shepherd") was convicted after a jury trial of first degree felony murder. The underlying felonies proffered were home invasion, attempted armed robbery, and attempted unarmed robbery. He was also indicted on charges of home invasion and armed assault with intent to rob, but not guilty verdicts were returned by the jury on those two charges. [D. 36, 37]. The jury found Shepherd guilty of murder in the first degree and found attempted unarmed robbery to be the proven predicate felony.[1] [D. 35].

The trial of this case was severed from that of a co-defendant, Terrence Tyler ("Tyler"). [ESCR2104-0551]. Tyler was tried two months before Shepherd and

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[1]There is no question that attempted unarmed robbery is a permissible predicate for first degree felony murder, which is defined by statute as "murder committed . . . in the commission or attempted commission of a crime punishable with death or imprisonment for life." G. L. c. 265, § 1. Unarmed robbery is punishable by as much as life imprisonment. G. L. c. 265, § 19.

convicted of first degree felony murder and unarmed assault with intent to rob. He was acquitted of home invasion. According to the Commonwealth, Tyler's theory of defense was that, although he was present at the time of the killing, Shepherd was responsible for the victim's death (i.e. the shooter). In this case, Shepherd never conceded his presence at the scene of the shooting. Shepherd's theory of defense was that he was not present during any part of the attempted robbery or fatal shooting of the victim. Neither defendant's theory of defense was accepted by their respective juries.

A third co-defendant, Monique Jones ("Jones"), was charged with first degree felony murder, home invasion, armed assault with intent to rob, and breaking and entering in the nighttime for a felony. Jones cooperated with the Commonwealth, testified as a witness at both trials, and pled guilty to the armed assault and breaking and entering charges after both trials concluded. The Commonwealth's theory against Jones, which she confirmed at trial, was that in accordance with a plan with Tyler and Shepherd, she arranged with the victim, who was a marijuana dealer she knew well, to visit him for purpose of sexual relations, intending to leave a door unlocked and permit Shepherd and Tyler to enter and rob the victim of drugs and/or money. Consistent with the plan, the two men entered the apartment through an unlocked outer door. The evidence at trial disclosed that a fierce struggle ensued

between the victim, who grabbed a baseball bat upon discovering the intruders, and Tyler. Shepherd was present in the apartment but no testimony described his involvement in the struggle, although Tyler was screaming for his assistance. Jones claimed to have fled to a closed bathroom during the struggle, when she heard one or two gunshots. She did not see the shooting. She reported seeing Tyler flee the apartment, but did not see Shepherd after hearing the gun shot(s). The Commonwealth nolle prossed the murder and home invasion charges against Jones and she was sentenced to five to seven years in state prison on May 18, 2016.

A timely notice of appeal was filed, the record was assembled, and the appeal was docketed in the Supreme Judicial Court. [SJC-12405]. On March 15, 2019, the Court stayed appellate proceedings and remanded Shepherd's motion for new trial for disposition in this court. [D. 57]. Supporting the motion are affidavits by Shepherd, his appellate counsel, and a proffered expert, Joseph J. Kennedy ("Kennedy"), on cell site location information ("CSLI"). No affidavit was submitted by Shepherd's trial counsel.[2] No affidavits were submitted by any witness at trial or any witness Shepherd now argues should have been called at trial.

[2]An affidavit from trial counsel is not unheard of in post-judgment challenges, particularly where strategic choices are an issue. This court has seen several affidavits from trial counsel admitting they were unaware of a particular issue or that a trial decision was not a strategic choice.

On April 5, 2019, this court (Feeley, J.) requested a responsive memorandum from the Commonwealth. [D. 58]. The Commonwealth's responsive memorandum was docketed on September 4, 2019. [D. 62]. The superior court judge who presided over the trial (Welch, J.) is now retired. Accordingly, this post-conviction challenge to Shepherd's first degree murder conviction in this case was assigned for adjudication to the undersigned associate justice of this court.

