COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

ESSEX COUNTY No. SJC-12405

COMMONWEALTH,
Appellee

v.

RASHAD A. SHEPHERD,
Appellant

On Appeal From a Judgment of Murder in the First Degree
Entered in the
Essex Division of the Superior Court Department

BRIEF OF THE APPELLANT RASHAD A. SHEPHERD

Claudia Leis Bolgen
BBO #556866
Bolgen & Bolgen
110 Winn Street, Suite 204
Woburn, MA 01801
(781) 938-5819
claudialb@bolgenlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

ISSUES PRESENTED

1. Whether the staggering racial disparity in persons convicted of felony murder prior to Commonwealth v. Brown should persuade this Court to apply that case to Mr. Shepherd, or to exercise its authority under G.L. c. 278, §33E to order a new trial or to reduce his conviction to murder in the second degree?

2. Whether jury instruction errors combined with the pervasive bias against Mr. Shepherd displayed by the trial judge created a substantial likelihood of a miscarriage of justice?

3. Whether trial counsel provided ineffective assistance resulting in a substantial likelihood of a miscarriage of justice by:

(1) failing to retain a cell phone expert to either advise her pre-trial or to testify at trial;

(2) failing to object to the testimony of an unqualified records custodian about the technical aspects of cell towers;

(3) failing to object to cell tower exhibits that did not qualify for the business records exception to the hearsay rule;

(4) failing to obtain an available jury instruction on second-degree felony murder;

(5) promising in her opening statement that phone records would show Mr. Shepherd wasn't involved in this incident, but failing to produce such evidence;

(6) not adequately preparing Mr. Shepherd's testimony, not providing him with important Commonwealth discovery before trial so that he could make informed choices about his defense, not calling and adequately preparing important defense witnesses; and

(7) with respect to the Commonwealth's star witness Monique Jones, failing to show Jones's motive to lie about Mr. Shepherd's involvement using an available police report and recorded jail calls provided in pre-trial discovery.

STATEMENT OF THE CASE

Rashad Shepherd was indicted for the crimes of murder (G.L. c. 265, § 1), home invasion (G.L. c. 265, § 18C) and armed assault with intent to rob (G.L. c. 265, § 18(b)) as a result of the shooting death of Wilner Parisse on August 16, 2014. R.I:22-27.[1] A co-defendant,

[1]"R#:#" is the Record Appendix volume and page. "IRA:#" is the Impounded Record Appendix. "SRA:#" is the Sealed Record Appendix. "T#:#" is the transcript volume and page. "Add:#" refers to the Addendum.

Terrence Tyler, was tried separately in March 2016, one month prior to Shepherd's trial. R.I:191.

Trial was held on April 4-15, 2016 (Welch, J.). R.I:11. The jury returned a guilty verdict of first-degree murder on the theory of felony murder, with attempted unarmed robbery as the predicate. R.I:28. The jury acquitted Shepherd of home invasion and armed assault with intent to rob. R1:29-30. Shepherd filed a timely notice of appeal. R.I:16.

On March 15, 2019, Shepherd filed a Motion for New Trial. R.I:17. On October 1, 2019, the motion was denied (Feeley, J.). R.I:17-18. On September 10, 2020, Shepherd filed a Second Motion for New Trial. R.I:299. On July 1, 2021, the motion was denied (McCarthy-Neyman, J.). R.I:19. On February 7, 2022, Shepherd filed a Third Motion for New Trial (as corrected February 15, 2022). R.II:132. On August 30, 2022, the motion was denied (McCarthy-Neyman, J.). R.I:20. Shepherd filed timely notices of appeal from each of these denials and the entire case is now before this Court. R.I:18-20.

STATEMENT OF THE FACTS

A. Trial.

Just before 1:45 AM on August 16, 2014, the Lynn Police received a dispatch to the area of 45 Grant Street, Lynn, where Parisse, a drug dealer, was found deceased from a single gunshot wound. T2:215, 219, 221; T4:14-16. Officers found one cartridge casing in the rear hallway leading into the kitchen but couldn't tell by the location of the casing where the gun was fired. T4:163; T5:10-11.

Officers found a cell phone on Parisse's bed that belonged to Monique Jones. T3:17, 127. Jones testified against both Tyler and Shepherd at their separate trials in exchange for prosecutors allowing her to plead to lesser charges resulting in a five to seven year prison sentence. T3:68.

The evening of August 15, 2014, Jones, Shanena McMillan, Tyler and Shepherd went to the China Bowl restaurant in Lynn. T3:88. Jones testified that while she and Shepherd were in the car, Tyler brought up with her the subject of robbing Parisse. T3:90. Jones testified that she and Tyler made a plan for Jones to "fool around" with Parisse in order to distract him while leaving the door open to allow Tyler and Shepherd to enter. T3:92-93. Shepherd was present but did not participate in this discussion. T3:94.

China Bowl surveillance video showed Shepherd, Tyler and Jones at the restaurant several hours prior to the shooting. T3:151-154. Jones testified that after the China Bowl closed, she drove to Parisse's apartment with McMillan, Tyler and Shepherd as passengers. T3:97-98. Jones then left the car, entered Parisse's apartment and left the door unlocked behind her. T3:101. After some time Jones left Parisse's room, went to the bathroom and called Tyler. T3:102-103. When Jones returned to Parisse's room, he closed the door and locked it. T3:103. She then texted Tyler and told him to wait while she tried to get the door unlocked. T3:103.

After Jones sent the text message to Tyler, she asked Parisse to get her something to drink. T3:106. When Parisse opened the bedroom door he came face-to-face with Tyler and they started fighting. T3:107-108. Jones stood in the doorway of Parisse's bedroom and watched Tyler and Parisse fight on the floor of the kitchen, while Shepherd stood by the back door to the kitchen. T3:108-109. Jones saw Parisse bite Tyler on the finger, and then heard Tyler screaming to Shepherd for help. T3:110-111.

Jones grabbed her clothes and pocketbook and ran into the bathroom. T3:111. While in the bathroom, Jones heard one or two gunshots. T3:112. She did not see who pulled the trigger. T3:126.

She came out of the bathroom to find Parisse bleeding on the floor. T3:112. Shepherd was not in the apartment and Tyler was just going out the back door. T3:112. Jones then grabbed her stuff and "got out of there" leaving her phone behind on Parisse's bed. T3:113. Jones returned to her car "screaming and yelling", kicked McMillan out of the car and started to drive away. T3:114. She saw Tyler come out of the bushes and he came into her car. T3:114-115. Jones did not see Shepherd again that night. T3:116.

Tyler was bleeding from his finger. T3:115. Blood matching Tyler's DNA profile was found in Jones's car. T5:24-25, 27; T6:25-26.

A surveillance camera on nearby Carlton Street recorded video of two persons resembling Tyler and Shepherd standing on the driveway and sidewalk of that home, and then walking together across Carlton Street towards Grant Street at approximately 1:30 AM prior to the shooting. T5:81-82; T7:40-45.

The Defense – Jones was a Liar and the Real Shooter

Defense counsel stated in her opening statement that Jones and Tyler went into the apartment with someone other than Shepherd. T2:141. Counsel continued, "How are you going to know that? Because you're going to get evidence by way of phone records." T2:141. However, no defense cell phone expert testified.

Defense counsel argued in closing that Jones lied and was a "coldhearted killer" who planned to rob Parisse with Tyler in order to get money and product for her drug business. T7:12, 14-15, 33. But during cross-examination Jones denied being a drug dealer or needing money. T4:40, 52-53.

Defense witness James Prushinski testified that at the time of the shooting, his back porch overlooked the back of 45 Grant Street. T6:94-95. He was awakened during the early morning hours of August 16, 2014 by the noise of an argument going on. T6:94-95. Prushinski went to his back porch and heard a male voice and then a female voice arguing. T6:96, 99. Then Prushinski heard one or maybe two gunshots. T6:100. A male voice said "You shot me, you shot me. Like he was really shocked." T6:101. Prushinski did not hear any other voices after he heard that. T6:101. Then Prushinski saw a female

come down the back stairs and run out in the courtyard. T6:101. Prushinski couldn't really see the face. T6:101. Prushinski stated that the female was running out towards Grant Street. T6:103. Prushinski then heard a car start, then a door slam and then it drove off. T6:104.

Cellphone Evidence at Trial

Jones testified that the call she made to Tyler from the bathroom was at 1:32:58 AM and there was a missed call from Tyler at 1:39:30 AM. T3:132. Jones texted Tyler at 1:36:58 AM telling him to wait while she got Parisse to unlock the bedroom door. T3:142-143. Jones testified to a missed call from Shepherd at 1:45:47 AM, another one at 1:51:10 AM, and another missed call from Shepherd at 2:07:51 AM. T3:132-133.

At trial, the prosecution called two cell phone witnesses – records custodian Ricardo Leal, T6:27-28, and Albert Kardoos who prepared a map purporting to show that a call from Shepherd's cell phone was made at 1:44:40 AM from inside a 120 degree pie-shaped area on a map, which area included the scene of the shooting. T6:59,62-64; R.I:188. No defense expert testified.

B. <u>First Motion for New Trial</u>

Joseph Kennedy, a cell tower antenna systems and cell site location information ("CSLI") expert, opined that the CSLI directionality and location information presented by the Commonwealth's trial witnesses had no scientific validity. R.I:91-97. In particular, Exhibits 93 and 94 were not accurate representations of the area in which the cell phone associated with Shepherd was located at the times in question, that the actual area was much larger and couldn't be represented by 120 degree pie-shaped lines, and that the testimony of Leal and Kardoos did not accurately reflect how cell phone calls connect to networks of cell phone towers, as calls connect to the clearest and most cost-effective tower, not the closest open tower or the one with the strongest signal. R.I:92.

Shepherd submitted an affidavit detailing trial counsel's lack of visits, not providing him with pre-trial discovery and not preparing his testimony for trial. R.I:98-104. This affidavit detailed the witnesses that he asked trial counsel to call which she did not and trial counsel's deficient preparation of the one witness she did call. R.I:99-100. As a result of these mistakes, although Shepherd wanted to tell his story, he did not testify because he wasn't prepared and because he was so

distraught from hearing and seeing all the evidence at trial that he had never known about before trial. R.I:101. Shepherd's testimony at trial would have been that he never set foot on any part of the property or building at 45 Grant Street, Lynn, MA and had absolutely nothing to do with the events that caused the death of Parisse. R.I:101.

C. Second Motion for New Trial

The month prior to the Parisse shooting, Lynn Police found a gun and large quantity of crack cocaine in Jones's apartment. R.I:317-318, 542-555. There was evidence from recorded jail calls available to trial counsel pre-trial that the gun and drugs were actually Jones's property, not that of her then-boyfriend Joshua Dixon, and that **the day of the shooting** Jones needed $5500 to post Dixon's bail in exchange for him taking her charges, but had only $1150. R.I:311-316, 391, 410. Trial counsel did not use any of this information at trial. R.I:321-333.

D. Third Motion for New Trial

Shepherd submitted extensive racial data showing that four out of five people serving life without parole ("LWOP") solely on account of a pre-Brown felony murder conviction (**82.40%**) are people of color and six out of ten (**59.25%**) are Black. R.II:148-153, 188-191, 501-503. This

data is not contested by the Commonwealth and is discussed at Argument 1.

Jones was released from custody on February 22, 2019. IRA:3. On November 29, 2021, Boston Police arrested Jones for the unlicensed possession of a large capacity .45 caliber firearm with a defaced serial number and an illegal suppressor barrel. R.II:254-255. The firearm was loaded with one hollow-point bullet in the chamber and twelve hollow-point bullets in the extended magazine. R.II:255. Jones also had oxycontin and $3628.20 in cash. R.II:221, 255.

SUMMARY OF THE ARGUMENT

This Court should extend the holding in Commonwealth v. Brown, to Shepherd or provide him relief under G.L. c. 278, § 33E because Black persons and persons of color have been disproportionately convicted of felony murder and not providing Shepherd relief from his felony murder conviction and life without parole sentence unjustly perpetuates systemic racism. pp. 21-39.

The trial judge committed prejudicial error by refusing to grant a mistrial when his jury instructions blatantly propped up the credibility of the Commonwealth's star witness. pp. 39-45. A substantial

likelihood of a miscarriage of justice was created by the trial judge's biased conduct of the trial and his constant questioning of witnesses. pp. 45-62.

Trial counsel provided ineffective assistance by her failure to appropriately challenge the Commonwealth's CSLI evidence, pp. 62-72, by failing to obtain an available jury instruction on second-degree felony murder, pp. 72-74, by promising evidence in her opening statement but failing to produce such evidence, pp. 74-77, by not adequately preparing Mr. Shepherd's testimony, not providing him with important Commonwealth discovery before trial so that he could make informed choices about his defense, not calling and adequately preparing important defense witnesses, pp. 77-81, and by failing to use available evidence to show Jones's motive to lie about Mr. Shepherd's involvement. pp. 81-84.

ARGUMENT

1. This Court should apply *Commonwealth v. Brown* retroactively or should exercise its authority under G.L. c. 278, §33E to order a new trial or reduce Mr. Shepherd's conviction, because Black persons and persons of color make up 82% of persons convicted of felony murder and not providing him relief from his conviction and life without parole sentence unjustly perpetuates systemic racism.

In Commonwealth v. Brown, 477 Mass. 805 (2017) cert. denied, 139 S. Ct. 54 (2018), decided after the trial in this matter but during the pendency of Shepherd's direct appeal, this Court prospectively narrowed the scope of felony murder liability to require proof that a defendant acted with one of the three prongs of malice. Id. at 807-808, 825. This Court should nevertheless apply Brown to this case.

Not applying the rule of Commonwealth v. Brown retroactively to persons serving LWOP due solely to a first-degree felony murder conviction unfairly and unjustly perpetuates systemic racial injustice by disproportionately impacting Black people and people of color, thereby violating state constitutional equal protection guarantees. Also, justice has not been done by sentencing Shepherd, who is Black, to death-by-incarceration upon proof which this Court has found unfair and unjust for all persons tried after September 20, 2017. Pursuant to G.L. c. 278, § 33E this Court should grant Shepherd a new trial at which the Commonwealth must prove the element of malice, or reduce the verdict to second-degree murder.

1.1 The issue of felony murder malice was preserved at trial and a finding of malice by the jury cannot be inferred from the verdict.

At this April 2016 trial, defense counsel raised the issue of the intent to commit a felony "in terms of substitution of malice and malice" and cited to Commonwealth v. Tejeda, 473 Mass. 269 (2015). T6:122, T7:3. The trial judge rejected Tejeda as being relevant to this case, noted that the Tejeda Court evidenced a dislike for the felony murder rule, but "they haven't changed the common law yet." T7:4. Trial counsel thus preserved the issue of whether the felony murder rule should substitute for proof of malice in this case.

This Court cannot infer a malice finding from the jury's verdicts. Parisse was shot to death, but this jury declined to find that Shepherd was armed with a gun. The jury expressly acquitted Shepherd of armed home invasion and armed assault with intent to rob. R.I:29-30. The jury declined to convict Shepherd of felony murder for the predicate felonies of attempted armed robbery and home invasion. R.I:28. Shepherd's only conviction is for felony murder predicated on attempted **unarmed** robbery.[2] R.I:28. Jury instructions gave no option for a second-degree murder conviction.

[2]Tyler, in his separate trial, was also convicted of felony murder predicated on attempted unarmed robbery. R.I:191.

1.2 The undisputed data shows a horrific racial disparity in pre-*Brown* felony murder convictions.

The Commonwealth does not dispute the following data, compiled as of December 1, 2021:

	All DOC Prisoners Serving LWOP for Murder	Persons Serving LWOP - 1st Degree Felony-Murder	DOC Prisoners Serving LWOP for Malice Murder
Black	356	(64)	292
Hispanic	186	(21)	165
Asian	28	(4)	24
Native American	13	0	13
Other	12	0	12
White	411	(19)	392
Total	**1,006**	**(108)**	**898**

R.II:148-153, 188-191, 502-503.[3] The motion judge denied relief on the basis of lack of authority and because this Court would decide the issue

[3] After a review of all reported SJC felony murder cases from 1980 to present, counsel identified 130 named persons as having only a pre-Commonwealth v. Brown first-degree felony murder conviction. R.II:176-177, 188-191. Of these persons, 22 no longer required relief from their first-degree felony murder conviction because they died or had their sentences reduced or convictions vacated. R.II:151. For details on data collection see R.II:148-153, 176-178.

in this appeal.[4] R.II:571. See Commonwealth v. Dowds, 483 Mass. 498, 512 (2019).

