SJC-11529

COMMONWEALTH vs. MANUEL ANDRADE.

Suffolk. April 7, 2021. - October 5, 2021.

Present: Budd, C.J., Cypher, Kafker, Wendlandt, & Georges, JJ.

Homicide. Assault with Intent to Kill. Evidence, Exculpatory, Third-party culprit, Admission by silence, Hearsay, Spontaneous utterance, Identification, Prior misconduct, Expert opinion, Absence of witness. Identification. Witness, Expert. Jury and Jurors. Constitutional Law, Sentence, Public trial, Waiver of constitutional rights. Practice, Criminal, Capital case, Verdict, Disclosure of Commonwealth's theory of case, Exhibits, Instructions to jury, Security measures, Sentence, Duplicative punishment, New trial, Empanelment of jury, Argument by prosecutor, Public trial.

Indictments found and returned in the Superior Court Department on June 28, 2007.

The cases were tried before Frank M. Gaziano, J., and a request for an evidentiary hearing on a motion for a new trial, filed on July 10, 2018, was considered by Linda E. Giles, J.

Rosemary Curran Scapicchio for the defendant.

Kathleen Celio, Assistant District Attorney (Edmond J. Zabin & Erin D. Knight, Assistant District Attorneys, also present) for the Commonwealth.

WENDLANDT, J. In April 2009, the defendant was convicted of murder in the first degree in the March 2007 shooting death of twenty-two year old Chiara Levin, a bystander who was caught in the crossfire of a shootout between the defendant and Casimiro Barros. The defendant also was convicted of assault and battery by means of a dangerous weapon, assault with intent to kill, assault by means of a dangerous weapon, and unlawful possession of a firearm.

After entering his appeal, and before his appellate brief was filed, in July 2018, the defendant filed a motion for a new trial in this court. The appeal was stayed, and the motion was remanded to the Superior Court for decision. A Superior Court judge, who was not the trial judge, inexplicably declined to rule on the motion, other than to deny the defendant's motion for an evidentiary hearing on four of his claims. The matter is now before us on the defendant's direct appeal, consolidated with the claims from his motion for a new trial. After having carefully reviewed the numerous claims in both the appellate brief and the motion for a new trial, we discern no error and no reason to exercise our extraordinary authority under G. L. c. 278, § 33E, to order a new trial or to reduce the verdict of murder in the first degree to a lesser degree of guilt. Accordingly, we affirm the convictions.

1. Background. a. Facts. We recite the facts in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), reserving some details for later discussion, see Commonwealth v. Rakes, 478 Mass. 22, 24 (2017).

At around 1:30 A.M. on March 24, 2007, after Levin and two friends left a club in Boston, they spoke with a group of men standing outside the club, including the defendant, his cousin Tony Andrade,[1] and Samuel Ortiz. The men, whom Levin and her friends had not met previously, invited them to a party in a private home; Levin's group accepted, and Tony drove them to the party.

There were about twenty-five to thirty people at the party. One guest, Jessica Nunez, saw a man, inferentially the defendant, wearing a black fitted baseball cap, a black "hoodie," and glasses approach Barros and Jason Barbosa, and say, "Y'all Roxbury n****** are nothing but bitches," and also refer to Barbosa as a "bitch ass n*****."[2]

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[1] Because he and the defendant share a last name, we refer to the defendant's cousin Manuel "Tony" Andrade by his nickname.

[2] Although Jessica Nunez did not identify the defendant, viewed in the light most favorable to the Commonwealth, the man she observed was the defendant. Several guests identified the defendant, who was wearing glasses and a hat, and wearing "grills" on his teeth, as having been present at the party. See Smith v. Cain, 565 U.S. 73, 79 n.2 (2012), citing Mouth Jewelry Wearers Love Gleam of the Grill, South Florida Sun-Sentinel,

About an hour after Levin and her two friends first arrived, Tony offered to take the group home. Tony, Levin, her two friends, Ortiz, and the defendant went outside, where Ortiz, and Levin and her group, got into Tony's Ford Escalade. Before the defendant reached the vehicle, he said something to Tony and then turned and walked back toward the house. Tony got into the driver's seat.

Nunez, who was still inside, heard arguing. She saw the defendant throw a plate of food at Barbosa and then pull out a gun. Nunez and other guests reported that they heard gunshots, and that guests ran from the house after the shots. A man ran into the kitchen yelling that "they were shooting" and everyone "needed to get out or we're going to die"; he added that "Spank was buggin',"[3] and "They're shooting in there." Barbosa was shot in the shoulder and fled through the front door. Nunez saw the defendant point a gun at Barros and then run through the front door, with Barros following.