Shepherd advances the following claims of ineffectiveness of counsel:

1. Trial counsel failed to obtain funds and employ a cell phone tower expert;
2. Trial counsel failed to object to testimony of a records custodian from the phone carrier who also testified how cell sites operate and how to locate a cell phone based on CSLI;
3. Trial counsel failed to object to Exhibits 93 and 94 which were not business records subject to a hearsay exception;
4. Trial counsel failed to request a jury instruction on second degree felony murder based on a predicate felony of breaking and entering a dwelling, nighttime, with intent to commit a felony;
5. Trial counsel provided ineffective assistance of counsel for promising the jury in her opening statement that phone records would show that

defendant was not involved in the shooting, but failed to fulfill that promise; and

6. Trial counsel failed to consult with defendant and provide him with discovery documents, failed to adequately prepare him to testify at trial, and failed to call and adequately prepare defense witnesses for trial.

Additionally, Shepherd advances one ground that is not phrased in terms of ineffectiveness of trial counsel. He claims that even if counsel was not ineffective, the presentation of incorrect cell tower evidence resulted in a substantial risk of a miscarriage of justice. The court denies so much of Shepherd's motion for new trial that contends that incorrect cell tower evidence resulted in a substantial risk of a miscarriage of justice. For some of the same reasons advanced by the Commonwealth, the affidavits submitted by Shepherd do not support any such extraordinary finding. Although the Commonwealth addresses and opposes the claims of ineffective assistance of counsel in its memorandum, the Commonwealth contends that Shepherd's motion and supporting affidavits fail to raise a substantial issue and should be denied without a hearing. See Mass. R. Crim. P. 30(c)(3).

Before further discussion, the court will not address as part of Shepherd's new trial motion those claims, although phrased in terms of ineffectiveness of counsel, that require no factual development and could be raised on direct appeal. As the

undersigned associate justice did not conduct the trial, review of evidentiary, trial, and instructional errors would require this court to act as an appellate court and review issues that can be raised on direct appeal. Shepherd can challenge on appeal the improper admission of evidence, even if not objected to, the failure to give an jury instruction, even if not requested, and the propriety of counsel's opening statement. Even ineffectiveness claims can be raised on appeal when the issues do not require establishing a post-conviction evidentiary record in the trial court. Those issues can be decided on the trial record. To the degree that this court is required to rule on all issues raised, it denies so much of Shepherd's motion for new trial that raises issues that require no new factual development and can be addressed on appeal from the trial record. The only true ineffectiveness claims left are the following, and even these can be decided on the submitted affidavits and do not require an evidentiary hearing:

1. Trial counsel failed to obtain funds and employ a cell phone tower expert; and
2. Trial counsel failed to consult with defendant and provide him with discovery documents, failed to adequately prepare him to testify at trial, and failed to call and adequately prepare defense witnesses for trial.

DISCUSSION

"In post-trial proceedings, the defendant bears the burden to rebut the

presumption that [he/she] had a fair trial." *Commonwealth* v. *Comita*, 441 Mass. 86, 93 (2004). "Motions for a new trial are granted only in extraordinary circumstances," *id.*, upon a showing that "justice may not have been done."[3] Mass R. Crim. P. 30(b); see *Commonwealth* v. *Moore*, 408 Mass. 117, 125 (1990). A hearing is required only when there "is a substantial issue raised by the motion or affidavits and is supported by a substantial evidentiary showing." *Commonwealth* v. *Lopez*, 426 Mass. 657, 663 (1998). No such substantial showing has been made by Shepherd, such that an evidentiary hearing is not necessary. See *Commonwealth* v. *Gordon*, 82 Mass. App. Ct. 389, 394 (2012) ("the rule, [in fact,] encourages the denial of a motion for a new trial on the papers where no substantial issue is raised.").

1. Legal Standard for Ineffectiveness Claims

In *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984), the Supreme Court "granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel."[4] The Court started its analysis by noting the

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[3]Mass. R. Crim. P. 30(b) provides in pertinent part: "The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." As discussed herein, there is no reason for this court to conclude that justice may not have been done in this case.