Of the 108 persons serving LWOP for felony murder, 64 are Black, 21 are Hispanic, 4 are Asian and 19 are White. R.II:503. Black people are **59.25%** of persons serving felony murder LWOP, and White people are **17.59%** of this group. Persons of color make up **82.40%** of persons serving LWOP on account of a felony murder conviction.

The parties agree there are 898 persons serving LWOP for malice murder, including post-Brown felony murder. R.II:437, 503. Of these 898 persons convicted of a form of malice murder, 292 persons are Black and 392 are White. R.II:153, 437, 503. Thus, Black people are **32.51%** of persons serving malice murder LWOP and White people are **43.65%** of this group.

Racial demographics across felony murder and malice murder LWOP sentences show stark overrepresentation of Black people:

- Black people are **59.25%** of people serving LWOP on a conviction of first-degree felony murder compared to just **17.59%** who are

[4]The motion judge invited this Court to remand the issue should further development of the record be necessary. R.II:571.

White. More than *three times* as many Black people (64) are sentenced to first-degree felony murder as compared to White people (19).

- By contrast, Black people are **32.51%** of people incarcerated for LWOP malice murder sentences compared to **43.65%** who are White. Roughly 1.34 times as many White people (392) are sentenced to first-degree malice murder as compared to Black people (292).

As compared to malice murder sentences, Black people are even more overrepresented in felony murder convictions than people of color as a whole.

- Black people are **32.51%** of persons serving LWOP malice murder sentences, but are **59.25%** of persons serving felony murder LWOP sentences. Black people are less than one-third of those serving LWOP malice murder sentences, but more than half of those serving felony murder LWOP sentences.
- People of color grouped together make up **82.40%** of persons incarcerated for felony murder LWOP, but **56.34%** of persons incarcerated for LWOP malice murder.

- For people of color grouped together, the difference between the two figures (82.40% of felony murder LWOP v. 56.34% of malice murder LWOP) is **146% (a 46% increase)**; people of color are roughly 1.5 times overrepresented in the LWOP felony murder population as compared to the demographic percentage breakdown of the LWOP malice murder population.
- For Black people, the difference between the two percentages (59.25% of felony murder LWOP v. 32.51% of malice murder LWOP) is **182% (an 82% increase**); Black people are more than 1.8 times overrepresented in the LWOP felony murder population compared to the demographic percentage breakdown of the LWOP malice murder population.

Out of every racial group, Black people are most likely to be serving LWOP due to felony murder, as opposed to malice murder:

- Focusing only on Black people allows for a within-race analysis of the predominance of felony murder convictions among people serving LWOP sentences; 18% of Black people sentenced to die in prison because of a murder conviction (nearly 1 in 5) are there due

to a felony murder conviction, compared to 4.6% of White people, 11.3% of Hispanic people and 14.3% of Asian people.

- The rate of felony murder convictions among people serving LWOP for murder **is higher for Black people than for any other discrete racial or ethnic group**.
- The rate of felony murder convictions among people serving LWOP **is substantially lower for White people than for any other discrete racial or ethnic group**.

As of May 1, 2022, the Massachusetts Department of Correction ("DOC") reported that of all criminally sentenced persons:

- **40%** were White (2,238 out of 5,582);
- **29.9%** were Black (1,671 out of 5,582);
- **26.9%** were Hispanic (1,505 out of 5,582);
- **1.5%** were Asian or Pacific Islander (89 out of 5,582);
- .**04%** were American Indian or Native Alaskan (27 out of 5,582); and
- **.09%** were "Unknown" (52 out of 5,582).

R.II:484. One would therefore expect that White people would be about 40% of persons and Black people would be about 29.9% of persons serving felony murder LWOP.

But the racial data for felony murder LWOP convictions between Black and White people is wildly disparate from this incarcerated population baseline:

- Black people are 29.9% of the DOC population, but are 59.25% of persons serving felony murder LWOP. For Black people, the difference between the two percentages (59.25% of felony murder LWOP v. 29.9% of all DOC prisoners) is **198% (a 98% increase)**, meaning Black people are roughly 2 times *overrepresented* in the felony murder population compared to the DOC population. For White people, the difference between the two percentages (17.59% White felony murder LWOP v. 40% of all DOC prisoners) is **227% (a 127% decrease)** meaning White people are 2.3 times *underrepresented* in the felony murder population compared to the DOC population.
- If all DOC inmates not identifying as White are considered together ("people of color"), then such persons make up **58.9%** of

the total DOC inmate population (3,292 out of 5,582). R.II:456, 484. People of color are **82.40%** of people currently serving felony murder LWOP. For people of color, the difference between the two percentages (82.40% of felony murder LWOP v. 58.9% of all DOC inmates) is **140% (a 40% increase)**; people of color are 1.4 times *overrepresented* in the felony murder population as compared to the DOC population.

- People of color make up **56.34%** of persons serving malice murder LWOP. For people of color, the difference between the two percentages (56.34% of malice murder LWOP v. 58.9% of all DOC inmates) is just **104% (a 4% increase)**, by far the smallest comparative increase in this entire data array.

Unquestionably, there is something very particularly and uniquely wrong with the felony murder LWOP racial disparity. Even given the over-representation of Black people and people of color in the DOC inmate population in proportion to the racial makeup of the general population of Massachusetts, R.II:456-457, the felony murder LWOP numbers are staggering in their disparity.

1.3 Although many of the reasons for the staggering racial disparity in people serving felony murder LWOP are

beyond this Court's power to correct, this Court can and must use the authority it has to address this issue.

This Court considers its abrogation of the felony murder doctrine in Brown to be a change to the common law which it is free to apply prospectively. See Commonwealth v. Martin, 484 Mass. 634, 645 (2020) cert. denied 141 S. Ct. 1519 (2021). Shepherd argued below and argues here that due to the disparate racial impact shown by this data, this Court's previous failure to make the Brown rule retroactive violates state constitutional equal protection principles contained in arts. 1 and 10 of the Massachusetts Declaration of Rights. R.II:160-163, 522-530.

This Court should reconsider whether disparate racial impact alone – when proven with proper statistical data – is sufficient to make out a state constitutional equal protection claim. Cf. Commonwealth v. Grier, 490 Mass. 455, 469 (2022)(holding in a case with no statistical racial data, racially disparate impact without discriminatory intent is constitutional); Commonwealth v. Laltaprasad, 475 Mass. 692, 703-704 & n.20 (2016)(leaving question open whether equal protection violation might be based on statistical proof of disparate racial impact). This Court's interpretation of our State Constitution takes care not to

perpetuate past discrimination against marginalized groups and seeks to "respond effectively to our changing world". Kligler v. Attorney General, 491 Mass. 38, ___, 2022 WL 17744330 at *14 (2022). Systemic racism produces racially disparate outcomes, regardless of the intentions of the people who work within it. See Commonwealth v. Long, 485 Mass. 711, 740 (2020)(Budd, J. concurring). Statistics showing "staggering inequity in numbers" provide potentially the strongest tool to uncover implicit bias and effect systemic change. Id. at 731.

Until now, this Court was unaware of the disparate racial impact of its previous decisions to make Brown non-retroactive. This 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. But **in reality** 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. Now that this Court is aware of the impact of Brown non-retroactivity on Black people like Shepherd, this Court should do the fair thing and make the Brown rule retroactive. Cf.

United States v. Irizarry, 322 Fed.Appx. 153, 155 (2009)("There is some authority to support the notion that an equal protection challenge may be viable where legislation was not enacted for an impermissible purpose but Congress subsequently reaffirmed that legislation in the face of evidence that it had a disparate impact on a protected group....").

Biases and inequities that exist both within and beyond the Massachusetts criminal justice system cause the staggering racial disparity in people serving felony murder LWOP. See Nazgol Ghandnoosh, Felony Murder: An On-Ramp for Extreme Sentencing, The Sentencing Project (March 2022) at page 5-6 ("Extreme Sentencing"). R.II:540-541. Structural racism drives the over-representation of people of color among felony murder convictions, in that Black people are more likely to live in concentrated urban poverty resulting in higher rates of violent crime among people who live there. See id. at 6. Fully eliminating these disparities would involve broad-based strategies that are beyond the scope of this Court's power. See id.

But this Court has stated that it is committed to rooting out structural racism in the criminal justice system. See Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar (June 3, 2020)("As judges, we must look afresh at what we are doing, or failing to do, to root out any conscious and unconscious bias in our courtrooms; to ensure that the justice provided to African-Americans is the same that is provided to white Americans; to create in our courtrooms, our corner of the world, a place where all are truly equal.") This Court should "look afresh" at the requirement imposed in Brown of proving malice in a felony murder conviction in light of the data showing that proof of malice is the difference between Black people being a minority of persons serving LWOP for malice murder but being the overwhelming majority of persons serving LWOP for pre-Brown felony murder.

This Court should conclude either

- that "truly equal" protection under the Declaration of Rights requires retroactivity of the Brown ruling; or

- that under G.L. c. 278, § 33E it is more consonant with justice to apply the Brown ruling retroactively to Shepherd, grant him a new trial or reduce his conviction.

The following points illustrate the "conscious and unconscious bias in our courtrooms" resulting in the extreme racial disparity in felony murder LWOP:

- "Deeply concerning racial disparities in prosecutors' use of discretion—in decisions about which homicides to prosecute as felony murder and how many people to charge as co-defendants — directly disadvantages people of color." See Extreme Sentencing at 6; R.II:541.
- "Evidence also suggests that these features of accomplice liability perpetuate the use of guilt by association, which has been linked to reinforcing biases and fostering disparate treatment against communities of color." See id. at 15; R.II:550.
- "Prosecutors should address charging and plea practices that exacerbate racial and ethnic disparities, such as expansive charging of accomplices and unjustifiably unfavorable plea offers to people of color." See id. at 21; R.II:556.

A recent study in Pennsylvania investigating the causes of racial disparity in that state's felony murder convictions is likely relevant to the causes of this racial disparity in Massachusetts. See Andrea Lindsay & Clara Rawlings, Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Sentencing (2021) https://www.plsephilly.org/wp-content/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf (accessed December 26, 2022).

Four out of five people (79.4%) serving second-degree murder LWOP in Pennsylvania – the analog to Massachusetts pre-Brown felony murder – are people of color, and seven out of ten (69.9%) are Black. Id. at 1. These numbers are comparable to Massachusetts, where four out of five people serving LWOP for felony murder (**82.40%**) are people of color and six out of ten (**59.25%**) are Black.

The key findings of this study were:

- Black and Hispanic/Latinx people were significantly younger than White people at the time of the offense; and while youth is predictive of having co-defendants, being White is predictive of **not** having co-defendants.

- Black people comprise the majority of those prosecuted in groups in which two or more people were convicted of second-degree murder for involvement in the same offense.
- Compared to Black and Hispanic/Latinx people, White people convicted of second-degree murder were more often involved in arson, burglary, kidnapping, and/or sexual offenses, and less often involved in robbery.

See id. at 5-6. Differential charging and plea-offer decisions by prosecutors as a cause for Pennsylvania's felony murder racial disparity was mentioned seven times in this study. Id. at 11, 13, 16, 19, 20.

The Harvard study contains insights about causation that are consistent with the Pennsylvania study. See E.T. Bishop, B. Hopkins, C. Obiofuma, F. Owusu, Racial Disparities in the Massachusetts Criminal System, at 63 (Sept. 2020)(evidence most consistent with "Black and Latinx defendants receiving more severe initial charges than White defendants for similar conduct.").

> Defendants of color are much more likely to be initially charged with murder than White defendants, with Black defendants facing murder charges at a rate over **six times higher** than their White counterparts.

Id. at 61 (emphasis added).

Felony murder's staggering racial disparities are also inextricably bound up with implicit racial bias. See Beth Caldwell, The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder, 11 U. C. Irvine L. R. 905, 915, 940-41 (Apr. 2021). The unstated assumption that a person who commits a felony "is by hypothesis a bad person, so . . . we should not worry too much about the difference between the bad results he intends and the bad results he brings about," toxically mixes with "copious evidence that individuals of all races have implicit racial biases linking blacks with criminality and whites with innocence." See id.

This Court has the opportunity to redress part of the systemic racism and implicit bias within the court system that has resulted in the egregious racial disparity in persons serving felony murder LWOP. This Court can and should interpret the equal protection provisions of the State Constitution to extend the Brown rule to Shepherd.

In the alternative, this Court's authority under G.L. c. 278, § 33E requires consideration of whether Shepherd's conviction of felony murder in the first degree and LWOP sentence are consonant with justice. See Commonwealth v. Brown, 477 Mass. at 823-824. Until

September 2017, Massachusetts used the felony murder rule to convict primarily Black people and people of color and sentence them to die in prison on less evidence than could otherwise sustain a murder conviction as a matter of law. The structural racism in the criminal justice system perpetuated by the combination of the historical felony murder rule and Brown non-retroactivity has resulted in Shepherd's death-by-incarceration. This is not consonant with justice and this Court must grant him relief.

2. Jury instruction errors combined with the pervasive bias against Mr. Shepherd displayed by the trial judge throughout this trial created a substantial likelihood of a miscarriage of justice.

2.1 The trial judge erred in not instructing the jury with a full Ciampa instruction.

Jones, the Commonwealth's star witness, had a cooperation agreement with the Commonwealth which the prosecutor elicited on direct examination. T3:68. The prosecutor did not expressly question Jones regarding whether her cooperation agreement required truthful testimony. T3:68.

But the jury became aware of Jones's promise to tell the truth during defense counsel's cross-examination of Jones when Jones

blurted out: "I had an opportunity to tell the truth and get -- and to help myself, yes. I wouldn't make up a story. It was **an agreement to be honest a hundred percent** or there's no agreement in place." T4:134. The prosecutor referenced Jones's cooperation agreement in her closing argument. T7:50.

The trial judge addressed the cooperation agreement in his instructions with an incomplete instruction pursuant to Commonwealth v. Ciampa, 406 Mass. 257, 266 (1989). T7:58; Add:94. Counsel objected and requested "the model jury instruction on the cooperating witness" but the trial judge declined. T7:95, 96.

This Court requires a judge to "specifically and forcefully tell the jury to study the witness's credibility with particular care." Id. Although the trial judge did use the words "particular care", more was required here because Jones told the jury the terms of her cooperation agreement didn't apply unless she was "honest a hundred percent". T4:134. "Where the jury are aware of the witness's promise to tell the truth, the judge also should warn the jury that the government does not know whether the witness is telling the truth." Commonwealth v. Washington, 459 Mass. 32, 44 n.21 (2011). The trial judge should have

given this fulsome instruction as requested by defense counsel. See Commonwealth v. Meas, 467 Mass. 434, 454-455 (2014).

Failure to give this instruction isn't reversible error unless the prosecutor has vouched for the witness. See Commonwealth v. Fernandes, 478 Mass. 725, 745-746 (2018). A prosecutor may not explicitly or implicitly vouch to the jury that she knows that the witness's testimony is true. See Commonwealth v. Marrero, 436 Mass. 488, 501 (2002). The vouching in the prosecutor's closing was the prosecutor's assurance that she had investigated all the corroborating evidence to Jones's story and presented it to the jury, so therefore the jury could be assured that Jones was telling the truth. T7:34-35. See Commonwealth v. Meuse, 38 Mass. App. Ct. 772, 774 (1995) *S.C.* Commonwealth v. Meuse, 423 Mass. 831, 832-833 (1996)(error for prosecutor to argue that police corroborated every detail of cooperating witnesses's testimony).

This Court should find reversible error for failure to give a full Ciampa instruction when it is **the judge** that takes the side of the Commonwealth and vouches for the cooperating witness. This Court has extended Ciampa to vouching by police officer witnesses. See

Commonwealth v. Chaleumphong, 434 Mass. 70, 74 (2001). The trial judge's bolstering of Jones's credibility through his erroneous "lifestyle" jury instruction, discussed at pages 42 to 45, and his biased conduct throughout the trial, discussed at pages 45 to 60, resulted in the same wrong. By bolstering Jones's credibility in his instructions and then not specifically instructing that the "government does not know whether the witness is telling the truth", the trial judge prejudiced Shepherd.

2.2 The trial judge should have granted the motion for mistrial when the judge told the jury to excuse Jones's lifestyle when deciding whether or not to believe her.

The trial judge instructed the jury:

> In that regard, ladies and gentlemen, you may 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.

T7:60 (emphasis added).

Defense counsel objected and made a motion for a mistrial, which the trial judge denied. T7:97. The objection's basis was that the judge specifically commented on the evidence and this comment "essentially

affirms through the Court's mouth the Commonwealth's theory of the case" and took the judge out of being a "neutral, impartial arbiter of the law." T7:97. During a sidebar, defense counsel had told the trial judge that Jones's "lifestyle" was a major part of the defense. T4:4-5.