The defendant walked quickly toward Tony's Escalade, looking behind him toward the house and smirking. Ortiz heard

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Feb. 4, 2007, at 5 ("'Golds' are permanent or removable mouth jewelry, also referred to as 'grills'"). See also Smith, supra, citing A. Westbrook, Hip Hoptionary 59 (2002) ("defining a 'grill' as a 'teeth cover, usually made of gold and diamonds'").

[3] "Spank" was the defendant's nickname.

someone at the front of the house say, "Pop him," and screamed at the defendant to "watch his back."

Barros, who was being restrained, broke free and moved toward the defendant. By that point, the defendant was near Tony's vehicle.[4] He got out his gun, and Barros did so as well. Both men opened fire. A bullet from the defendant's gun struck a nearby vehicle. Several of the bullets from Barros's gun hit Tony's vehicle; one of them traveled through the front passenger's side door as the defendant tried to flee, and struck him in the buttocks. Another bullet from Barros's gun went through the rear passenger's side window, which shattered, and then hit Levin in the head.

As Levin's friends yelled for Tony to drive Levin to the hospital, he sped away, with the defendant also in the vehicle. After about a minute, the defendant said that he had to get out. Tony stopped the vehicle, and the defendant and Ortiz left. Tony drove to a Boston hospital. On arrival, Levin was unconscious and unresponsive. After approximately two hours of effort, doctors determined that she was "brain dead" and there was nothing further they could do to assist her, so they terminated their efforts and she died.

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[4] In contrast to Levin's friends, Benjamin Eichel and David Schiffrin, Samuel Ortiz testified that the defendant was already in the vehicle when the shots were fired.

Nunez drove Barbosa to the same hospital, where he was treated for a collapsed lung. One of the guests who had been at the party when the shootings took place called the defendant. He told her, "You didn't see anything, right?" and said that she should tell the other people with whom she had been there that they had not seen anything either.

b. Prior proceedings. The defendant was indicted on charges of murder in the first degree; aggravated assault and battery by means of a dangerous weapon; two counts of armed assault with intent to murder; assault by means of a dangerous weapon; two counts of home invasion; and carrying a firearm without a license.[5]

The defendant was tried in March and April of 2009.[6] After two days of deliberation, the jury found him guilty of murder in the first degree on a theory of deliberate premeditation; aggravated assault and battery by means of a dangerous weapon; assault with intent to kill, as a lesser included offense of assault with intent to murder; assault by means of a dangerous weapon; and carrying a firearm without a license. He was

[5] Barros also was indicted on a charge of murder in the first degree and other charges relative to this shootout. In January 2009, the defendant's motion to sever his case from Barros's was allowed, and the two were tried separately.

[6] After the Commonwealth rested its case, the judge allowed the defendant's motion for required findings of not guilty on the charges of home invasion.

acquitted of assault with intent to murder with respect to Barbosa.[7]

On July 10, 2018, after he had entered his appeal in this court, the defendant filed a motion for a new trial in this court, and we ordered it remanded for disposition in the Superior Court. On October 18, 2018, a Superior Court judge who was not the trial judge issued a written statement that she declined to act on the motion, as this court would be reviewing the record pursuant to G. L. c. 278, § 33E. At the same time, she considered, and rejected, the defendant's request for an evidentiary hearing on four issues. The defendant timely appealed from these rulings, and we consolidated that appeal with the defendant's direct appeal.

2. Discussion. The defendant raises thirteen claims in his direct appeal, and twenty-one distinct claims in his motion for a new trial, a number of which also are made virtually identically in his direct appeal. We first address the claims in the direct appeal, and then we turn to those arguments in the motion that were not included in the appellate brief.

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[7] On July 28, 2009, the defendant filed a motion to reduce the verdict pursuant to Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995). The motion was denied. The defendant filed a notice of appeal from the denial, but did not perfect his appeal. The assembly of the record was not completed until September 2013, and there are no further entries in the docket until 2017, when the defendant filed motions for jury contact information.

a. Asserted inconsistencies. i. Inconsistency of verdicts. The defendant maintains that because he was not convicted of assault with intent to murder Barros, but rather of the lesser included offense of assault with intent to kill, due to mitigating factors, the verdict of murder in the first degree is inconsistent, as both charges stem from the same act of shooting toward Barros. In essence, the defendant argues that if mitigating factors applied to his conduct toward Barros, those factors also must apply with respect to his responsibility for Levin's death.