[4]The court frames the ineffectiveness standard as articulated by the United States Supreme Court in *Strickland, supra.* The court does not view the Supreme Judicial Court's articulation of that standard in *Commonwealth* v. *Saferian*, 366 Mass. 89 (1974) to be substantively different from the federal standard. It is only if the Supreme Judicial Court creates a constitutional standard under the

crucial role played by defense attorneys in assuring the constitutional right to a fair trial. *Id.* at 684-685. The Sixth Amendment Right "to have the Assistance of Counsel for his defense" includes "the right to the effective assistance of counsel." *Id.* at 686, quoting *McMann* v. *Richardson*, 397 U.S. 759, 771, n.14 (1970). The Court concluded that a constitutional ineffectiveness claim has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

The "deficiency or performance prong" of the *Strickland* standard is measured by "reasonableness under prevailing professional norms." *Id.* at 688. Among the basic duties of defense counsel is the duty to assist the defendant. "From counsel's

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Declaration of Rights that is more favorable to defendants that the federal constitutional standard does not control. This court does not read *Saferian* as creating a more generous standard for ineffectiveness claims. In any event, the Court in *Saferian* stated: "[W]hat is required in the actual process of decision of claims of ineffective assistance of counsel, and what our own decisions have sought to afford, is a discerning examination and appraisal of the specific circumstances of the given case to see whether there has been serious incompetency, inefficiency, or inattention of counsel-behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer - and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defense." *Saferian*, 366 Mass. 89, 96 (1974) (citations omitted).

function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id.*

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. "[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692. Setting aside certain claims not here relevant, "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Id.* at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* "[T]he defendant must show that [particular unreasonable errors of counsel] actually had an adverse effect on the defense." *Id.* The appropriate test for establishing prejudice is as follows: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

2. Analysis

A. Cell Site Location Information

With respect to Shepherd's contention that the failure to obtain and call a cell tower location/phone records expert, the court rules that there was no serious incompetency, inefficiency, or inattention of counsel, that is, there was no behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer. See *Sefarian,* 366 Mass. at 89. Stated another way, the court rules that Shepherd has failed to show that trial counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland,* 466 U.S. at 687.

The provided affidavit of Kennedy is not persuasive. He does a fine job of pointing out claimed "scientific inaccuracies," but does not point out how accurate evidence would have assisted Shepherd's defense. Without such a causal connection, it cannot be found that trial counsel was ineffective in failing to obtain expert assistance/testimony.

It is not at all clear to this court that Kennedy's proffered testimony would even have been offered at trial, as it is not clear to this court that his testimony would have assisted Shepherd's defense, or, at least that it would have assisted Shepherd's defense in any measurable way beyond the effective cross-examination conducted by

Shepherd's trial counsel. Kennedy relies in his affidavit on direct examination of Commonwealth phone witnesses and omits any reference to cross-examination that appears to have pointed out and corrected for the jury the very inaccuracies he claims were presented at trial. Without explaining how accurate evidence would have assisted Shepherd's case, the court cannot find that ineffective assistance of counsel was provided.

Kennedy also claims that Exhibits 93 and 94 are not accurate representations of the area in which the cell phone associated with Shepherd was located at the time in question, in that the accurate area is much larger. However, Kennedy does not state where the phone in question would have been located based on his larger area, or whether more accurate evidence (i.e. coverage map) would not have included the areas near Grant Street and the China Bowl Restaurant, where Shepherd was last seen with Tyler and Jones and where he contended in his defense that he separated from the other two.

It was always clear to the jury that CSLI does not pin-point an exact location, but provides a broad area within which the phone could have been located. As best the court can tell, based on Kennedy's affidavit, neither the Commonwealth's argument not Shepard's arguments at trial were based on inaccurate evidence. The CSLI area may have been bigger, but Kennedy does not deny that his larger area

included the location of the killing and the location (China Bowl Restaurant) where other evidence placed Shepherd just before the offense conduct occurred. A strategy of relying upon cross-examination, in lieu of an expert such as Kennedy that could not offer block-buster testimony, was not manifestly unreasonable when made. See *Commonwealth v. Ortega*, 441 Mass. 170, 175 (2004).

Kennedy's conclusory challenge to the accuracy of all call detail records based on an unidentified number of "observed errors" in call detail records not connected to this case is similarly unhelpful to Shepherd. The court expects that call detail records of cell phones in this country include billions and billions of records of phone calls. Saying some may contain errors, without suggesting that any such errors are reflected in the evidence before this court is not a substantial evidentiary showing. Call detail records are typical business records offered regularly in the courts of this Commonwealth. Mass. Guide Evid. § 803(6). They meet the requirements of the business records exception to our hearsay rules, and Kennedy's challenge to call detail records generally says nothing about the reliability of the call detail records in this case, and does not support a finding under the deficiency prong of the ineffectiveness standard. In any event, it was not ineffective assistance of counsel for trial counsel to accept the reliability of call detail records.