The trial judge referred to "a witness" and did not name Jones in his erroneous credibility instruction. T7:60. But a judge may not directly or indirectly express an opinion on the credibility of any witness, nor may he instruct the jury that they must draw particular inferences from the evidence. See Commonwealth v. Sneed, 376 Mass. 867, 870 (1978); Commonwealth v. Perez, 390 Mass. 308, 319 (1983). 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 trial judge's instruction any other way than as referring to Jones. The trial judge's remarks about "lifestyle" would have caused the jury to give Jones more credibility, and to discount all the impeachment that defense counsel had done on cross-examination. See Commonwealth v. Ortiz, 39 Mass. App. Ct. 70, 72-73 (1995)(new trial when jury instructions strongly implied jury could ignore

defendant's argument that main Commonwealth witness was not credible).

The trial judge unfairly put his thumb on the scales of justice by telling the jury to ignore "lifestyle" when evaluating Jones's credibility. See Commonwealth v. Cote, 5 Mass. App. Ct. 365, 369 (1977) ("It is . . . improper for a judge to . . . direct what inferences the jury should draw from certain evidence"); Commonwealth v. Foran, 110 Mass. 179, 179 (1872)("Whether the circumstances under which the witness obtained evidence, and the motives under which he acted, would or would not detract from the weight of his testimony, was a question exclusively for the jury.") This was such a major below-the-belt blow to the defense – so prejudicial – that a new fair trial is required.

In addition, the theme of this trial was that the trial judge was the "star of the show". See pages 45 to 60. This magnified the prejudice of the trial judge's instruction to the jury removing "lifestyle" as part of the credibility determination because the overriding importance of the judge's role in this trial made it more likely that the jury followed his erroneous instruction enhancing Jones's credibility. The trial judge's erroneous instruction seen in the context of his

intrusive, self-congratulatory conduct of the trial "constituted an improper endorsement of the testimony of the Commonwealth's witnesses which usurped the jury's obligation to determine what testimony they would believe and how much weight they would give to the evidence presented." Commonwealth v. Richards, 53 Mass. App. Ct. 333, 340-341 (2001).

2.3 The trial judge indulged in pervasive inappropriate questioning and commentary resulting in an unfair trial in violation of Mr. Shepherd's federal and state constitutional rights.

It is permissible for a trial judge to question a witness as long as the questioning is not biased or partisan. See Commonwealth v. Festa, 369 Mass. 419, 422 (1976). The trial judge inserted himself into this trial in a biased and partisan manner by asking witnesses 146 questions, see pages 47-52, engaging in chummy banter with 3 Commonwealth witnesses, pages 52-54, and showcasing himself as the "star of the show" in 6 lengthy jury instructions, pages 54-60. After all of this, the trial judge failed to warn the jury not to be influenced by "anything that he had said or done". See Argument 2.4.

A judge can act as the "guiding spirit and controlling mind at a trial." Commonwealth v. Campbell, 371 Mass. 40, 45 (1976). But what

happened here was intrusive and unfair. The trial judge's participation in constant inappropriate comments, questions and self-aggrandizement showed his disregard for the concept that "any judicial comment is likely to be accorded substantial weight by the jury". Commonwealth v. Sneed, 376 Mass. at 870. A judge must use his authority to ask questions of witnesses with restraint because to a jury, a judge's "lightest word or intimation is received with deference and may prove controlling." Commonwealth v. Hanscomb, 367 Mass. 726, 732 (1975)(Hennessey, J. concurring) *quoting* Quercia v. United States, 289 U.S. 466, 470 (1933).

Although these comments and instructions weren't objected to by trial counsel, this extraordinary level of intrusion by the trial judge into this trial resulted in Shepherd being denied his constitutional right to a fair and impartial trial under the Fourteenth Amendment to the United States Constitution and arts. 11, 12 and 29 of the Declaration of Rights. See In re Murchison, 349 U.S. 133, 136 (1955)("A fair trial in a fair tribunal is a basic requirement of due process."); United States v. Hill, 332 F.2d 105, 106 (7th Cir. 1964)(cumulative effect of trial judge's numerous intrusions into examination of witnesses required a new

trial); King v. Grace, 293 Mass. 244, 246-247 (1935)(provisions of art. 11 and 29 are "at least as rigorous in exacting high standards of judicial propriety" as Fourteenth Amendment).

"Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." Commonwealth v. Howard, 367 Mass. 569, 572 (1975) *quoting* In re Murchison, 349 U.S. at 136. Here the trial judge's conduct resulted in prejudice to Shepherd. But because the proceedings as a whole did not have "the appearance of fairness and impartiality necessary to our judicial system" this Court should reverse Shepherd's conviction on that basis alone. See Commonwealth v. Howard, 367 Mass. at 572.

2.3.1 The trial judge's questioning of Jones and Withrow was not merely "clarifying" but helped build the Commonwealth case.

The trial judge asked Jones **30 questions** during the prosecutor's direct examination, T3:75, 85, 91, 92-93, 94, 95, 97, 98-99, 106-107, 111, 117; Add:95-108[5], and **30 questions** during defense counsel's cross examination for a total of **60 questions** to the Commonwealth's star

[5]Questions are numbered and reproduced in the Addendum.

witness. T4:35, 45, 46, 48-49, 61-62, 64-65, 76, 88, 91, 100-101, 105, 107, 126-127, 135, 136-137; Add:109-137.

"The role of the trial judge is that of an impartial arbiter and not that of a prosecutor." Commonwealth v. Sneed, 376 Mass. at 870. The trial judge, acting as prosecutor, elicited new facts from Jones that Shepherd wasn't asleep and was present during Jones and Tyler's planning, T3:91, 94, that Shepherd went to "Wilner's" after the China Bowl, T:97, that Shepherd participated in a discussion about Jones leaving Parisse's door open, T3:99, that while fighting Parisse Tyler yelled for help towards Shepherd, T3:111, and that Jones never saw Tyler with a gun "that night". T3:116-117. See Commonwealth v. Hassey, 40 Mass. App. Ct. 806, 810 (1996)(reversible error when judicial questioning went beyond clarification, counsel finished questioning and testimony wasn't confusing).

Even the judicial questions which didn't directly assist the prosecutor's case were prejudicial because they habituated the jury to look to the judge to elicit important information from the witnesses. Defense counsel was adequately questioning Jones, and the trial judge's takeover of questioning wasn't necessary for the jury to

understand the evidence. See id.; cf. Adoption of Seth, 29 Mass. App. Ct. 343, 351 (1990)(excusing judicial takeover of questioning as "primarily a reflection of impatience with the inability of department's counsel to pose proper questions"). For example, the trial judge went into a long explanation of military time with Jones, showing off his knowledge to the jury and his authority to instruct a witness on her testimony. T4:61-62.

The trial judge also took over questioning of Lynn officer Withrow from the prosecutor in a manner that wasn't clarifying, but which assisted the prosecutor's case. T5:56-57. The prosecutor had just finished questioning Withrow regarding his knowledge of McMillan, who was with Jones the night of the shooting. T5:56. The prosecutor was finished and was moving onto another subject, when the trial judge jumped into the questioning. T5:56. He asked Withrow 5 questions about whether he knew McMillan, whether he had seen her lately, and whether he had seen her "since you had a summons to serve her to ask her to come into court". T5:56-57. This questioning was prejudicial because it suggested that 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.

The trial judge's questioning prompted defense counsel to have to elicit on cross examination the best that she could that actually Withrow hadn't exhausted all avenues to locate McMillan. T5:61-62. But this cross-examination was ineffective to counter the prejudice.

2.3.2 The trial judge's gratuitious takeover of questioning of trial witnesses to show off his factual knowledge to the jury habituated the jury to take their cues on factual issues from the trial judge.

The trial judge took over questioning of the prosecution's witnesses and one defense witness with regard to factual testimony on 146 separate occasions, including the 60 questions to Jones and the 5 questions to Withrow referenced above:

- Seven questions to Menard (Parisse's roommate). T2:173, 177, 182, 186-187, 190.
- Five questions to Sergeant Avery. T3:18-20, 23.
- One question to Detective Pierce. T3:41.
- Three questions to Medical Examiner Grivetti. T4:16-17.
- Twelve questions to Trooper Cote, the ballistician. T4:164-166, 170, 176; T5:9, 11.

- Three questions to Sheauling Kastor, State Police Lab. T5:16.
- Four questions to Christina Owen, State Police Lab. T5:17-18.
- Three questions to Emily Despres, DNA analyst. T5:38.
- Six questions to Trooper Tulipano. T5:76-77, 78, 79, 84.
- Eighteen questions to DNA analyst Elizabeth Duval. T6:15-17, 22-23.
- Ten questions to Sprint records custodian Ricardo Leal. T6:28, 31, 34, 46.
- Nine questions to defense witness James Prushinski. T6:98-99, 104, 106.

The trial judge took three transcript pages during the prosecutor's questioning of Cote to show off his knowledge of firearms, T4:164-66, and then continued to ask further questions. T4:170, 176, T5:9, 11. The trial judge also pointlessly and extensively questioned Duval. T6:15-17, 22-23. The lowlight of this questioning was when the judge acknowledged his pointless intervention, the prosecutor indicated that they had warned Duval about the trial judge's habit of pointless but constant questioning and the judge then chattily boosted the credibility of the witness. T6:17.

A judge doesn't need to take a "vow of silence", but he must "find and tread the narrow path that lies between meddlesomeness on the one hand and ineffectiveness and impotence on the other." Commonwealth v. Brown, 462 Mass. 620, 632 (2012). Here, the constant and gratuitous insertion of commentary into this trial by this meddlesome trial judge habituated the jurors to take their cues on factual issues from him, thus denying Shepherd a fair trial.

2.3.3 The trial judge's social conversation with three Commonwealth witnesses impermissibly created sympathy for them with the jury and prejudiced the defense.

The judge repeatedly engaged in extraneous and irrelevant social conversation with the Commonwealth's witnesses, thereby (1) focusing the jury's attention on the likeability of the Commonwealth's witnesses and engendering juror sympathy towards them, (2) demonstrating partiality to the Commonwealth's case and (3) affirming the overriding importance of the judge's role in this trial which made it more likely that the jury followed his erroneous instruction enhancing Jones's credibility.

- The trial judge conversed with Menard about Candyland and the worst cards to have. T2:165-166. This was inappropriate because it engendered jury sympathy for a prosecution witness.
- The trial judge bantered with Commonwealth witness Owen with regard to the circumstances of her broken leg, which the prosecutor pointed out to the judge was in a cast. T5:17-18. This was prejudicial because it engendered juror sympathy for the prosecution's witness.
- The trial judge questioned Leal about the fact he had flown in from Kansas and then thanked him for coming. T6:28. This was prejudicial because it bolstered Leal's credibility by signaling to the jury that the witness had made a great effort to be there and that the judge had a positive opinion of the witness for doing so.

This chummy, irrelevant banter with prosecution witnesses was extremely similar to the commentary by the same trial judge noted in Commonwealth v. Pearson, 77 Mass. App. Ct. 95, 106 (2010) as being "better left unsaid, at least in front of the jury." Unlike the situation in Commonwealth v. Lucien, 440 Mass. 658, 664 (2004) where that trial judge participated in "folksy" banter with both Commonwealth and

defense witnesses, here the trial judge treated the lone defense witness with no chumminess. T6:93-107. Alone and in combination with the other judicial misconduct outlined in this section, the trial judge's banter with Commonwealth witnesses resulted in a substantial likelihood of a miscarriage of justice.

2.3.4 The trial judge's self-aggrandizing comments and the constant use of himself as an example in jury instructions directly prejudiced Mr. Shepherd and, by emphasizing that the trial judge was the "star of the show", made it more likely the jury followed his impermissible credibility instruction.

The trial judge's self-aggrandizing statements during trial and constant use of himself and his family as examples in the jury instructions prejudiced Shepherd and violated Shepherd's constitutional rights. In addition, this showcasing of the judge as the "star of the show" made it more likely that the jury would believe Jones due to interpreting his instruction not to judge Jones's lifestyle as a judicial endorsement of her credibility. See Argument 2.2.

- **"Judge can make bail"**:

During an instruction concerning Shepherd's pre-trial incarceration, the trial judge stated that if he was "suddenly arrested on some charge and bail was set" that he would hope his wife would

promptly "make my bail" because "people of means don't necessarily end up at the House of Correction". T5:59; Add:130.

This instruction was prejudicial because it pointed out that Shepherd either had no-one to post bail for him or was too poor to do so. This prejudiced Shepherd because the trial judge, by pointing out that he would be able to make bail, distanced himself from Shepherd. This distancing is in stark contrast to the trial judge's identification of himself with the victim, and thus the Commonwealth's case. See pages 59-60. By the use of himself as an example, the trial judge continued to make himself the star of the show making it more likely that the jury would interpret his instruction not to judge Jones's lifestyle as a judicial endorsement of her credibility.

- **"Excellent Judge takes the stand":**

After the trial judge got down from the bench and stood in front of the jury for fourteen pages of the jury instructions, T7:52-65, he stated:

> Now, what is proof beyond a reasonable doubt. I'm going to give you that definition of that, but to do that, ladies and gentlemen, I'm going to retake the stand so I can actually read it to you to make sure I get it correct. Okay. How am I doing so far?
> THE COURT OFFICER: Excellent.
> THE COURT: Excellent. Okay.

T7:64-65; Add:131-132.

This statement was prejudicial because the judge called the bench "the stand" which suggested to the jury he was acting as a witness in the trial. See Quercia v. United States, 289 U.S. at 470 (judge may not assume the role of a witness). And, in telling the jury he was doing "excellent", he was elevating himself as the "star of the show" and making certain the jury looked to him to lead them on how to decide the credibility of Jones, the Commonwealth's star witness.

- **"Judge has a screw loose"**:

Immediately after the truncated Ciampa instruction about Jones, discussed at pages 39-42, the judge gave as an example of "assessing anyone's credibility" a situation where on a sunny day:

> I come 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 judge is crazy. Because you have contrary evidence to what I would be saying to you. T7:58-59; Add:133-134.

This instruction suggested to the jury that unless they had contrary evidence from their own direct experience, they should believe Jones. This was prejudicial because the jury could not have **direct evidence** to counter any testimony of Jones about the events leading to the death of Parisse. This example also reinforced the trial judge as the "star of

the show", making it more likely that the jury would interpret his instruction not to judge Jones's lifestyle as a judicial endorsement of her credibility.

- **"My crazy, dumb brother-in-law"**:

The trial judge gave an elaborate joint venture instruction about a bank robbery involving himself and his "crazy", "dumb" brother-in-law. T7:71-74; Add:135-138. First, this is a prejudicial example in a case where the predicate felony was robbery. See Commonwealth v. Gumkowski, 487 Mass. 314, 332 (2021)(error for hypothetical in jury instructions to closely track facts of case and emphasize prosecution theory of guilt).

Second, by indulging in this elaborate story, the trial judge highlighted for the jury that Shepherd in fact **did not testify** and tell the jury the "backstory" of how and why he came to be on the surveillance video near the shooting scene, in violation of his constitutional right to remain silent under art. 12 of the Declaration of Rights and the Fifth Amendment to the United States Constitution. See Commonwealth v. Sneed, 376 Mass. at 871 (even judge's unintended suggestion that might induce jury to draw an unfavorable

inference from defendant not testifying is error). The trial judge's prolonged example using himself and explaining to the jury his motivation to be the joint venturer in a robbery suggested that Shepherd, in not explaining himself, was seeking to "conceal or deceive". Id.

The trial judge's prior instruction that the jury shouldn't consider that Shepherd didn't testify, T7:64, by its timing and words did not cure this subsequent intimation that Shepherd should have explained himself to the jury as did the judge. See Commonwealth v. Buiel, 391 Mass. 744, 746-747 (1984) (instruction warns the jury against adverse inference from defendant not testifying, but also highlights that he didn't testify), *abrogated in part by* Commonwealth v. Rivera, 441 Mass. 358, 368-371 (2004). "And, of course, leading the jury down an inappropriate path is precisely the opposite of what jury instructions are supposed to do." Commonwealth v. Wolfe, 478 Mass. 142, 149 (2017). This error requires reversal. See Commonwealth v. Sneed, 376 Mass. at 871.