Verdicts are factually inconsistent when, "considered together, [they] suggest inconsistent interpretations of the evidence presented at trial." Commonwealth v. Resende, 476 Mass. 141, 147 (2017), quoting Commonwealth v. Gonzalez, 452 Mass. 142, 151 n.8 (2008). Legally inconsistent verdicts are "verdicts of guilt involving mutually exclusive crimes, where it is impossible for the Commonwealth to prove the elements of both offenses with respect to a particular defendant." Resende, supra. Here, the jury's differing factual conclusions with respect to different victims do not require a new trial. See id., quoting Commonwealth v. Medeiros, 456 Mass. 52, 57-58 (2010) ("While legally inconsistent verdicts may not stand, factually inconsistent verdicts may"). The jury evaluate each indictment independently. See Commonwealth v. Fluellen, 456

Mass. 517, 523 (2010). It is "not necessary that the verdicts be consistent on the separate indictments." Commonwealth v. Scott, 355 Mass. 471, 475 (1969). Depending on their view of the evidence, the jury properly could have convicted the defendant of murder in the first degree for Levin's death, and acquitted him of assault with intent to murder Barros. See Commonwealth v. Walsh, 255 Mass. 317, 320 (1926).

To find the defendant guilty of murder in the first degree on a theory of deliberate premeditation, the jury necessarily found that he purposefully caused Levin's death after reflection. See Commonwealth v. Colas, 486 Mass. 831, 836 (2021). In situations involving a shootout, "[t]he Commonwealth need not prove an intent to kill the victim[,] because intent could be transferred from the intent to kill [the opponent]." Commonwealth v. Santiago, 425 Mass. 491, 502 (1997), S.C., 427 Mass. 298 and 428 Mass. 39, cert. denied, 525 U.S. 1003 (1998). The Commonwealth must prove beyond a reasonable doubt, however, that the defendant caused the victim's death. See Colas, supra at 842, and cases cited ("With respect to causation, the Commonwealth may establish that a defendant caused the touching 'by proving beyond a reasonable doubt that the defendant either directly caused or directly and substantially set in motion a chain of events that produced the serious injury in a natural and continuous sequence" [citation omitted]). In order to prove

that the defendant acted with malice (the intent to kill), the Commonwealth must prove the absence of mitigating circumstances. See Commonwealth v. Vargas, 475 Mass. 338, 353 (2016) ("malice and mitigating circumstances are mutually exclusive"); Commonwealth v. Johnson, 412 Mass. 368, 373 (1992) (mitigating circumstances reduce degree of criminal liability).

The jury reached their determination after having been instructed on the mitigating factors of heat of passion upon reasonable provocation and heat of passion induced by sudden combat. On the evidence before them, the jury could have found that the defendant instigated the shootout that caused Levin's death when he deliberately and with no evident provocation shot Barbosa at close range and then threatened Barros with his gun, provoking Barros to fire in return. While the Commonwealth need not prove who fired the first shot, it must prove beyond a reasonable doubt that the defendant was not acting in self-defense. See Santiago, 425 Mass. at 503. Nothing in the defendant's acts of leaving the house and heading toward Tony's vehicle, stopping and talking to Tony, turning around, and heading back to the house, picking up and throwing a plate of food at Barbosa, who was inside, pulling out a gun and shooting Barbosa at close range, and then pointing the weapon at Barros suggests self-defense. To the contrary, the evidence supports a conclusion beyond a reasonable doubt that the defendant acted

with deliberate premeditation and malice. Moreover, in finding that the defendant started this chain of events, with premeditation, the jury could have determined that no mitigating factors applied with respect to the shooting of Levin. See, e.g., id. at 503-504.

To sustain a conviction of assault with intent to kill requires the Commonwealth to prove an "assault, specific intent to kill, and [a] mitigating factor" with respect to the offense of assault with intent to murder. Commonwealth v. Johnston, 446 Mass. 555, 558 n.3 (2006), quoting Commonwealth v. Nardone, 406 Mass. 123, 131 (1989). Here, the jury could have considered the defendant's gunshots at Barros outside the house to be mitigated by the heat of passion in mutual combat, as at that point there was evidence that Barros had displayed his weapon or already had fired it in the direction of the defendant.

ii. Inconsistencies between defendant's trial and Barros's trial. The defendant contends that the Commonwealth relied upon inconsistent theories at his trial and at Barros's trial, in violation of his rights to due process. Specifically, he maintains that, at Barros's trial, the Commonwealth argued that the defendant fired the first shot inside the house, but that Barros began the shooting outside, while the defendant fled. The defendant asserts, on the other hand, that, at his trial, the prosecutor argued that the defendant fired first inside, and

then goaded Barros outside, where he shot at Barros, and Barros responded.