Even if Kennedy's affidavit established that trial counsel's performance was

constitutionally deficient, Shepherd's showing does not meet the prejudice prong of the ineffectiveness standard. The court relies on and adopts the Commonwealth's argument that any deficient performance had no likely impact on the jury verdict. The crucial evidence against Shepherd was Jones' testimony, as she was a participant in the events of that night and was present in the apartment at the time of the killing. Other evidence corroborated Jones' testimony of Shepherd's role, but if the jury did not believe Jones, no corroboration would have produced a guilty verdict.

With trial counsel's effective cross-examination, the impact of the CSLI evidence was minimized, and in fact was not inconsistent with (and was perhaps helpful) to Shepherd's theory of defense. There was other evidence of corroboration, even if the CSLI evidence had not been accepted into evidence. Surveillance video and call detail records, including Shepherd's call to Jones minutes before the killing and his repeated attempts to contact Jones in the immediate aftermath of the killing, were strong corroboration of Jones' testimony about Shepherd's role in the planned robbery.

B. Preparation Issues

Shepherd makes a series of challenges to the preparation of his trial counsel for trial, and her alleged failure fully and competently to consult with him and prepare him and suggested witnesses for trial. The court rules that Shepherd's affidavit does

not establish either the deficient performance prong or the prejudice prong of the ineffectiveness standard. Shepherd admits to three jail visits and several courthouse consultations, as well as numerous telephone calls with his trial counsel. His affidavit is an attempt to blame someone besides himself for his conviction and life sentence. It is not supported by an affidavit of trial counsel. Shepherd does not say he was unaware of anticipated video and phone evidence. In fact he received the phone evidence several days before trial.

Shepherd also admits that the decision not to testify was his and his alone, but claims it was caused by his trial counsel's failings. The court does not credit any suggestion or contention that his decision not to testify was his counsel's fault. See *Commonwealth* v. *Grant*, 426 Mass. 667, 673 (1998) (judge may reject self-serving, conclusory affidavits as incredible). No witness (to the court's knowledge) identified him from the Carleton Street video, although he claims he could "clearly be seen in the driveway." That may be so to his eye, but the court does not understand that any witness identified him in the video. Certainly, the video was consistent with Shepherd being present with Tyler shortly before the killing, and permitted reasonable argument to that effect, but apparently no witness could "clearly" see Shepherd in the video.

Shepherd certainly knew about the video and the Commonwealth's intended

use of the video long before trial. The court is at a loss to understand how viewing the video before trial would have changed any strategic decisions at trial. The video was the video, and it was properly admitted into evidence. To the degree it was devastating evidence, viewing it before trial would not have made it inadmissible or less devastating. There was nothing Shepherd could have done, or could have done differently, if he had viewed the video before trial. This court specifically disbelieves any suggestion that the video, and his failure to view the video before trial, or any other alleged failings of counsel, influenced the decision he made not to testify.

The remaining claims of ineffectiveness require little discussion beyond that advanced by the Commonwealth in its opposition memorandum, which the court adopts and relies upon. There is no factual support for the claims. No potential witnesses have submitted affidavits. One of the witnesses could not be found by the Commonwealth, and Shepherd has not established that she was available and willing to testify in his case-in-defense. In any event, minor further impeachment of Jones, even if available, would not support the grant of a new trial. Shepherd's subjective and speculative belief that better preparation of one defense witness would have assisted his case is just that: subjective and speculative.

ORDER

Shepherd's motion for new trial [D. 57] is **DENIED** without a hearing.

Timothy Q. Feeley
Associate Justice of the Superior Court

October 1, 2019

78

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 1477CR01550

COMMONWEALTH

vs.

RASHAD SHEPHERD

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S SECOND MOTION FOR NEW TRIAL (Paper No. 72)

On April 15, 2016, a jury convicted the defendant, Rashad Shepherd, of first-degree murder.[1] On October 1, 2019, the defendant's first motion for a new trial was denied.[2] This matter is now before me on the defendant's second motion for new trial, filed on September 23, 2020 (Docket No. 72). The Commonwealth opposes this motion. In his motion, the defendant argues that his counsel was ineffective based on a purported failure to request and use jail calls to challenge a trial witness's credibility. On April 22, 2021, I presided over a non-evidentiary hearing on this motion. After reviewing the record and considering the arguments of counsel, this motion is **DENIED**.