Third, by placing himself in the position of the joint venturer, and calling out the principal as being "crazy" and "dumb", the trial judge

implied that Shepherd was crazy and dumb too, because the judge had just told the jury that the Commonwealth's theory was that Shepherd was the principal. T7:69. See Commonwealth v. Gumkowski, 487 Mass. at 332. Lastly, by highlighting himself, the trial judge made himself the "star of the show" yet again, making it more likely that the jury would interpret his instruction not to judge Jones's lifestyle as a judicial endorsement of her credibility.

- **"Judge as robbery victim"**:

The judge instructed that if someone robbed him of his car keys by "pound[ing] me up here on the bench" and then running into his lobby and taking his keys, that would be in the judge's area of control just like "property that's within Mr. Parisse's area of control". T7:84; Add:139. The judge **expressly** equated himself with the victim in this case, and thus the prosecution. This was partisan and was reversible error. See Commonwealth v. Sneed, 376 Mass. at 870. And, because the jury ultimately found attempted unarmed robbery as the predicate felony, this particular example positing the judge as the victim of an unarmed robbery was especially prejudicial.

- **"Judge punches the clerk in the nose"**:

In charging the jury on armed assault with intent to rob[6], the judge spun a tale about punching his clerk in the nose. T7:90-91; Add:140-141. This instruction made the trial judge and his thoughts, intent and actions the "star of the show", making it more likely that the jury would interpret his erroneous instruction not to judge Jones's lifestyle as a judicial endorsement of her credibility.

Finally, the trial judge took it upon himself twice to ask the prosecutor – not the clerk or the court officer or defense counsel – to help him display a chalk to the jury during his joint venture instructions, T7:67, 74, and then asked the prosecutor's opinion on his instructions. T7:91. These judicial requests to the prosecutor illustrate the "thematic rather than fleeting" quality of the judge pervasively placing his finger on the scales of justice in favor of the Commonwealth and to the detriment of Shepherd at this trial. See Commonwealth v. Richards, 53 Mass. App. Ct. at 340.

2.4 Nothing cured the contamination of this trial by the trial judge's improper credibility instructions, constant biased commentary, questions and use of himself in the jury instruction examples.

[6]The jury found Shepherd not guilty of this charge. T9:16.

The trial judge told the jury, "Don't think that I have made up my mind on the facts of this case. That's not my job. I haven't." T7:55. But in a complete failure to acknowledge or warn against his pervasive biased commentary, questioning and use of himself in jury instruction examples, the trial judge's final instruction didn't tell the jury not to be influenced by "anything that he had said or done". T7:55; Add:142. See Commonwealth v. Hassey, 40 Mass. App. Ct. at 811 (judge's questioning of witness reversible error when no instruction that jury "should draw no inferences, let alone conclusions, from the circumstance that it was the judge who asked certain questions").

In Commonwealth v. Pearson, 77 Mass. App. Ct. at 106 & n.17, which concerned the same trial judge, the court relied upon a specific instruction that the jury "should not conclude from anything that he had said or done" that the trial judge had made his mind up about the case. Id. at 106, n.17. Unlike the situation in Pearson where there was only one isolated odd comment, see id. at 106, in this case there were 146 witness questions, six lengthy examples in the jury instructions featuring the trial judge himself and innumerable odd comments.

The general, cursory instruction didn't cure the improper influence the trial judge brought to bear on the case against Shepherd through his improper credibility instructions and biased conduct of this trial. See Commonwealth v. Sylvester, 388 Mass. 749, 750-751 (1983)(a cursory two-sentence jury instruction couldn't cure the pervasiveness of the trial judge's prejudicial remarks).

3. Trial counsel provided ineffective assistance in violation of Mr. Shepherd's Sixth Amendment and state constitutional right to counsel.

This Court will review whether trial counsel provided ineffective assistance of counsel under the substantial likelihood of a miscarriage of justice standard of G. L. c. 278, § 33E and Sixth Amendment constitutional law. See Commonwealth v. Salazar, 481 Mass. 105, 112 (2018); Strickland v. Washington, 466 U.S. 668, 690 (1984).

3.1 Trial counsel was ineffective for failing to retain a CSLI expert.

Where a claim of ineffective assistance of counsel is based upon some error of counsel that can be characterized as a tactical or strategic decision, such decision is error if it was manifestly unreasonable when made. See Commonwealth v. Moore, 480 Mass. 799, 816 (2018). That is the situation here.

Joseph Kennedy, a cell tower antenna systems expert, opined that the CSLI directionality and location information presented by the Commonwealth's trial witnesses had no scientific validity. R.I:91-97. Despite the fact that the motion judge credited the Kennedy opinion that the testimony was scientifically inaccurate, R.I:290, the motion judge ruled that trial counsel made no error in not challenging this evidence at trial. R.I:290. The root of this ruling was that the motion judge couldn't see how the accurate evidence would have assisted the defense at trial. R.I:290.

This was error. The Commonwealth's CSLI trial evidence was both important to the Commonwealth's case for conviction and extremely detrimental to the defense. A surveillance camera on a neighboring home on Carlton Street recorded video of two persons closely resembling Tyler and Shepherd standing on the driveway and sidewalk of that home, and then walking together across Carlton Street towards Grant Street at approximately 1:30 AM prior to the shooting. T5:81-82; T7:40-45. At trial, the prosecutor argued in her closing that Shepherd was the person in this video with Tyler....."Here we see defendant. And here we see Mr. Tyler." T7:43. The prosecutor even

suggested that the jury should see in this video that Shepherd had the gun used to kill the victim. T7:43. The CSLI "pie slice" evidence was extremely important to the Commonwealth's case because it needed to prove that Shepherd proceeded from Carlton Street into the Grant Street residence of Parisse. Even the prosecutor's closing argument pointed to the CSLI evidence as important evidence corroborating Jones's testimony. T7:47.

The motion judge faulted Kennedy for not excluding the China Bowl nor Grant Street from the correct coverage area. R.I:291. The motion judge completely ignored the diagram provided by Kennedy showing where the 1:44:40 AM call could have been made from, with a "cardiod" flower-petal like shape surrounding the tower and three enormous 21 mile radiuses. R.I:97. The motion judge also discounted the value of Kennedy's information, finding that the jury knew that CSLI doesn't pinpoint an exact location but provides a "broad area" where the phone could be located. R.I:291. But the motion judge completely ignored the testimony of Kardoos and Exhibit 94 indicating that Shepherd's cellphone when it made a call at 1:44:40 AM, within moments of the shooting, was located in a small particular "pie-slice"

that included the scene of the shooting. T6:64; R.I:188. According to Kennedy there was no scientific validity to the existence of a "pie-slice" in the first place, nor that the direction of this “pie-slice” covered the shooting scene. R.I:92-95.

The motion judge completely discounted the importance of the CSLI evidence simply because it couldn’t exclude the Shepherd phone from the coverage area at 1:44:40 AM. R.I:291-292. But the fact that the coverage area was so much larger and non-directional was why this evidence was so important to the defense. The motion judge also erroneously discounted the importance of the CSLI evidence in general, finding that other evidence corroborated Jones’s testimony. R.I:293. But had the jury determined that the CSLI evidence regarding the call at 1:44:40 AM couldn't prove that Shepherd was very close to the shooting scene moments afterwards, that would have materially impacted the jury's consideration of the defense that despite the Carlton Street surveillance video, Shepherd wasn't in the apartment at the time of the shooting. Trial counsel's failure effectively to challenge the CSLI evidence completely deprived Shepherd of the defense that there was no extrinsic evidence to corroborate Jones's testimony with

particular respect to Shepherd's location at the shooting scene moments afterwards.

The motion judge also erroneously pointed to the cross-examination of Leal and Kardoos by trial counsel as having corrected the inaccurate references to directionality and the pie-slice model. R.I:290-291. But trial counsel could not shake Kardoos's testimony that Shepherd's cell phone made a call at 1:44:40 AM from somewhere within a "pie-slice" shaped sector that included the scene of the shooting. T6:62-64, 68, 70-71; R.I:188. The fact that defense counsel got Kardoos to admit that he didn't know from where in this non-existent pie-slice-shaped sector which included the shooting scene the call was made was of absolutely no value to the defense. The correct testimony would have been that CSLI evidence offered no legitimate proof **at all** of where Shepherd's cell phone was moments after the shooting.

It was manifestly unreasonable for trial counsel to do no investigation of the scientific validity of the Commonwealth's CSLI evidence, there was no reasonable professional judgment that could support doing no investigation whatsoever, and thus this conduct fell

below the standard of an ordinary, fallible lawyer. See Commonwealth v. LaBrie, 473 Mass. 754, 771-772 (2016). It was devastating to the only trial defense to have this scientifically inaccurate testimony go unchallenged at trial.

The jury unquestionably relied on Exhibit 94 in order to convict Shepherd. The prosecutor specifically referred to the Exhibit 94 "pie-slice" chart concerning the location of the call at 1:44:40 AM in her closing argument and urged the jury to use it to convict Shepherd. T7:47.

Trial counsel had a duty imposed by state and federal constitutional law to conduct an independent investigation of the facts. See Commonwealth v. Baker, 440 Mass. 519, 529 (2003); Strickland v. Washington, 466 U.S. at 690; Sixth Amendment to the United States Constitution. By failing to hire a defense expert, trial counsel permitted the Commonwealth to be "the sole purveyor" of the CSLI testimony to the jury yielding a distinct advantage to the Commonwealth and depriving Shepherd of a substantial defense. Commonwealth v. Baran, 74 Mass. App. Ct. 256, 277-278 (2009). Such deficient conduct prejudiced the defense, see Strickland v. Washington,

466 U.S. at 687, and likely influenced the jury's conclusion. See Commonwealth v. Salazar, 481 Mass. at 112.

Even if this court finds that trial counsel wasn't ineffective for allowing the Commonwealth to present scientifically incorrect CSLI evidence to the jury, Shepherd is still entitled to a new trial. Because the jury convicted Shepherd based in part on scientifically inaccurate information placing him near the scene of the shooting within moments of its occurrence when there was no physical evidence linking him to the shooting and Jones's credibility was impermissibly boosted by the trial judge, see Argument 2.2, this resulted in a substantial likelihood of a miscarriage of justice.

3.2 It was ineffective assistance for trial counsel not to object to the technical testimony of the records custodian.

Leal was a Sprint records custodian with a BA degree in "human relations in management". T6:29. He had only "on-the-job" training as a records custodian. T6:29. Yet, trial counsel raised no objection to the extensive technical testimony offered by Leal as to how cell phones and cell phone towers work.[7] T6:30, 32, 40-41, 49.

---

[7]The motion judge didn't address Arguments 3.2, 3.3, 3.4 and 3.5, noting these issues could be decided on the trial record. R.I:285-286.

A records custodian's opinion that cellphone calls are "typically" transmitted to the closest cellular site was of doubtful admissibility because such an opinion "may well have required a witness with greater technical expertise." Commonwealth v. Gonzalez, 475 Mass. 396, 411 n.37 (2016); see also Commonwealth v. Javier, 481 Mass. 268, 286 (2019). A trial judge abuses his discretion by permitting an unqualified expert to testify beyond the area of his expertise. See Commonwealth v. Rintala, 488 Mass. 421, 426 (2021). Had trial counsel made a timely objection to Leal's technical testimony about sector directionality, T6:40-41, and that handsets connect to the closest cell tower, T6:30, 32, 49, the trial judge would have allowed it. Had this objection been allowed, the central premises used by Kardoos to produce Exhibits 93 and 94 would have been decimated. Trial counsel's failure to object to the testimony of Leal was ineffective assistance because this error prejudiced the defense, see Strickland v. Washington, 466 U.S. at 687, and likely influenced the jury's conclusion. See Commonwealth v. Salazar, 481 Mass. at 112.

3.3 It was ineffective assistance for trial counsel not to object to CSLI exhibits 93 and 94 on the basis that neither of these exhibits qualified for the business records exception

to the hearsay rule because they were created after Mr. Shepherd's indictment.

The "pie-slice" CSLI diagrams created by Kardoos and admitted as Exhibits 93 and 94 were hearsay that did not qualify as business records because they were created after Shepherd's December 2014 indictment and in anticipation of litigation. See G.L. c. 233, § 78; Commonwealth v. Trapp, 396 Mass. 202, 210 (1985)(records generated after indictment not admissible as business records). Kardoos testified that he prepared Exhibits 93 and 94 relying on information contained in Exhibit 91, the Sprint Call Detail Records, and in Exhibit 92, the Sprint Cell Site Locations. T6:54-57. Because these records were not prepared until February and March 2016, R.I:112, 115, Kardoos could not have prepared Exhibits 93 and 94 prior to the production of the Sprint records.

Exhibits 93 and 94 were hearsay because these CSLI diagrams do not qualify as being nonhearsay computer-generated records. Computer-generated records are those "generated solely by the electrical or mechanical operation of a computer" and are not hearsay because they do not contain a statement from a person. Commonwealth v. Brea, 488 Mass. 150, 160 (2021). If human action is

required to create and retrieve any computer-stored information, then the testimony or exhibit is hearsay. See Commonwealth v. Royal, 89 Mass. App. Ct. 168, 172 (2016).

Kardoos did much more than input coordinates into a mapping program to generate the CSLI "pie-slice" diagrams by "mechanical operation of a computer". Kardoos's diagrams reflect:

- his misunderstanding that the cell phone tower could determine the direction or "sector" in which a handset connecting to the tower was located; T6:59, 64; R.I:92-94.
- his misunderstanding that directionality based upon sector selection cannot be scientifically determined because a handset can be in the coverage area of three different sectors at one time, in a cardioid (flower-like) pattern; R.I:92-94, 97.
- his misunderstanding that sector antennas radiate in wedge shapes with no coverage overlap; T6:64; R.I:94.
- his seemingly arbitrary and scientifically inaccurate practice of drawing his pie slices by going 70 percent of the distance to the next tower, when a cell tower can service areas for a distance out to 21 miles in any direction. T6:62; R.I:95.

Kardoos, and not the mapping software, made these errors in creating Exhibits 93 and 94.

Kardoos's own actions, inaccurate scientific assumptions and biases in creating Exhibits 93 and 94 went far beyond inputting raw data into a mapping program and letting an alogorithm process a result. See Commonwealth v. Fremming, 92 Mass. App. Ct. 1107 (2017)(issued pursuant to Rule 1:28)(Add:170)(assuming without deciding that the admission of CSLI diagrams produced by Kardoos was error). Instead, Kardoos's production of Exhibits 93 and 94 were in reality his hearsay statements offered to prove the truth of the matters asserted therein. Had Kennedy used the same software as did Kardoos, Kennedy's scientifically accurate assumptions would have resulted in a far different diagram than those produced by Kardoos. R:I:92-95, 97. Trial counsel was ineffective for failing to raise an objection that would have kept these exhibits out of evidence, this error prejudiced the defense, see Strickland v. Washington, 466 U.S. at 687, and likely influenced the jury's conclusion. See Commonwealth v. Salazar, 481 Mass. at 112.

3.4 It was ineffective assistance of trial counsel not to request a jury instruction on second-degree felony murder with

breaking and entering a dwelling in the nighttime with intent to commit a felony as the predicate.

At the charge conference, trial counsel requested an instruction on second-degree felony murder. T6:116. But when the trial judge pressed counsel for what lesser-included crime supported a second-degree felony murder instruction, trial counsel struggled and eventually answered with a crime – unarmed robbery – which could not support such an instruction because it was a life felony. T6:116-118; see G.L. c. 265, § 19(b). Trial counsel stated that she had a copy of the jury instructions in the Tyler trial. T6:110. The Tyler trial included an instruction on felony murder in the second degree with the predicate felony being breaking and entering a dwelling in the nighttime with intent to commit a felony. R.I:233-239. Shepherd's jury instructions included no second-degree felony murder charge.

Trial 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. The charges against both co-defendants were identical as was the Commonwealth's evidence against them. It is clear from the record (1) that trial counsel wanted a second-degree felony murder instruction and (2) that she had a blueprint from the Tyler trial

how to get one. Shepherd, as was Tyler, was entitled to the second-degree felony murder instruction based upon the trial evidence. See Commonwealth v. Donlan, 436 Mass. 329, 335 (2002). Trial counsel's failure to effectively request a second-degree felony murder instruction to which Shepherd was entitled was an error that prejudiced the defense, see Strickland v. Washington, 466 U.S. at 687, and likely influenced the jury's conclusion. See Commonwealth v. Salazar, 481 Mass. at 112.

3.5 It was ineffective assistance for trial counsel's opening statement to promise that phone records would show Mr. Shepherd wasn't involved in this incident, but then not produce such evidence.

In her opening statement, trial counsel told the jury:

> And they needed a third, and that third, ladies and gentlemen, is -- was – was not Mr. Shepherd. How are you going to know that? Because you're going to get evidence by way of phone records. T2:141.