BACKGROUND

At trial, the Commonwealth presented evidence from which the jury could have found the following.

The victim, Wilner Parisse, sold marijuana from his apartment. Monique Jones was both a customer and frequent sexual partner of Parisse. Jones was also friends with both the defendant and a fourth individual, Terrence Tyler.

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[1]He was acquitted of two additional counts.
[2]The defendant's direct appeal is docketed in the Supreme Judicial Court (docket no. SJC-12405) but is stayed pending resolution of the present motion for new trial.

In the summer of 2014, Tyler convinced Jones to help him and the defendant rob Parisse. Jones agreed to engage with Parisse sexually while the defendant and Tyler would enter the apartment and rob it.

The trio put their plan into action. During the robbery, a fight between Tyler and the victim ensued. Jones ran to the bathroom. She heard gunshots and emerged to find Parisse not moving. She concluded he was deceased and fled the scene. A neighbor called 911. Medical personnel arrived and pronounced the victim dead.

A day later, Jones learned police had seized her cell phone from the apartment. Jones went to the police and falsely asserted she had been in bed with the victim when three masked men entered the apartment. She did not think the police found her credible and subsequently decided to cooperate with the investigation. She entered into a cooperation agreement in which, in exchange for her testimony, the Commonwealth would recommend a five-to-seven-year sentence to resolve charges against her for the incident. On October 21, 2014, police arrested the defendant.

The present motion for new trial is premised on trial counsel's alleged failure to obtain and introduce jail calls from Jones' boyfriend, Joshua Dixon. Dixon's incarceration arose after police responded to Jones' residence on July 6, 2014, leading to gun and drug charges against Dixon. While Dixon was in custody, and a day before the Parisse murder, he and Jones spoke about his bail. He inquired about ensuring he had bail money and she assured him she would acquire it. In later calls, Jones discussed her own case, her own financial needs, and her inability to provide Dixon with bail money. In other calls, Dixon complained to his mother that Jones was unappreciative and that he had "stayed and took the hit" when police arrived.

RULINGS OF LAW

In the present motion, the defendant argues that he is entitled to a new trial because he was deprived of effective assistance of counsel based on a purported failure to obtain jail calls that he asserts could have more effectively impeached Jones' credibility. This argument is unavailing.[3]

I. Legal Standard for New Trial Motion

"The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b). "Judges are to apply the standard set forth in rule 30(b) rigorously and should only grant such a motion if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth." Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635-636 (2001). A judge has discretion to deny a motion for a new trial without holding an evidentiary hearing. See Commonwealth v. Upton, 484 Mass. 155, 161-162 (2020).

I. Legal Standard for Ineffective Assistance of Counsel

"A defendant is denied his constitutional right to the effective assistance of counsel where the conduct of his attorney falls 'measurably below that which might be expected from an ordinary fallible lawyer,' and thereby 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" Commonwealth v. Glover, 459 Mass. 836, 842 (2011), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "The burden is on the defendant to meet both prongs of the test." Commonwealth v. Peloquin, 437 Mass. 204, 210 (2002).

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[3]The defendant also argues his trial counsel was ineffective for failing to elicit certain evidence from Dixon in the form of live testimony at trial. This argument warrants little discussion. For the reasons set forth on pages 52 through 58 of the Commonwealth's opposition (Docket No. 75), such an approach would have proven unsuccessful. Among other reasons, Dixon would have perjured himself and been impeached with inconsistent statements were he to have testified as the defendant suggests he would have.

"[W]ith respect to the second prong of the test, the Defendant must show that 'better work might have accomplished something material for the defense.'" Commonwealth v. Phinney, 446 Mass. 155, 162 (2006) (internal citation omitted), quoting Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977). Stated differently, a court must have "a serious doubt whether the jury verdict would have been the same had the defense been presented." Commonwealth v. Millien, 474 Mass. 417, 432 (2016).

II. Application

The defendant has argued that trial counsel rendered ineffective assistance by failing to request jail calls which he asserts could have been dispositive in the jury's assessment of the evidence. Even assuming counsel's conduct fell measurably below that of an ordinarily fallible lawyer - which is far from clear - the argument fails because the defendant cannot establish that this evidence, if had been introduced, would reasonably have influenced the jury's verdict. See Commonwealth v. Tate, 486 Mass. 663, 669 (2021).

"A defendant is entitled to reasonable cross-examination of a witness for the purpose of showing bias, but failure to use particular methods of impeachment at trial rarely rises to the level of ineffective assistance of counsel." Commonwealth v. Goitia, 480 Mass. 763, 770 (2018) (internal quotations and citations omitted). This case is no exception.

In this case, the jury was apprised of the facts that Jones (1) had lied to police, (2) needed money at the time of the robbery, and (3) had an incentive to testify against Shepherd due to her cooperation agreement. The defendant's trial counsel cross-examined her at length and highlighted her credibility problems, motive to fabricate, and financial situation to the jury. (IV/29-33, 38-39, 120-136). Trial counsel again highlighted Jones' credibility problems and financial motivation during closing argument. (VII/14-15.) Thus, using the Dixon jail calls to emphasize Jones' incentive to pay for Dixon's bail with robbery proceeds would have merely

been cumulative of evidence already used by the defense and presented to the jury. See Commonwealth v. Valentin, 470 Mass. 186, 191 (2014) (counsel not ineffective in failing to cross-examine witness concerning particular statement where counsel otherwise "conducted a thorough impeachment" of witness through cross-examination); see also Commonwealth v. Jenkins, 458 Mass. 791, 805 (2011) ("Failure to impeach a witness does not, standing alone, amount to ineffective assistance."); Commonwealth v. Fisher, 433 Mass. 340, 357 (2001) ("absent counsel's failure to pursue some obviously powerful form of impeachment available at trial, it is speculative to conclude that a different approach to impeachment would likely have affected the jury's conclusion.").

Regardless of who ultimately shot the victim, Jones, Tyler, and the defendant could also have been found guilty of murder under a felony-murder theory. The defense thus appropriately focused on eliciting doubt that Shepherd was present during the robbery. The missing jail calls would not have supported this objective. These calls would not have revealed any specific reason Jones would have intentionally and falsely *identified the defendant* as a participant.

Additionally, the Court finds that there is no reason to conduct an evidentiary hearing in this case. Simply put, nothing presented in the defendant's motion required such a hearing to inform the Court's decision. See Commonwealth v. Barry, 481 Mass. 388, 401 (2019) (evidentiary hearing unnecessary where submissions sufficient to allow informed decision); see also Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 394-395 (2012), and cases cited.

The Court is satisfied the absence of the jail calls did not affect the verdict. Accordingly, the defendant has not met his burden to prove ineffectiveness.

ORDER

For the foregoing reasons, the defendant's Second Motion for a New Trial is **DENIED**.

Kathleen M. McCarthy-Neyman
Justice of the Superior Court

June 30, 2021

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 1477CR01550

COMMONWEALTH

vs.

RASHAD SHEPHERD

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S THIRD MOTION FOR A NEW TRIAL

On April 15, 2016, a jury convicted the defendant, Rashad Shepherd, of first-degree murder.[1] The defendant's first and second motions for a new trial were denied. This matter is now before this Court on the defendant's third motion for a new trial, filed on April 1, 2022 (Paper # 85).[2] The Commonwealth opposes (Paper # 89). In his motion, the defendant argues that justice was not done for the reasons addressed below. After reviewing the record and considering the arguments of counsel, this motion is **DENIED**.

BACKGROUND

As previously stated in this Court's denial of the defendant's second motion for new trial, at trial, the Commonwealth presented evidence from which the jury could have found the following.

The victim, Wilner Parisse, sold marijuana from his apartment. Monique Jones was both a customer and frequent sexual partner of Parisse. Jones was friends with both the defendant and a fourth individual, Terrence Tyler.

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[1]He was acquitted of two additional counts.

[2]The defendant's direct appeal is docketed in the Supreme Judicial Court (docket no. SJC-12405) but is stayed pending resolution of the present motion for new trial.

In the summer of 2014, Tyler convinced Jones to help him and the defendant rob Parisse. Jones agreed to engage with Parisse sexually while the defendant and Tyler would enter the apartment and rob it.