However, counsel never introduced such phone evidence.

"A promise by defense counsel in [her] opening statement to produce key testimony, followed by a failure to deliver it may, without more, constitute ineffective assistance of counsel." Commonwealth v. Duran, 435 Mass. 97, 109 (2001); see also Anderson v. Butler, 858 F.2d

16, 19 (1st Cir. 1988)("to promise even a condensed recital of such powerful evidence, and then not produce it, could not be disregarded as harmless. We find it prejudicial as a matter of law.") Failure to deliver on promises is not per se ineffective assistance of counsel, but that determination is made after an evaluation of the nature and extent of the promise made in the opening statement, any strategic justification for failure to produce the promised evidence and the likely impact on the jury of the failure to produce the promised evidence. See Commonwealth v. Duran, 435 Mass. at 109-110.

Counsel's strategic decisions are ineffective assistance of counsel if those decisions are "manifestly unreasonable" when made. See Commonwealth v. Martin, 484 Mass. at 641. This was not a situation where defense counsel had no control. Cf. Commonwealth v. Ng, 489 Mass. 242, 251-252 (2022). Trial counsel knew she had no expert witnesses to counter the Commonwealth's phone evidence nor had she gained expertise from consulting with CSLI experts. There was no possibility at the time of opening statements that trial counsel could show Shepherd's non-involvement in this crime through the phone records. Even if Shepherd had testified he could have made no

commentary on the phone records themselves, yet the phone records are what trial counsel highlighted for the jury. There is no suggestion in the record that trial counsel interviewed the Commonwealth's cell phone witnesses prior to trial. It is fundamental that counsel should not tell a jury about anticipated testimony from a witness she has not interviewed. See Commonwealth v. Dwyer, 448 Mass. 122, 134 (2006).

Additionally, trial counsel's error in her opening statement was not mitigated by time because the trial was short. The jury began its deliberations a mere eight days after hearing trial counsel's problematic opening statement. This rapid sequence of events made it impossible for the jurors to forget defense counsel's representations about phone records showing that Shepherd wasn't involved in this incident. See Anderson v. Butler, 858 F.2d at 18 (1 day prior) ; Commonwealth v. Chambers, 465 Mass. 520, 534 (2013)(3 days prior); cf. Commonwealth v. Nardone, 406 Mass. 123, 128 (1989)(opening statement made 27 days before jury deliberations began may have been forgotten).

There was no possible strategic justification for promising to show the jury that phone records would prove innocence. The

Commonwealth's scientifically inaccurate CSLI evidence was powerfully incriminatory, trial counsel's broken promise in her opening statement was error that prejudiced the defense, see Strickland v. Washington, 466 U.S. at 687; Anderson v. Butler, 858 F.2d at 19, and likely influenced the jury's conclusion. See Commonwealth v. Salazar, 481 Mass. at 112.

3.6 It was ineffective assistance for trial counsel not to consult with Mr. Shepherd and provide him with discovery documents, not to adequately prepare him to testify at trial and not to call and adequately prepare defense witnesses for trial.

Trial counsel provided ineffective assistance to Shepherd by making numerous trial preparation errors. Shepherd's affidavit detailed trial counsel's lack of visits, not providing him with pre-trial discovery and not preparing Shepherd's testimony for trial. R.I:98-104. This affidavit detailed the witnesses he asked trial counsel to call which she did not, and trial counsel's deficient preparation of the one witness she did call. R.I:99-100. As a result of these mistakes, although Shepherd wanted to tell his story, he did not testify because he wasn't prepared and because he was so distraught from hearing and seeing all the evidence at trial that he had never known about before

trial. R.I:102. Shepherd's testimony at trial would have been that, despite what it may have seemed in the Carlton Street surveillance video, he never set foot on any part of the property or building at 45 Grant Street, Lynn, MA and had absolutely nothing to do with the events that caused the death of Parisse. R.I:101.

The motion judge did not credit Shepherd's affidavit and found neither deficient performance nor prejudice. R.I:293-295. This was error. Here it was manifestly unreasonable and thus ineffective assistance for trial counsel not to provide Shepherd with the discovery necessary for him to make a rational decision regarding whether to testify, and then not to sufficiently prepare Shepherd to testify.

The Supreme Court of the United States has stated:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant.... From counsel's 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.

Strickland v. Washington, 466 U.S. at 688. The reasonableness of counsel's choices in investigating or not investigating certain defenses is assessed by what information the defendant gave to counsel. See id.

at 691. "In particular, what investigation decisions are reasonable depends critically on such information." Id. Because counsel did not give Shepherd critical discovery documents prior to trial and did not follow up on his reasonable suggestions for investigation, trial counsel failed in her duty to assist him in advocating his cause. Because counsel did not adequately prepare Shepherd to testify, counsel's failure practically deprived Shepherd of his ability to give testimony in his own defense. These failures of counsel prejudiced Shepherd because as a result of being ambushed by unexpected Commonwealth evidence, he was unprepared in every way to assert his innocence of this crime before the jury.

Trial counsel also provided ineffective assistance by failing to follow Shepherd's direction to investigate, call and prepare to testify the witnesses Carol Gayton, James Prushinski, the third-floor neighbor, Terrence Tyler and Shanena McMillan. The only witness on this list that trial counsel called was Prushinski, and she only reached out to him the day prior to his testimony. R.I:99-100. Had she prepared Prushinski to testify before trial, his testimony would have been far more effective in proving Shepherd's innocence. Prushinski's

trial testimony had to be constantly refreshed with the transcript of Prushinski's grand jury testimony, making his exculpatory testimony seem less credible and powerful. T6:93-107; SRA:3-17.

Prushinski's trial testimony left out important details from the grand jury testimony. Prushinski testified at the grand jury that directly after he heard a male and female arguing, a gun-shot and the male stating "you shot me" he saw a woman running from the scene with a "page boy" hairstyle that was cut higher than above the shoulders. SRA:11. This omission due to failure of preparation of the witness and/or failure of trial counsel to ask about the hairstyle prejudiced Shepherd because Jones wore her hair in this exact hairstyle on the night of the shooting. R.I:347.

The testimony of Carol Gayton, who testified at the grand jury but not at trial, would also have further discredited Jones's testimony about what happened before, during and after the shooting. SRA:18-28. Gayton testified that before hearing any gunshot, she heard a child crying and dogs barking and then after the gunshot everything went quiet. SRA:24, 26. In contrast, Jones never testified to hearing dogs

barking prior to the gunshot and testified that after the shooting she was "screaming and yelling". T3:114.

Trial counsel's failure to properly and effectively call and prepare defense witnesses, to adequately prepare Shepherd to testify and to provide Shepherd with important discovery pre-trial was error that prejudiced the defense, see Strickland v. Washington, 466 U.S. at 687, and likely influenced the jury's conclusion. See Commonwealth v. Salazar, 481 Mass. at 112.

3.7 Trial counsel's failure to use available information in recorded jail calls and a police report to show Jones's motive to lie about Mr. Shepherd's involvement was ineffective assistance.

The month prior to the Parisse shooting, Lynn Police found a gun and a large quantity of crack cocaine in a search of Jones's apartment. R.I:317-318, 542-555. There was evidence from recorded jail calls available to trial counsel pre-trial that the gun and drugs were actually Jones's property, not that of her then-boyfriend Joshua Dixon, and that **the day of the shooting** Jones needed $5500 to post Dixon's bail in exchange for him taking her charges, but had only $1150. R.I:311-316, 391, 410. Trial counsel did not use any of this information at trial. R.I:321-333. This error prejudiced the defense, see Strickland v.

Washington, 466 U.S. at 687, and likely influenced the jury's conclusion. See Commonwealth v. Salazar, 481 Mass. at 112.

Trial counsel failed to use this evidence to show that Jones wasn't a helpless onlooker, but instead was a gun-toting drug dealer needing fast money who was lying about Shepherd's involvement in this crime to cover up that she shot Parisse herself. Trial counsel's cross-examination of Jones focused on making her out to be a drug dealer, but Jones denied that drug dealing was her job. T4:39-40. Trial counsel also attempted to elicit that Jones was in financial difficulty in order to show the jury that Jones had her own motive to rob Parisse. T4:31-33. But Jones specifically stated in response to defense counsel's questioning, "I wasn't in it for a profit or to resell the drugs." T4:53. Thus defense counsel ended up with no evidence that Jones was a gun-toting drug dealer in need of money. The prosecutor even mocked defense counsel's attempts to show that Jones was the primary actor in this crime. T7:39, 49.

Under these circumstances, the motion judge erred in denying Shepherd's Second Motion for New Trial by discounting this evidence as cumulative and not probative as to why Jones would have falsely

identified Shepherd as a participant. R.II:408-409. The motion judge erred in denying the Third Motion for New Trial, R.II:572-573, because information about the arrest of Jones on November 29, 2021 for her unlicensed carrying of a high capacity weapon with a suppressor barrel, an obliterated serial number and loaded with 13 lethal hollow-point bullets, R.II:254-255, showed that the evidence of Jones's dangerous gun-toting and drug-dealing available pre-trial was critical to a fair trial.

Jones was clearly at the scene, and there was trial testimony from Prushinski, about hearing a woman shoot a man, T6:96, 99, 100-101, and other evidence that he saw a woman with Jones's "page boy" hairstyle running away alone immediately after the shooting. T6:101; SRA:11. The trial evidence combined with the evidence presented in Shepherd's First, Second and Third Motions for New Trial that Jones was a dangerous, gun-toting drug dealer with a specific urgent financial motive for robbery, should lead to the conclusion that she lied about Shepherd's presence inside 45 Grant Street and framed Shepherd as the shooter to cover up that she shot Parisse herself. Because Jones's testimony was the only evidence putting Shepherd inside 45 Grant

Street, a confluence of factors resulted in justice not being served here. See Commonwealth v. Rosario, 477 Mass. 69, 77-78 (2017).

CONCLUSION

For the reasons set forth above, this Court should vacate Mr. Shepherd's felony murder conviction and order a new trial, or enter a verdict of second-degree murder.

Respectfully submitted,
Rashad A. Shepherd
By his attorney,

/s/ Claudia Leis Bolgen
Claudia Leis Bolgen
BBO #556866
Bolgen & Bolgen
110 Winn Street, Suite 204
Woburn, MA 01801
(781) 938-5819
claudialb@bolgenlaw.com

Dated: December 27, 2022

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

ESSEX COUNTY No. SJC-12405

COMMONWEALTH,
Appellee
v.
RASHAD A. SHEPHERD,
Appellant

CERTIFICATE OF SERVICE

The undersigned Claudia Leis Bolgen, Esquire, counsel for Rashad A. Shepherd hereby states under the pains and penalties of perjury that on this 27th day of December, 2022, through the Massachusetts Court System Odyssey File and Serve e-file internet system, I served:

Kenneth Steinfield, Esq. A.D.A.,
Essex District Attorney's Office
Ten Federal Street
Salem, MA 01970
kenneth.steinfield@state.ma.us

with a PDF copy of the Brief of the Appellant Rashad A. Shepherd and PDF copies of the Record Appendix and Impounded Record Appendix of the Appellant Rashad A. Shepherd.

/s/ Claudia Leis Bolgen
Claudia Leis Bolgen
BBO #556866
Bolgen & Bolgen
110 Winn Street, Suite 204
Woburn, MA 01801
Tel: (781) 938-5819
claudialb@bolgenlaw.com

CERTIFICATION PURSUANT TO MASS. R. A. P. 16(k)

The undersigned Claudia Leis Bolgen, Esquire, hereby certifies that pursuant to Mass. R. App. P. 16(k), the attached brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to Mass. R. App. P. 13, and 16-21.

I further certify that this brief was prepared in Wordperfect 2021 using 14-point "Century Schoolbook" font, and according to Wordperfect's word count tool, contains 14,102 non-excluded words. Along with this brief I have filed a motion for leave to file an oversized brief.

/s/ Claudia Leis Bolgen
Claudia Leis Bolgen

Addendum Table of Contents

United States Constitution

Fifth Amendment
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Massachusetts Declaration of Rights

Article 1
All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring,

possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article 10
Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

Article 11
Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Article 12
No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or

infamous punishment, excepting for the government of the army and navy, without trial by jury.

Article 29
It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

G.L. c. 233, § 78
An entry in an account kept in a book or by a card system or by any other system of keeping accounts, or a writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall not be inadmissible in any civil or criminal proceeding as evidence of the facts therein stated because it is transcribed or because it is hearsay or self-serving, if the court finds that the entry, writing or record was made in good faith in the regular course of business and before the beginning of the civil or criminal proceeding aforesaid and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. For the purposes hereof, the word "business", in addition to its ordinary meaning, shall include profession, occupation and calling of every kind. The court, in its discretion, before admitting such entry, writing or record in evidence, may, to such extent as it deems practicable or desirable, but to no greater extent than the law required before April eleventh, nineteen hundred and thirteen, require the party offering the same to produce and offer in evidence the original entry, writing, document or account or any other form which the entry, writing or record offered or the facts therein stated were transcribed or taken, and to call as his witness any person who made the entry, writing or record offered or the original or any other entry, writing, document or account from which the entry, writing or record offered or the facts therein stated were transcribed or taken, or who

has personal knowledge of the facts stated in the entry, writing or record offered. When any such entry, writing or record is admitted, all other circumstances of the making thereof, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight and when such entry, writing or record is admitted in a criminal proceeding all questions of fact which must be determined by the court as the basis for the admissibility of the evidence involved shall be submitted to the jury, if a jury trial is had for its final determination.

G.L. c. 265 § 1

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. 265, § 19(b)

(b) Whoever, not being armed with a dangerous weapon, by force and violence, or by assault and putting in fear, robs, steals or takes from the person of another, or from his immediate control, money or other property which may be the subject of larceny, shall be punished by imprisonment in the state prison for life or for any term of years.

G L. c. 278, § 33E

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.

they're saying to you probable or improbable. Is their testimony supported by or contradicted by other evidence. How good is their memory. Is it selective. Is it particularly poor. Is it too good to be believed, or is it just what you would think it would be given the passage of time and all the circumstances. You can take into account whether a witness has some sort of bias or favoritism for one side or another. You can take into account whether a witness has something to win or lose by their testimony.

In this case you heard the testimony of Monique Jones. You heard that she has a cooperation agreement with the Commonwealth. You would take that into account. You would treat her testimony with particular care because you know she has received a benefit from the Commonwealth of Massachusetts. You take that into account. You take into account that sort of thing when you would be assessing anyone's credibility. You take all these things into account, ladies and gentlemen, to determine do you believe the witness.

I suggest to you 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

Q And is that how your relationship with Mr. Parisse started?
A Yes.
Q I'm going to show you what's been marked Exhibit 32. One moment.
Do you recognize who that is?
A Yes.
Q Who is that?
A That's Wilner.
THE COURT: You -- you would refer to him as Will? Question 1
THE WITNESS: Yes.
THE COURT: Mr. Parisse? Question 2
THE WITNESS: Yes.
THE COURT: Okay.
BY MS. KIRSHENBAUM:
Q So you said your relationship with Mr. Parisse started as you buying marijuana from him?
A Yes.
Q How often would you go to buy marijuana from him when you originally started spending time with him?
A I don't know. Few times a week maybe. Three times a week, I would say, give or take.
Q Where would you go to buy marijuana from him?
A To his house, which was when I first met him at the

A Yeah. Her speech.
Q Had you spent time with Shay before?
A Yes.
Q You said that then you and Shea were drinking, correct?
A Correct.
Q What were you drinking that night at your house?
A Hennessey. Cognac.
Q Do you know how much you drank?
A Probably about a pint.

Question 3

THE COURT: About what time of day was this?

THE WITNESS: It was probably midafternoon, probably like 5:00, 5:00 or 6:00 o'clock.

THE COURT: 5:00, 6:00 o'clock?

Question 4

THE WITNESS: Yes.

THE COURT: That's when you began drinking?

Question 5

THE WITNESS: Correct.

THE COURT: Okay.

BY MS. KIRSHENBAUM:
Q What about Shay, was she drinking around that time also?
A Yes.
Q Do you know what she was drinking?
A Remy Martin. Also cognac. Something different.
Q Could you -- well, or do you remember how much she

A I mean, he was listening. He seemed like he was aware.

MS. JERUCHIM: Objection. Move to strike.

THE COURT: Sustained. Just what you observed, not -- you and I can't look into someone's mind.

THE WITNESS: Okay.

THE COURT: The jury can make conclusions based on everything. But so you just tell us what you observed. He didn't say anything, correct?

Question 6

THE WITNESS: Correct.

THE COURT: Did he react in any way physically?

Question 7

THE WITNESS: No.

THE COURT: Okay. And he wasn't asleep at the time.

Question 8

THE WITNESS: No.

THE COURT: Okay.

Q So and you said they were both in the backseat together at this point?

A Correct.

Q Okay. At some point after Terrence bringing this up, or after Terrence brought this up to you, what was your response this time?

A I agreed to it.

Q Why did you agree to it?

A Um, just looking back at it now, I think I was just

caught offguard maybe, just frustrated with everything that was going on. But I really -- I don't really know, but I agreed to it.

Q Did you see any weapons on either of these two individuals, the defendant or Terrence Tyler, at this point?

A No.

Q Okay. Was there a plan that was formed in the car about how this would all go down?

A Yes.

Q What was that plan?

A That I would go up in the --

MS. JERUCHIM: Objection, Your Honor, in terms of --

THE COURT: Sustained.

MS. JERUCHIM: Thank you.

THE COURT: Who said what in the car about the plan? You were asked, was a plan formed, and you said yes?

Question 9

THE WITNESS: Right.

Question 10

THE COURT: But tell it to us in terms of who said what. Who suggests what. Who agrees to what. Who is -- who is involved in this discussion.

THE WITNESS: Um, I would say it was a discussion between me and Terrence.

Question 11

THE COURT: Okay. And what did he say.

THE WITNESS: He -- basically it was Terrence knew that I had a physical relationship with him, so the plan was amongst the two of us, I want to say. I really can't recall. But he -- he wanted basically for me to go upstairs, we'd be fooling around, I leave the door open --

Question 12

THE COURT: Fooling around with Will?

THE WITNESS: Yes.

Question 13

THE COURT: You'd leave the door open.

THE WITNESS: Unlocked, yeah.

THE COURT: Okay.

THE WITNESS: They would come in while me and Will was in the process of messing around so that he would be like -- he would be distracted, so they could, you know, attempt to take the stuff out the house.

Q And you said they would come in. Who is they?

A Terrence and City.

Q Terrence and the defendant?

A Yes.

Q And did you agree to this?

A Yes.

Q At any point, or any point that night prior to this, had you been communicating with Wilner?

A Yes.

Q Do you remember what that -- or strike that.

After Terrence and the defendant and you agreed to this plan --

Question 14

THE COURT: Well, I'm sorry -- after you have this conversation, does the defendant, Mr. Shepherd, who you know as City, does he participate in the discussion when you're talking there in the car?

THE WITNESS: No.

THE COURT: Okay.

THE WITNESS: No.

Question 15

THE COURT: Is he present for the entire discussion?

THE WITNESS: Yes. Yes.

THE COURT: Okay. Go ahead.

Q After that discussion, do you communicate with Wilner at all?

A Yes. I did it right after. So Terrence took my phone and was texting him first. Just explicit stuff, I guess, trying to set the mood, I would say.

Q You said explicit stuff. What do you mean by that?

A Just sex, sexual stuff, things of that nature. What we'll do when we are, you know, alone, stuff like that.

Q And was any plan formed between or --

THE COURT: Where does this take place, the texting?

Question 16

THE WITNESS: That's also in the vehicle.

THE COURT: Okay.

Q Was the defendant present during texting back and forth?

A Yes.

Q Now, did Terrence -- or at any point was there a plan -- at any point after that did you text with Wilner? Did you use your phone to text with Wilner?

A I believe I did at the end of the night when the bar was closed, or I might -- I believe I texted him or called him to let him know when I was coming to the house.

Q So had you texted him or had Terrence texted Wilner to form a plan of when you would go over to Wilner's house?

A Yes. Yes.

Q And do you know what the substance of that -- or do you do it or did Terrence do it?

A Terrence did that.

Q Do you know what the substance of that conversation was?

A Yes. It's for -- for me to come over so we could be intimate.

China Bowl for?

A No. But I know we stayed until the closing time.

Q Do you recall talking to either Terrence or the defendant about the plan to rob Will inside the China Bowl?

A No.

MS. JERUCHIM: Objection to the form of the question.

THE COURT: Overruled.

Q You said you stayed until about closing time?

A Yes.

Q After the bar was closing, where did you go?

A Um, we went to Will's house to Grant Street.

THE COURT: Who is we?

Question 17

THE WITNESS: Me, Terrence, City. And Shay was in my car also.

Question 18

THE COURT: The four of you --

THE WITNESS: Yes.

THE COURT: -- go to Wilner's? Okay.

Q After you actually walk out of China Bowl, you said you went to Will's house, how did you get to Will's house?

A We drove there. I drove that there.

Q In your rental car?

A Yes.

Q Do you remember where Shay was in the car?
A Shay was in the front seat passed out.
Q Passed out?
A Yes.
Q When you got back into your car after leaving the China Bowl, was anybody else already in the car?
A Shay was.
Q So Shay had come from the China Bowl before you and passed out in your car?
A Yes.
Q Did -- so then you drove to Wilner's house?
A Yes. Yes.
Q Okay. So Grant Street?
A Yes.
Q Do you remember if he parked right in front of Wilner's house on Grant Street?
A No, I didn't. I parked up the street about four houses, five houses up.
Q Now, was there a particular signal or anything you were going to give to either Terrence or the defendant to come inside the house?
A No. The -- basically we discussed it, I would go in, they would come in.
MS. JERUCHIM: Objection to the responses in terms of we.

THE COURT: Who is we, when you say, basically we discussed it. And when did this take place? This the?

Question 19

THE WITNESS: We were parked up from the street, Will's house.

Question 20

THE COURT: Parked up the street. At this time obviously Shay is not part of the conversation.

THE WITNESS: Correct. She's still passed out.

THE COURT: Okay.

THE WITNESS: So it's me and the two gentleman.

THE COURT: Are both participating in the discussion?

Question 21

THE WITNESS: Correct.

Question 22

THE COURT: Okay. What's said?

THE WITNESS: Basically they were -- I was going to go in the house. I said, you know, Will leaves the doors open, so I will leave the doors open upon going in, and they would come in about 20 minutes after.

Q You said that you -- that Will leaves the doors open?

A Yeah. When I was -- there's a downstairs. There's two doors. There's a back downstairs door, and then the upstairs door.

Q Is that the only entrance you ever took to get inside Wilner's house?

Q After you sent, you said, there are two text messages or one text message you can recall that you sent to Terrence after the door was locked?

A I believe it was -- I believe it was one, but I'm not -- I'm not sure, but I believe it was one.

Q After you sent the text messages, did you say anything to Will?

A Yeah. I asked Will if he could go get me something to drink.

Q What did Will do?

A He went to get me something to drink.

Q Did he unlock the bedroom door?

A Yes.

Q When he opened the door, what happened?

A He was startled by Terrence and City. They were --

MS. JERUCHIM: Objection. Move to strike.

THE COURT: Sustained. You can't tell us whether he was startled or not because --

THE WITNESS: Oh, okay.

THE COURT: Because you don't know. You were not inside his brain.

THE WITNESS: Right.

THE COURT: But --

THE WITNESS: Well --

THE COURT: He opens the door. And what do you

observe or hear or see? Question 23

THE WITNESS: Okay. He opens the door.

Question 24

THE COURT: He opens his bedroom door, right?

THE WITNESS: Yes, that's correct.

Question 25

THE COURT: You unlock it, open the door?

THE WITNESS: Right. And the kitchen is right off his bedroom.

Question 26

THE COURT: What did you hear or observe.

THE WITNESS: I observed he comes face-to-face with Terrence. At that point they started fighting.

Q Now Mr. Shepherd -- could you actually see clearly outside in the kitchen from where you were sitting at that point?

A Not clearly. But it was dark, so the only light was coming off of the bedroom.

Q Wilner's bedroom?

A Correct.

Q So what could you see specifically from where you were seated?

A I just seen -- I seen him, and I seen a gentleman. I seen two people, I guess I want to say, not the shadow, but roughly like a man's body present, like when he walked out, they kind of clashed into each other, you know, walked into each other.

Q Could you make out -- so Wilner walks into -- at

anything?

A He was -- he was -- at that point I believe he started screaming. I don't -- I think he was screaming for help.

Q He was yelling out for help?

A Yes.

Q Could you see who he was directing that to?

A I would -- I would say he was directing it to City.

MS. JERUCHIM: Objection. Move to strike.

THE COURT: Overruled. Do you see Terrence yelling out for help? Question 27

THE WITNESS: Correct.

THE COURT: Is he yelling it towards any particular person? Question 28

THE WITNESS: Yeah. He's looking -- yes. He's looking towards City.

THE COURT: The defendant? Question 29

THE WITNESS: Yes.

THE COURT: Okay.

Q At that point what did you do?

A I grabbed my stuff, my pocketbook and my clothes, and I run into the bathroom.

Q Did you make it into the bathroom?

A Yes.

Q And as -- after you made it into the bathroom, did

MS. KIRSHENBAUM: All I expect, unless something is new, I don't even know, but is that she's going to say that she saw him driving, he was trying to get her to pull over once in the car. So, I mean, I don't --

THE COURT: That's it?

MS. KIRSHENBAUM: That's all I expect.

THE COURT: I'll allow it. Okay.

(End of side bar.)

THE COURT: That night did you ever see Terrence with a gun? Question 30

THE WITNESS: No.

THE COURT: Okay. Go ahead.

BY MS. KIRSHENBAUM:

Q That includes the early morning hours right after you had left the scene?

A Yeah.

Q After that night, did you ever speak with the defendant again?

A Um, I saw -- I saw him on occasion. He -- I want to say he was like, he spoke to -- he attempted to speak with me, but I -- I, you know, was -- I told him I had something to do, so and I just got in my car and left. Like we were at a store and he seen me, but then I, you know, took off.

THE COURT: Well, do you remember. Question 31

Q Do you remember what you told him?

A I don't, but I've seen the paper.

THE COURT: Okay. Then --

Q I'm going to refresh your memory. If you can look at line 5?

A Um, okay.

Q Well, does that refresh -- does that refresh your memory?

A Yes, it does.

Q What did you tell Detective Tulipano on that day?

A It says, I'm self-employed.

THE COURT: Not what it says. Do you recall what you told him? Question 32

THE WITNESS: Yes, I recall.

THE COURT: Okay. What did you tell him? Question 33

THE WITNESS: I recall I said I was self-employed. As I think now, me and my mom were doing some catering at the time.

Q So you -- now you remember that you were doing catering?

A No, no. It was something we did on weekends. It wasn't a full -- it was just something we were doing on the weekends from time to time.

Q But you remember that now?

Q Does that refresh your memory about his question to you?
A Twenty-three or?
Q Twenty-two.
A Oh, 22.
Q Yes.
A Okay.
Q Okay. And if you can just read to yourself lines 24, your responses to 25, to line 1 on page 48.
Show you it again.
A Twenty-four, uh-huh.
Q Can you read it?
A Yep.
Q Okay. Does that refresh your memory that you told Detective Tulipano that you had also had a city drink when you always drink?
A No. It could be a typo error. Doesn't even sound like anything we say. City drink.
Q You're saying this transcript is wrong then?
A I didn't say it was wrong. I said it would be a typo error.

Question 34

THE COURT: But it doesn't refresh your memory?
THE WITNESS: No, it doesn't.
THE COURT: Okay.
Q And you said you had consumed a pint of Hennessey.

Is that what you had -- what you testified yesterday?
A I said I had a pint of Hennessey, yes.
Q And you were also drinking -- you were also smoking marijuana?
A Correct.
Q This was sometime midafternoon that you started?
A Correct.
Q And at some point you and Shay decided to go over to the China Bowl?
A Correct.
Q What time did you decide to do that?
A It was probably around 11:30, 12:00 o'clock.
Q Okay.
THE COURT: In the evening? Question 35
THE WITNESS: In the evening, yes.
Q Eleven-thirty, twelve?
A Yes.
Q That's when you decided to go to China Bowl?
A Yes.
Q Do you remember what time you got to the China Bowl?
A I'm not sure, no.
Q And you had been texting T.E. all that day. Do you remember that you were talking -- talking to him?
A Um, I don't remember if I was texting him all day, no. I mean, I probably talked to him a couple of

A Not really, no.
Q So you'd use code words, right?
A I mean, if you have seen what I stated, it's not really code words. But I -- you know, when I was seeing Will, I put, I want a 3.5. I wouldn't call it a code word though.
Q You would not explicitly say 3.5 of what, right?
A No.
Q And during your conversations with T.E., during that day, T.E. was again trying to push you to set up that robbery that he had asked you now on two or three prior occasions?
A Yes.
Q All right. This was your phone call with T.E. that you were doing this, right? You knew that that's what T.E. wanted you to do?
A Repeat the question? Are you --
Q During your phone conversations with T.E. that day, he wanted -- he was putting pressure on you to try to set this up robbery, right?
A When we got together, yes, he was questioning me. I don't believe we had much phone calls about -- conversation about it. I don't recall.

Question 36

THE COURT: Where did you get together?
THE WITNESS: Huh?

Question 37

THE COURT: Where did you get together?

THE WITNESS: I picked him up, and we -- on the way to the bar was more of a conversation then.

THE COURT: The China Bowl? Question 38

THE WITNESS: Correct.

THE COURT: Okay.

Q And you said you picked T.E. up on Essex Street?

A Yes.

Q Essex Street is parallel to Union Street where the China Bowl is, right? It's like literally right around the corner?

A Yes. But Essex Street is a main street in Lynn. It goes basically through East Lynn almost to West Lynn. So it's kind of the length of most half -- half the city, I would say.

Q As you're having these discussions with T.E. about setting up this drug robbery, you certainly -- Ms. Jones, it was pretty apparent to you that what T.E. was proposing was a crime?

A Yes.

Q A crime that could involve somebody getting hurt?

A I didn't believe that someone would get hurt. But, yes, somebody could get hurt, I agree.

Q Somebody could get hurt, right?

A Yes, I agree.

A We were -- no. We were in the car when Terrence was using my phone texting.

Q So you went back into the car? You got out of the China Bowl, and you went back into the car?

A No. Before we went into the China Bowl, Terrence was texting Will.

Q So let me ask you this. What time did you leave the China Bowl?

A They closed at one, so I believe we probably left a little about one o'clock, maybe a few minutes before.

Q What time did the bar close down at China Bowl?

A It closes at one.

Q Okay. So I'm going to show you some text messages. Do you remember texting Will at 233541?

A I would have to see it because the numbers are the military, follow the military time. I think this kind of throws me off.

Question 39

THE COURT: As you understand military time, 2400 hours would be midnight, 12:00 o'clock.

THE WITNESS: I do. It still confuses me though.

Question 40

THE COURT: It's still a little confusing?

THE WITNESS: Yeah.

THE COURT: But it's a 24-hour clock. In other words --

THE WITNESS: Right.

Question 41

THE COURT: -- it doesn't go until 12, then one o'clock again. It goes 12, then, for example, one o'clock would be --

THE WITNESS: One o'clock in the morning, right.

Question 42

THE COURT: Now I'm confused. One o'clock would be one, but 11:00 o'clock -- well, one o'clock would be -- one o'clock in the afternoon would be 1300 hours. Do you understand that? In other words, it wouldn't be 12, it would be 13.

THE WITNESS: Right.

Question 43

THE COURT: So then when it's at like 24, it would be midnight.

THE WITNESS: Okay.

Question 44

THE COURT: If it's then at one, you're one in the morning.

THE WITNESS: Okay.

Question 45

THE COURT: If you're at zero twenty, you're at 20 minutes after midnight.

THE WITNESS: Okay.

THE COURT: Okay? Go ahead I think.

BY MS. JERUCHIM:

Q At 12:00 o'clock you were still at the bar, right, with T.E., correct?

A Correct.

Q So the plan with T.E. -- so as you're texting him from approximately, let's see 1104 to 2304, you sent Will a text, You still up. Do you remember that?
A Yes.
Q And Will responded with question marks at 111106?
MS. KIRSHENBAUM: Objection.
Q Do you remember that or 23 --
THE COURT: I'll see you at side bar.
MS. JERUCHIM: Sure.
SIDE BAR:
THE COURT: What's the basis of the objection?
MS. KIRSHENBAUM: Just the characterization. I want to make sure we're careful it's actually she sent it to him.
MS. JERUCHIM: Sure. I'll make sure the record --
THE COURT: Okay.
(End of side bar.)
Q So you said you sent Will a message, a text, saying, Are you still up. Right?
A Yes.
Q And that was at 11:04. Do you recall that?
A Yes. I believe it was at that time, yes.
Q At 11:06 you sent him another text with question marks because he hadn't responded to you?