The trio put their plan into action. During the robbery, a fight between Tyler and the victim ensued. Jones ran to the bathroom. She heard gunshots and emerged to find Parisse not moving. She concluded he was deceased and fled the scene. A neighbor called 911. Medical personnel arrived and pronounced the victim dead.

A day later, Jones learned police had seized her cell phone from the apartment. Jones went to the police and falsely asserted she had been in bed with the victim when three masked men entered the apartment. She did not think the police found her credible and subsequently decided to cooperate with the investigation. She entered into a cooperation agreement in which, in exchange for her testimony, the Commonwealth would recommend a five-to-seven-year sentence to resolve charges against her for the incident. On October 21, 2014, police arrested the defendant.

RULINGS OF LAW

In the present motion, the defendant argues that he is entitled to a new trial for three reasons: (1) he is entitled to the benefit of retroactive application of Commonwealth v. Brown, 477 Mass. 805 (2017); (2) new evidence following a 2021 arrest of Jones would have influenced the jury deliberations; and (3) justice was not done because of a "confluence of factors." These arguments are unavailing.

I. Legal Standard for New Trial Motion

"The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b). "Judges are to apply the standard set forth in rule 30(b) rigorously and should only grant such a motion if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth."

Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635-636 (2001). A judge has discretion to deny a motion for a new trial without holding an evidentiary hearing. See Commonwealth v. Upton, 484 Mass. 155, 161-162 (2020).

II. Application

1. *Application of Commonwealth v. Brown*

While both parties spend numerous pages addressing whether Commonwealth v. Brown, 477 Mass. 805 (2017), should be applied retroactively, the answer is now straightforward. In July 2022, the Supreme Judicial Court clarified that Brown's holding abolishing the felony-murder rule is prospective only. See Commonwealth v. Sun, 490 Mass. 196, 224 (2022) Thus, the defendant's Brown argument is without merit.

While the defendant raises important points about the role of race in the justice system[3], this Court has no authority to allow a challenge to binding precedent. See Commonwealth v. Vasquez, 456 Mass. 350, 356 (2010) (Supreme Judicial Court's "decisions on all questions of law are conclusive on all Massachusetts trial courts"); see also State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (lower court must adhere to precedent despite question of its continuing vitality as it is Supreme Court's exclusive prerogative to overrule one of its precedents).[4]

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[3] Though not determinative of the defendant's motion, neither this Court, the Commonwealth, nor the Supreme Judicial Court questions that racial disparities continue to plague our criminal justice system. See, e.g., Commonwealth v. Williams, 481 Mass. 443, 451 & n.6 (2019); Commonwealth v. Jackson, 486 Mass. 763, 780 n. 27 (2021); Commonwealth v. Warren, 475 Mass. 530, 539-540 (2016); Commonwealth v. Long, 485 Mass. 711, 716, 723-724 (2020); id. at 740 (Budd, J., concurring); Commonwealth v. Sweeting-Bailey, 488 Mass. 741, 754-755 (2021); Commonwealth v. Rossetti, 489 Mass. 589, 598 n. 15, 604 n. 25 (2022); see also id. at 621 (Budd, C.J., concurring) (sharing concern "that mandatory minimum sentences risk unduly harsh penalties for any individual and contribute to the unjustly disproportionate rate of incarceration for Black and brown folks. But this concern no more enables this court to presume ambiguity where sentencing language is clear than it enables us to wholly ignore clear sentencing language."); Paper #89 pages 45-46, 50-51 (Commonwealth acknowledging such concerns).

[4] There is also merit to the Commonwealth's position that, given this murder case has a pending direct appeal, automatic plenary appellate review by the Supreme Judicial Court renders consideration of this argument in the trial court unnecessary. See Commonwealth v. Rosado, 408 Mass. 561, 568 (1990) (where any "ground asserted for a new trial [is] one available for appellate consideration on the record ... judge had no obligation to hear evidence, to make findings of fact, or to rule on those issues"). Should the Supreme Judicial Court seek further development of the record, it has the authority to remand. See Commonwealth v. Watt, 484 Mass. 742, 756 (2020).

2. Newly Discovered Evidence

The defendant next argues Jones' firearm-related charges in response to a November 2021 Boston Police investigation and the subsequent judicial finding of her dangerousness constitute newly discovered evidence for the purpose of a post-conviction motion. That conclusion is erroneous.

This argument fails for the simple reason that "events … occur[ing] posttrial … do not qualify as newly discovered evidence." Commonwealth v. Hernandez, 481 Mass. 189, 196 n.12 (2019); see id. (cases cited); contrast, e.g., Commonwealth v. Lessieur, 488 Mass. 620, 627-628 (2021) (new DNA testing of trial evidence qualifies). Moreover, even if this evidence could hypothetically have been offered to a jury, it would not have affected the verdict for substantially the same reasons the evidence referenced in the defendant's second motion for new trial would not have: the evidence undermining Jones' credibility was cumulative and if the jury found both Shepherd and Jones were present (as they apparently did), it did not matter who the shooter was. See denial of second motion for new trial, Paper # 78, citing, e.g., Commonwealth v. Fisher, 433 Mass. 340, 357 (2001) ("absent counsel's failure to pursue some obviously powerful form of impeachment available at trial, it is speculative to conclude that a different approach to impeachment would likely have affected the jury's conclusion.").[5]

3. "Confluence of Factors" Analysis

The defendant's final claim - that justice was not done due to a "confluence of factors" - is nothing more than a recasting of the ineffective assistance of counsel claim rejected in this Court's prior denial combined with the purported new evidence claim as to Jones' dangerousness.

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[5] That the jury acquitted the defendant of the other two charges at trial tells us nothing meaningful as a matter of law for two reasons recognized in precedent: (1) "each charge represents a separate indictment that may stand or fall on its own" and (2) "there are any number of factors having nothing to do with the defendant's actual guilt that can drive an acquittal." See Commonwealth v. Medeiros, 456 Mass. 52, 57–59 (2010) (internal quotations omitted), and cases cited.

It is true, as the Supreme Judicial Court teaches in Commonwealth v. Rosario, that "in rare cases, in order to fulfill the obligation incorporated in Mass. R. Crim. P. 30 (b) to determine whether 'justice may not have been done,' a trial judge may need to look beyond the specific, individual reasons for granting a new trial to consider how a number of factors act in concert to cause a substantial risk of a miscarriage of justice and therefore warrant the granting of a new trial." 477 Mass. 69, 77–78 (2017). This matter, however, is not one of those "rare cases." See id. at 77. While courts should reconsider previously-presented arguments in light of related newer ones, the factors nevertheless must still add up to a substantial risk of a miscarriage of justice. See id. at 77-78. Here, they do not. See Lessieur, 488 Mass. at 632.

Indeed, although Rosario contemplates such "rare cases," it also reminds us that "the principle of finality of convictions remains a valuable and important concept in our jurisprudence, as does the principle that a defendant is entitled to a fair trial but not a perfect one." Id. at 77 (internal quotations and citation omitted). Given that Jones' lack of credibility was presented to the jury and that there was no requirement that the defendant rather than Jones be the shooter to sustain a conviction, this case does not warrant a departure from those principles.

In sum, the Court is not persuaded that any of the supposed reasons to grant relief presented in the instant motion justify a new trial or a further hearing. Accordingly, the defendant's motion must be denied.

ORDER

For the foregoing reasons, the defendant's Third Motion for a New Trial is **DENIED**.

Kathleen M. McCarthy-Neyman
Justice of the Superior Court

August 30, 2022

RULE 16(k) CERTIFICATION

I, Kathryn Leary Janssen, counsel for the Commonwealth, hereby certify that this brief complies with the rules of Court that pertain to the filing of with the rule of the Court pertaining to the filing of briefs and appendices except for the page-limit requirement which the Commonwealth has sought leave to file an overlong brief.

The brief uses monospaced Courier New font, in 12 point, which contains 10 characters per inch. The number of non-excluded pages is 95.

Date: September 13, 2023 /s/Kathryn Leary Janssen
Kathryn Leary Janssen
Assistant District Attorney
BBO No. 690538

CERTIFICATE OF SERVICE

I, Kathryn Leary Janssen, hereby certify that on September 13, 2023, I caused the within document to be served electronically upon Claudia Leis Bolgen, Esq. at claudialb@bolgenlaw.com, counsel for the defendant.

/s/Kathryn Leary Janssen
Kathryn Leary Janssen
Assistant District Attorney
BBO No. 690538