Question 46

THE COURT: Well, do you know this or would you have to refer to a document?

THE WITNESS: It would be easier if I could refer to the document, yes.

THE COURT: Okay.

MS. JERUCHIM: Sure.

Q Take a moment to look at that page.

THE COURT: And you are showing her a page of what exhibit?

MS. JERUCHIM: Yes. So showing of Exhibit 53.

A Okay.

Q So that's the third page of Exhibit 53. Those are text messages. If you can take a moment to refresh your memory.

Question 47

THE COURT: So I think the question that was asked, was it 11:06.

THE WITNESS: 11:06?

Question 48

THE COURT: Did you text Will with question marks?

THE WITNESS: Yes.

THE COURT: Okay.

Q Okay. And Will responded at 11:16 and he said, Yeah. Correct?

A Correct.

Q And you texted him back at 11:17 and you said, I need

in, Will was to be in the most compromised position possible; namely, that you were having sex with him, and he was naked and undressed and vulnerable, right?

A Yes.

Q So you had to make sure that 20 minutes from the time that you parted that you were in exactly that position so this robbery could go smoothly, right?

A Correct.

Q And you left the door downstairs unlocked when you entered?

A Correct.

Q And you went upstairs and you had to unlock the door behind you because it was Will's apartment, right, the upstairs door?

A No.

Q Well, Will locked the door behind you, didn't he?

A No. Will was in his room when I came in.

Q When he came out of his room, he went and locked the door? He left his room at some point and locked the door?

Question 49

THE COURT: Are we talking about the kitchen door?

MS. JERUCHIM: The kitchen door. The door upstairs.

A Well, he didn't leave the room until later, until I

went into the kitchen swinging it at Terrence, yes.
Q So Terrence --
A Like I said, the kitchen and the bedroom are right there. Step out the bedroom and you are in the kitchen.
Q Right. Right. But, Ms. Jones, you're telling me that it all started when Terrence pushes Will onto the bed, right?
THE COURT: Onto the bed? Question 50
MS. JERUCHIM: Onto the dresser.
Q Right? That's how the fight started?
A The fight started when Will stepped into the kitchen.
Q And that's not the kitchen, is it?
A No, it's not.
Q And that lamp that fell, that lamp fell because of some kind of struggle, right?
A Yes.
Q The lamp wasn't on the bed when you started there with Will earlier that evening?
A No. It wasn't like that, no.
Q So the struggle started in the bedroom, right?
MS. KIRSHENBAUM: Objection.
A No.
THE COURT: Sustained.
Q The struggle -- the altercation -- the physical

A Well, yeah. They were -- they -- they -- they fell. They were wrestling, yes, on the ground.
Q And you were watching all of this. And your testimony was that you -- now, you weren't in harm's way at this time, right?
A I -- I wouldn't say that, no. No.
Q Nobody was harming you? Nobody was hurting you, correct?
A Correct.
Q And again this was nothing that you did -- that you didn't expect because you understood that there was a possibility that there could be activity that involved some type of fighting, right?
MS. KIRSHENBAUM: Objection.
THE COURT: Overruled.
Did you expect this or not? Question 51
THE WITNESS: No.
Q Well, you knew --
A I mean, I -- I was not expecting it to turn into a physical altercation, no. I wasn't expecting that.
Q Well, you knew that Terrence -- Terrence had told you in discussing the plan that you might have to -- that Will might have to be strongarmed a little bit, put him into a chokehold. Remember that?
A No, I don't recall that.

Terrence at that point running out the back door, yes.

Q You only saw Terrence?

A At that point, yes.

Q Okay. Ms. Jones, do you remember testifying before a Grand Jury on November 10, 2014, in conjunction with this case?

A What date?

Q November -- November 10th?

A Yes.

Q 2014?

A Yes.

Q And you testified under oath, I presume, correct?

A Yes.

Q And you would agree that your memory was better back in November of 2014 than it is today, correct?

A Yes.

Q Do you remember testifying --

THE COURT: I'm going to interrupt you here for a second to inform the jury about something. You've heard reference now a couple of times to a Grand Jury to where -- and, Ms. Jones, you testified before a Grand Jury, correct?

Question 52

THE WITNESS: Right.

THE COURT: Now, ladies and gentlemen, a Grand

Jury is different from, completely different from, the trial jury. You're actually called the petit juror because you're small compared to a Grand Jury. A Grand Jury has 23 members or so on it, and they have a completely different function. And you will actually notice if you were paying attention when the clerk read off the indictments, the indictments actually come from the Grand Jury. So what they, the Grand Jury does is it hears testimony under oath from individuals, that sort of thing, but they have a completely different function than a trial jury. You here decide whether the Commonwealth has proven the case beyond a reasonable doubt, that the Grand Jury doesn't do that. But they do hear testimony. That's what they're referring to here now is when Ms. Jones appeared before the Grand Jury under the same oath that she takes here in the courtroom.

Please proceed.

MS. JERUCHIM: Thank you, Your Honor.

Q Ms. Jones, do you remember testifying at that time that you said, After I heard the shots, I froze for a second, and then came out of the bathroom. This is page 27, by the way, lines 20 to 23.

I could hear -- I heard them running, but as I came out the bathroom, I see Terrence. He was behind

would say on his back. I'm not sure.
Q He collapsed on his back?
A I'm not sure. He was reaching up, then he wasn't. Then he was on the ground.
Q And you told this jury that Mr. Parisse, when he was interrupted by Mr. Tyler, he was in his boxers; is that right?
A I said he was in the room when I came in in his boxers.

Question 53

THE COURT: In his boxers. That's all he had on I think I told this jury.
A When I came in the house, yes.
Q And when he was there, he was in his boxers. The point was for the two of you to have sex, right?
A Yes.
Q If you are looking at Mr. Parisse's picture of his deceased body on the floor, can you tell the jury what he's wearing?
A He has pants and shirt on.
Q And his boxers?
A Yes.
Q And socks, right?
A Yes.
Q So he has more than his boxers on at the time that he was in a struggle with Mr -- with T.E., right?

just asked me. But I guess yes.

Q You guess?

A I guess so, yes. I thought you just asked me if I got dressed in the room. That's what I thought you asked me.

Q Well, before you get dressed in the room --

THE COURT: Well, did you get dressed in the room? Question 54

THE WITNESS: No, I didn't. Question 55

THE COURT: You didn't get dressed in the room?

THE WITNESS: No, I didn't. I was actually running down the street, putting my pants on at the time of the incident. I didn't get dressed at the house at all. I had a shirt and bra on. When I left I was putting my pants on.

Q You were pulling your pants on as you were running down the stairs?

A Yes.

Q Before you pulled your pants on to run down the stairs, you saw Mr. Parisse dying on the floor and you left him there?

A Um, I believe when I left the house that he had passed, yes.

Q Were -- you didn't take his pulse?

A I didn't, no.

Do you remember that?
A Yes.
Q And then you tell them the story that you were in bed with Will when these three white males came in and tried to rob Will, right?
A Yes.
Q And you described what they were wearing, and that one had a tattoo. Do you remember that?
A Yes.
Q So you took some time to develop some details to the first story that you gave them?
A Well, I would say during the questioning the police were kind of leading me on, asking me about tattoos and whatnot, and I kind of more agreed with the police.
Q So --
A Like they would say something, and I would, as I said, they were white men, and I believe that they said, you know, they was masked. Did they have tattoos, and I think I just agreed with them and added it in.
Q So --
A So I would say, like, they were leading on that. I --

Question 56

THE COURT: But you knew it was false at the

time?

THE WITNESS: Yes.

Question 57

THE COURT: At the time they were saying it?

THE WITNESS: Yes. Yes.

Q So the police were asking you to give them a description of these three white males, and they were asking you what color hair they had or what they were wearing or whether or not they had any tattoos, right?

A Correct.

Q And what kind of clothing they were wearing, correct?

A Yes.

Q And you were lying? You were filling in the details, and you were coming up with a story?

A Correct.

Q To take yourself out of it so that you wouldn't go to jail for the rest of your life?

A Yes. I was telling them -- I made up a story because I was -- I was scared at that point, yes.

Q You were scared to go to jail?

A Yeah. I was scared of a lot of things, yes.

Q So you were -- well, you were scared to go to jail for the rest of your life, Ms. Jones?

A Yes.

Q And at some point, you felt you -- you wanted to

hearing proceeding in this case a month ago. Do you remember that?

A A proceeding a month ago?

Q Yes. Where you testified --

A Yes.

Question 58

THE COURT: In Salem, Massachusetts?

THE WITNESS: Yes.

Q In Salem. Do you remember that?

A Yes.

Q And you were under oath?

A Yes.

Q And at that proceeding you were asked similar questions by the prosecution. Do you remember that?

A What similar questions?

Q Question -- questions then as were in this trial.

A Yes.

Q And you were asked by the prosecutor -- prosecution as to how T.E. and City would know where to look for the marijuana and the money. Do you remember that?

A Yes.

Q And you told -- you testified on that case that T.E. and City knew where Will kept his marijuana and money. Do you remember -- do you recall that? Page 11.

A Not. Sure. If I can see it.

I believe it -- I believe I said that, but could I see it? I believe I said more upon that also.

Q Line 4.

A Yes.

Q All right. So you remember that the prosecution asked you, did the defendant and City know where Will kept his marijuana and his money. Do you remember that?

A Yes.

Q This was a month ago?

A Yes.

Q And you lied and you said yes?

A Yes, because I told them in the car that it was in the closet, yes.

Q So you lied at that proceeding under oath?

MS. KIRSHENBAUM: Objection.

Question 59

THE COURT: Overruled. Did you lie there or was that the truth?

THE WITNESS: Repeat the question that you're asking if I lied about?

Q Well, you testified in a different proceeding that you that City and Tyler knew where Will kept his marijuana and his money; is that right?

A Correct.

Q But you told this jury that they didn't know

because --

Question 60

THE COURT: Well, that wasn't your question. Did you lie then or were you telling the truth then.

Q Were you lying to them? Lying at that proceeding?

A No, I wasn't. I -- I -- I told them in the car that that the stuff -- that Will's stuff was in the closet. I believe I -- I believe I said that at the last one too.

Q You did not know where he kept the stuff. You told that to this jury, right?

MS. KIRSHENBAUM: Objection.

THE COURT: Sustained.

Q You testified earlier that you didn't know exactly where he kept his stuff.

THE COURT: That's sustained.

Q Ms. Jones, a few minutes ago, or earlier yesterday, you testified when asked about where Will kept his marijuana, for example, that you thought that he had -- it was in the closet, but you didn't know exactly where. Is that correct?

A I said it was in the closet, I didn't know exactly where in the closet it was.

Q Okay.

MS. JERUCHIM: Excuse me. Just one moment?

THE COURT: Uh-huh.

Judge Can Make Bail Instruction

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 charge and bail was set, I would -- well, I would hope my wife would come in with money and make my bail promptly so 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 that would be very unfair.

So let's proceed.

THE CLERK: Exhibit No. 76 so marked.

(Exhibit No. 76, Tape, received into evidence.)

BY MS. KIRSHENBAUM:

Q Before I play this, Detective Withrow, you stated you've been a detective with the Lynn police for over 20 years, correct?

A Correct.

Q As part of your just time as a police officer in and around the city of Lynn, fair to say you've become familiar with its residents?

reasonable doubt. And so it's the Commonwealth that has to prove the defendant guilty. So if they're equally reasonable inferences to you, then you would draw the inference that favors the defendant.

Now, ladies and gentlemen, one inference that you cannot draw anything from is the fact that the defendant did not testify here; that the defendant never has to testify; he never has to present any evidence here. Here the defendant has a right to present evidence. He did call one witness. But the fact that he did not testify, you cannot draw any inference from that against the defendant, because he has an absolute right not to.

We live in a system of justice where the burden of proof is solely upon the Commonwealth. It's the Commonwealth's responsibility to attempt to prove to the jury beyond a reasonable doubt that the defendant committed the crime charged.

Now, what is proof beyond a reasonable doubt. I'm going to give you that definition of that, but to do that, ladies and gentlemen, I'm going to retake the stand so I can actually read it to you to make sure I get it correct.

Okay. How am I doing so far?

THE COURT OFFICER: Excellent.

THE COURT: Excellent. Okay.

Now, proof beyond a reasonable doubt, ladies and gentlemen, is best defined as follows: The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge or charges made against him.

Now, in this case, ladies and gentlemen, remember, we have three different charges brought against the defendant, and you take each one separately. And you decide has the Commonwealth proven each charge beyond a reasonable doubt. So you take each one separately. The Commonwealth may prove one or two or all three beyond a reasonable doubt, but you take each one separately. And the Commonwealth bears the burden of proof on each and every charge.

In this case, ladies and gentlemen, we have the charge of first degree murder by means of felony murder. I'll define that for you in a few minutes. The second charge is home invasion, and the third charge is armed assault with intent to rob. The Commonwealth has to prove the defendant guilty beyond a reasonable doubt of each charge before the jury could find him guilty.

What is proof beyond a reasonable doubt. The

they're saying to you probable or improbable. Is their testimony supported by or contradicted by other evidence. How good is their memory. Is it selective. Is it particularly poor. Is it too good to be believed, or is it just what you would think it would be given the passage of time and all the circumstances. You can take into account whether a witness has some sort of bias or favoritism for one side or another. You can take into account whether a witness has something to win or lose by their testimony.

In this case you heard the testimony of Monique Jones. You heard that she has a cooperation agreement with the Commonwealth. You would take that into account. You would treat her testimony with particular care because you know she has received a benefit from the Commonwealth of Massachusetts. You take that into account. You take into account that sort of thing when you would be assessing anyone's credibility. You take all these things into account, ladies and gentlemen, to determine do you believe the witness.

I suggest to you 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 -- I'm also walking out there. And I come 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 judge is crazy. Because you have contrary evidence to what I would be saying to you. You can see the that the sun is shining. You can see it's actually a much nicer day than it has 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.

You use your common sense in another way here also, ladies and gentlemen, in not only determining what to believe, but also how important is a piece of evidence. You give a weight to each piece of evidence. You might say, well, I believe that, but big deal, it's not very important. You know. In other words, it doesn't have much weight. Or you might have an opposite conclusion as to a piece of evidence. You might say, I believe that and I

defendant guilty. Presence alone does not establish a defendant's knowing participation in the crime, even if the person knew about an intent of the crime in advance and took no steps to prevent it.

To find the defendant guilty there must be proof that the defendant intentionally participated in some fashion in committing the particular crime and had or shared the intent required to commit the crime. It is not enough to show that the defendant simply was present when the crime was committed, or that he knew about it in advance.

Now, ladies and gentlemen, that's lot of words. So let me give you an example of joint venture, what is or is not a joint venture.

I have a brother-in-law who is always coming up with ideas, some of them not the smartest ideas. But let's say he comes up to me one day and he says, look, I think I'm going to go rob the First and Ocean National Bank on State Street in Newburyport, and I think I'm going to do it tomorrow at noontime. And he tells me that. And I think he's crazy enough to do it. You know. I really think that, hey, he might do that. I have -- he's informed me that that's his plan, that he's going to go rob the bank. Now, I don't do anything about that. Don't call the police.

I don't tell anybody. He goes and he commits the crime. He goes and robs the bank. I'm not in joint venture with him. Mere knowledge that the crime is going to occur is not enough to make me a joint venturer. I don't have the intent that the crime occur. I don't have the -- I haven't done anything to assist him in any way. I might have a moral responsibility to tell somebody, but that's not a legal responsibility. So I'm not a joint venturer in that situation.

Let's say, for example, that he tells me that and I say, really, you're going to do that. And he says, yep, I'm going to do that. I have the knowledge that he's going to do that. And so I decide, well, I'm going to be there at noontime, I'm going to go to the ice cream parlor across the street and see if he actually is dumb enough to actually try to rob the bank. So I'm present at the scene, in the generally vicinity of -- the general vicinity of the crime, and I'm eating my ice cream cone. And I see him go in and rob the bank. I have knowledge that the crime is going to happen. I'm even present at the scene. Still I'm not a joint venturer because I don't have the intent. I don't share the intent to rob the bank. I haven't done anything in any way to

assist him.

But let's change the example one more time. What if he tells me he's going to rob the bank at noontime, which bank he's going to rob, where it is, and I say to him, hey, when you come out, look around for me if you need a hand. And sure enough, at 11:55, five minutes before noontime that day, I come up to the curb in my automobile, and I am idling my automobile. He goes into the bank, he comes running out. He looks at me. I wave to him. He waves back and he runs by. Now, in that situation, a juror could, they don't have to, but the juror could find that I was a joint venturer. I have knowledge of the plan, I didn't have an explicit oral agreement with him, but I have knowledge of the plan. I am there. The jury could decide that I shared the intent to help him commit the crime of armed robbery, because I am there present to provide the getaway vehicle if he needs it. Now, the fact that he didn't actually need the getaway vehicle doesn't absolve me of being a joint venturer, but the jury could find that I shared the intent. I was not only just present at the scene, I was there present to provide some sort of aid to make the crime succeed, and to provide the getaway. There a juror could find that I was a joint

venturer.

So the Commonwealth has to prove here, ladies and gentlemen, that the defendant shared the intent and did something to help the crime succeed here. So a joint venturer. Has he intentionally participated in some meaningful way in the commission of the offense, with the intent to have -- to commit the offense.

So, ladies and gentlemen, let me now go into the elements of the crime of murder in the first degree, felony murder, and I am going to actually ask Ms. MacDougall if you could -- great. Could I have that one back? Great. Thank you so much.

Now, ladies and gentlemen, let me just shuffle my papers for a moment here.

I want to talk to you about the charge of murder in the first degree; that is, the felony murder charge. The defendant is guilty of felony murder in the first degree if the Commonwealth has proved beyond a reasonable doubt that Mr. Parisse was killed by the defendant or a person participating with him in the commission of the felony; in other words, a joint venturer, when the felony has a maximum sentence of life imprisonment, and that the killing was caused by an act that occurred during the

to carry away property against Mr. Parisse's will with the intent to deprive Mr. Parisse of that possession permanently. In other words, he wasn't just going to borrow it.

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 area of 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 of 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.

Now, in this case, ladies and gentlemen, the Commonwealth doesn't have to prove armed robbery. They can prove unarmed robbery, which is the exact same elements with the exception of they -- if the Commonwealth fails to prove that the defendant or one of his joint venturers was armed at the time with a dangerous weapon.

As I've already told, ladies and gentlemen, the Commonwealth here does not claim that the armed

First, that the defendant committed or someone he is acting in joint venture with committed an assault on Wilner Parisse; second, that the defendant or someone he was acting in joint venture with was armed with a dangerous weapon. In this it's alleged that he was armed with a gun. And, third, that at the time of the assault, the defendant had the specific intent to rob Wilner Parisse. I already told what you robbery consists of. That the defendant himself had that specific intent, the Commonwealth has to prove, and that the defendant knew that he or someone he was acting in joint venture with was armed with a dangerous weapon, and that he or someone he was acting in joint venture with committed an assault upon Mr. Parisse.

Let me just briefly tell you what an assault is. An assault is an attempted battery. A battery is a touching of someone, an un-consented touching of someone no matter how slight.

Now, if you commit a battery against someone, you've necessarily committed an assault. Let's said if I get irritated at the clerk Mr. Murphy and I decide to punch him in the nose, and I fully connect and I actually connect and I miss his nose but I punch him in the shoulder, that is an assault and

battery. I've touched him no matter how slightly and it's an un-consented touching. So that's a battery. It would be -- the assault is necessarily part of the battery. Let's say I really am angry at Mr. Murphy and I am going to punch him in the nose, and I swing and I just miss him. Well, that, ladies and gentlemen, would be an assault. It's an attempted battery.

So the Commonwealth has to off prove an assault. If the Commonwealth proves a battery, they've necessarily proven an assault.

Here the Commonwealth claims that the battery was actually committed by a joint venturer, Mr. Tyler, in struggling with Mr. Parisse.

Am I correct on that? Is that the Commonwealth's theory on armed assault with intent to rob, or is the Commonwealth actually claiming the gunshot being the assault?

MS. KIRSHENBAUM: No.

THE COURT: Okay.

MS. KIRSHENBAUM: What you said is correct.

THE COURT: Okay. So, ladies and gentlemen, that's what the Commonwealth is claiming. So the Commonwealth would have to prove beyond a reasonable doubt that the joint venturer struggled with Mr.

instructions to you.

As I tell you what the law is, you have to accept the law as it stands today. Now, you may say, I don't like that law. I think it should be something different. That's fine. In a democracy you can change the law, but you do that on election day at the ballot box. You don't change the law in the jury box. So you have to the accept the law as I give it to you.

Having said that, however, remember, ladies and gentlemen, you are the sole, the 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. You're the ones who put things together.

Don't think that I have made up my mind on the facts of this case. That's not my job. I haven't. I have a hard enough job making sure the case is tried fairly and efficiently to you, that I make the correct legal determinations, that I instruct you on the law correctly, that I make the correct evidentiary determinations. That's my job. Your job is to determine the facts of the case.

So you render your verdict, of course, based on the evidence. And let's review again what the evidence is. The evidence is not what the lawyers

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

---

[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

---

[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

---

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.

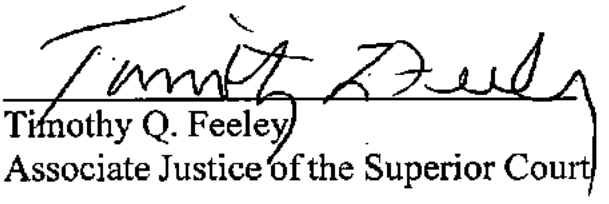
Shepherd certainly knew about the video and the Commonwealth's intended

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

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.

---

[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).

---

[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.

[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]

---

[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.

[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

Document: Commonwealth v. Fremming

Commonwealth v. Fremming

Appeals Court of Massachusetts

October 5, 2017, Entered

16-P-1317

Reporter

92 Mass. App. Ct. 1107 | 94 N.E.3d 435 | 2017 Mass. App. Unpub. LEXIS 868

COMMONWEALTH *vs*. TETAO A. FREMMING.

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE* V. *CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

Subsequent History: Appeal denied by Commonwealth v. Fremming, 478 Mass. 1105, 2017 Mass. LEXIS 853 (Mass., Nov. 30, 2017)

Appeal denied by Commonwealth v. Badger, 478 Mass. 1105, 2017 Mass. LEXIS 847 (Mass., Nov. 30, 2017)

Judges: Rubin, Neyman & Henry, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant, Tetao A. Fremming, was convicted of misleading a police officer in violation of G. L. c. 268, § 13B, and making a false report of a crime in violation of G. L. c. 269, § 13A. On appeal, he argues that the trial judge erred in (1) admitting in evidence five diagrams created by the Commonwealth purporting to show that the defendant made cellular telephone (cell phone) calls from certain vicinities, (2) admitting in evidence several photographs because they were irrelevant to the crimes charged and misled the jury, and (3) denying the defendant's motion for a required finding of not guilty because the Commonwealth failed to establish that the defendant made any false statement in reporting the theft of a motor vehicle. We affirm.

Background. On December 31, 2013, at approximately 7:00 P.M., Worcester police officers responded to a report of a car crash near 123 Summer Street in the city of Worcester. Eyewitnesses reported that a white vehicle had struck a pedestrian and left the scene. On January 5, 2014, at 3 Wyman Street in Worcester, officers discovered a grey Chevrolet Sonic that was determined to have been the vehicle involved in the hit-and-run collision. Officer James Foley testified that a check of the Registry of Motor Vehicles database indicated that the vehicle was a rental vehicle owned by Enterprise, and the renter for the relevant time was the defendant's girl friend, Georgia Grammatikakis. She and the defendant had filed a stolen motor vehicle report with the Worcester police department on January 1, 2014.

The defendant reported that he had driven the vehicle to 114 Eastern Avenue to visit a friend, left the keys in the ignition, and, when he went to ring his friend's doorbell, someone stole the vehicle. Police officers obtained surveillance video footage from the doorway above 112 Eastern Avenue for the time between 6:35 P.M. and 7:35 P.M. on December 31, 2013, which was admitted in evidence at trial. These homes, 112 and 114 Eastern Avenue, are connected as a duplex. The surveillance video footage showed the street in front of the building, where the defendant claimed to have parked the vehicle. The defendant stipulated at trial that he did not appear in this surveillance footage.

With a search warrant, the Commonwealth obtained cell site location information (**CSLI**) regarding the defendant's cell phone for December 31, 2013 through January 7, 2014. Seventy pages of the defendant's **CSLI** was admitted in evidence. The **CSLI** records included the date, time, and duration of telephone calls made to and from the defendant's cell phone, the telephone numbers in communication with the defendant's cell phone, and the cellular towers and sectors that received transmissions from the cell phone.

Massachusetts State Trooper Albert Kardoos testified that he used an "off-the-shelf" Microsoft software product called MapPoint[1] to plot the information contained in the CLSI spreadsheets on a map, creating diagrams (**CSLI** diagrams) representing the location of the defendant's cell phone. The trooper explained his training in mapping and analyzing cell phone records and how cell towers and cell phones communicate. He testified that cell phone antennae operate in all directions, 360 degrees, from the cell tower. This 360-degree range is divided into three 120-degree segments or sectors that indicate the approximate location of a particular cell phone handset at the time it utilizes the cell tower.

Trooper Kardoos testified that "[i]t's impossible to predict exactly how far out [from the tower] the signal was propagated that day, given different conditions . . . . So . . . we go about 70 percent to the nearest tower." In other words, the **CSLI** diagrams generated by Trooper Kardoos represent the approximate vicinity where the defendant's cell phone was located in relation to various cell towers during each of five outgoing telephone calls made between 6:45 P.M. and 8:29 P.M. on the evening of December 31, 2013. These **CSLI** diagrams were admitted in evidence, as were several photographs depicting the scene of the hit-and-run, the victim's clothing and injuries, the police investigation into the incident, and the damage to the vehicle implicated in the crash.

At the close of evidence, the defendant filed a motion for a required finding of not guilty, which was denied. The jury returned a verdict of guilty on both counts. The defendant appeals.

Discussion. 1. ***CSLI*** *diagrams depicting cellular activity*. The defendant argues that the trial judge erred in admitting in evidence the five **CSLI** diagrams. He contends that the **CSLI** diagrams are hearsay and not admissible as business records because they were created "in anticipation of litigation." See, e.g., *Commonwealth* v. *Pena*, 455 Mass. 1, 13 n.13, 913 N.E.2d 815 (2009) (autopsy

report inadmissible as business record "insofar as it had been 'created in anticipation of litigation'"). The Commonwealth, however, is not contending the **CSLI** diagrams are business records.

The Commonwealth argues that the **CSLI** diagrams are nonhearsay computer-generated records. Computer-generated records are those "generated solely by the electrical or mechanical operation of a computer." *Commonwealth* v. *Thissell*, 457 Mass. 191, 197 n.13, 928 N.E.2d 932 (2010) ("Because computer-generated records, by definition, do not contain a statement from a person, they do not necessarily implicate hearsay concerns"). "Computer-generated records are the result of computer programs that follow designated algorithms when processing input and do not require human participation. Examples include automated teller machine receipts, log-in records from Internet service providers, and telephone records." *Commonwealth* v. *Royal*, 89 Mass. App. Ct. 168, 171, 46 N.E.3d 583 (2016) (citation omitted). Compare *Commonwealth* v. *Whitlock*, 74 Mass. App. Ct. 320, 325-327, 906 N.E.2d 995 (2009) (testimony about distance between point of drug sale and school determined by computer software program not hearsay because "calculation of a distance . . . is impossible without use of a tool that has been calibrated to show a relevant unit of measure" and "[w]hen employed to measure something, none of those tools makes a 'statement'"), with *Royal*, *supra* at 172 (officer's testimony that a registry check of defendant's driver's license indicated that his license had been suspended, used to prove that fact, hearsay because "human action was required both to create and retrieve this computer-stored information").

It is undisputed that the defendant did not object to the admission of the **CSLI** diagrams at trial, and we thus review any error to determine whether their admission creates a substantial risk of a miscarriage of justice. See *Commonwealth* v. *Alphas*, 430 Mass. 8, 13, 712 N.E.2d 575 (1999).

Even if we assume, without deciding, that the admission of the **CSLI** diagrams was error,[2] we conclude that their admission did not create a substantial risk of a miscarriage of justice because they were "cumulative of correctly admitted evidence that was clearly sufficient to convict the defendant." *Id.* at 14. The **CSLI** records were admitted in evidence, and the jury heard the testimony of Trooper Kardoos, separate from the **CSLI** diagrams, regarding the time, cell tower location, and sector activated by each of the five telephone calls at issue.[3] Thus, even if we assume there was error, it did not create a substantial risk of a miscarriage of justice.

2. *Photographs*. The defendant argues that several photographs of the scene of the hit-and-run, the victim's clothing and injuries, the police investigation into the incident, and the damage to the vehicle implicated in the hit-and-run were improperly admitted in evidence. He argues that the photographs are irrelevant and misleading. Because the defendant raised no objection at trial to their admission, we review to determine whether there was error that created a substantial risk of a miscarriage of justice. See *id.* 13.

"The concept of relevance has two components: (1) the evidence must have some tendency to prove a particular fact; and (2) that particular fact must be material to an issue in the case." *Harris-Lewis* v. *Mudge*, 60 Mass. App. Ct. 480, 485, 803 N.E.2d 735 (2004). "The judge has discretion to decide whether evidence is relevant and, if relevant, whether the evidence is to be excluded because its probative qualities are outweighed by its prejudicial effect." *Ibid.* "The admissibility of photographic evidence rests almost entirely in the discretion of the judge. It is a 'rare instance[] in which the probative value of [such] evidence is [so] overwhelmed by its inflammatory potential' that a reversal would be warranted." *Commonwealth* v. *Bradshaw*, 385 Mass. 244, 270, 431 N.E.2d 880 (1982), quoting from *Commonwealth* v. *Repoza*, 382 Mass. 119, 128, 414 N.E.2d 591 (1980) (citation omitted).

The Commonwealth argues that the photographs were relevant to establish the occurrence of the hit-and-run, the involvement of the defendant's girl friend's rental vehicle with the hit-and-run, and the defendant's motivation to file a false police report and to mislead officers in order to avoid culpability for the hit-and-run. Intent is an essential element of both of the crimes charged. We conclude that the judge did not abuse his discretion in admitting these photographs in evidence.

3. *Motion for required finding of not guilty*. The defendant argues that his motion for a required finding of not guilty should have been granted because, by failing to foreclose the possibility that the defendant had told officers the truth and the rental car had in fact been stolen, the Commonwealth failed to prove the falsity of the police report filed by the defendant. In reviewing claims of insufficient evidence, this panel reviews the evidence in the light most favorable to the Commonwealth to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth* v. *Latimore*, 378 Mass. 671, 677, 393 N.E.2d 370 (1979). Inferences drawn from the evidence need not be necessary inferences, only "reasonable and possible." *Commonwealth* v. *Marquetty*, 416 Mass. 445, 452, 622 N.E.2d 632 (1993). "To the extent that conflicting inferences are possible from the evidence, 'it is for the jury to determine where the truth lies.'" *Id.* at 452-453.

The defendant was charged with "intentionally and knowingly" making, or causing to be made, "a false report of a crime to police officers." G. L. c. 269, § 13A. The Commonwealth presented surveillance video footage indicating that the defendant lied about his presence at 114 Eastern Avenue at the time he reported that the car was stolen, and **CSLI** records tending to prove that the defendant was instead in the vicinity of 123 Summer Street at the time of the hit-and-run and later 3 Wyman Street where the vehicle was recovered. Taking the evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth, we conclude that a rational trier of fact could have found that the defendant filed a false report.

Judgments affirmed.

By the Court (Rubin, Neyman & Henry, JJ.[4]),

Entered: October 5, 2017.

Footnotes

[1] Microsoft discontinued MapPoint on December 31, 2014. http://www.microsoft.com/mappoint/en-us/home.aspx (last visited October 3, 2017).

[2] Contrary to the defendant's contention, the Supreme Judicial Court has concluded that similar computer-generated information for context for a jury is not hearsay and does not violate a defendant's confrontation rights. *Commonwealth* v. *Cole*, 473 Mass. 317, 327, 41 N.E.3d 1073 (2015) (deoxyribonucleic acid expert testimony concerning probability statistics was not hearsay; in the absence of computer technology, the witness would perform the calculations by hand). As in *Cole*, "the relevant question" was "whether the foundation was sufficient for the introduction" of the visual representation of the underlying data, which already was in evidence. *Id.* at 328.

[3] The defendant also did not object to the admission in evidence of the CLSI records or Trooper Kardoos's testimony, nor does he raise any argument on appeal regarding this evidence.

[4] The panelists are listed in order of seniority.

Content Type: Cases

Terms: "CSLI"

Narrow By: Sources: Sources

Date and Time: Feb 05, 2019 04:13:24 p.m. EST