"For a due process violation to occur, 'an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime.'" Commonwealth v. Keo, 467 Mass. 25, 36 (2014), quoting Smith v. Groose, 205 F.3d 1045, 1047, 1051–1052 (8th Cir.), cert. denied sub nom. Gammon v. Smith, 531 U.S. 985 (2000). The Commonwealth's theories at both the defendant's and Barros's trials centered on a series of events beginning with the defendant shooting Barbosa and confronting Barros inside the house, a confrontation that, moments later, spilled out onto the street and caused Levin's death. The prosecutor at each trial argued consistently that two men were responsible for Levin's death, based on the individual actions of each. With respect to whether the prosecutor argued that Barros or the defendant fired the first shot when both were outside the house, there was no due process violation; the identity of the first shooter outside was irrelevant to the theory of a shootout and transferred intent. See Santiago, 425 Mass. at 503.

The defendant also asserts that the Commonwealth's theory changed with respect to its presentation of Nunez's testimony. At Barros's trial, in response to Nunez's statement that there had been "crossfire" between Barros and the man in the black

hat, the prosecutor impeached Nunez with a statement to the grand jury in which she said that she had not seen a gun.[8] At the defendant's trial, Nunez testified that she saw the man in a black hat, standing in the street, "pull[] out a gun." Neither party impeached her with her prior inconsistent statement.

The alleged inconsistency was not so "core" to the case as to constitute a violation of due process. See Keo, 467 Mass. at 42-43. As discussed, there was evidence at both trials that the defendant started the shootout with his conduct inside the house. Moreover, Nunez testified that, in addition to what she saw, she heard gunshots "from both sides." Any inconsistency as to whether Nunez saw the defendant's gun did not go to the core of the issues at trial -- whether the defendant engaged in the shootout.

The defendant also argues, based on differences in testimony by a ballistics expert, that the Commonwealth's theory concerning whether Tony's Escalade was moving at the time the bullets hit it was inconsistent between the two trials. At Barros's trial, in response to a hypothetical question posed by the prosecutor, the expert testified that, assuming the shooter had been standing in the location the prosecutor suggested, the

[8] In response to the prosecutor's question at Barros' trial, "Did you actually see the person in the black fitted hat fire a weapon?" Nunez replied, "I'm not sure."

vehicle would have had to have been in motion when the bullets hit. At the defendant's trial, in response to a similar hypothetical question, the same expert testified that either the vehicle or the shooter would have had to have been moving. The defendant maintains that this difference goes to the heart of whether the defendant could be liable in connection with the shootout because, if the vehicle had been in motion, the defendant would have had to have been inside it, and therefore fleeing the scene rather than instigating a shootout by firing with deliberate premeditation.

Significantly, these responses were to hypothetical questions. They were not evidence of the defendant's or the Escalade's actual locations at the time of the shooting. In addition, regardless of the order of events outside, the evidence at both trials was that the defendant initiated the shootout after he decided to return to the house, where he threw objects at Barbosa, who was inside, shot and seriously wounded Barbosa, and then brandished his loaded weapon at Barros. Whether the Escalade was moving as the defendant fired or fled the scene had no bearing on whether he fired the first shot in the series of events that led to the shootout. The defendant's focus on identifying the relative position of the vehicle at the time of the fatal shot also disregards the theory, discussed in Santiago, that by choosing to engage in a shootout, with an

intent to kill, a defendant may be the cause of the death of a bystander, regardless of which side fired the fatal bullet, because the death of a bystander is a natural result of a shootout. See Santiago, 425 Mass. at 503-504 ("[W]here the defendant chooses to engage in a gun battle with another with the intent to kill or do grievous bodily harm and a third party is killed, the defendant may be held liable for the homicide even if it was the defendant's opponent who fired the fatal shot. Thus, the inability to prove who fired the fatal shot would not be ground for a directed verdict. . . . The defendant's act must be a cause, which, in the natural and continuous sequence, produces the death, and without which the death would not have occurred" [quotation, citation, and footnote omitted]).

The ballistics expert testified at both trials that two weapons were used, one firing from the street near the vehicle, where two of Levin's friends saw the defendant, and another firing from the front of the house. Although the defendant suggests otherwise, a finding of deliberate premeditation does not require a plan formulated well in advance of the murder. Rather, "no particular period of reflection is required, and . . . a plan to murder may be formed in seconds" (citation omitted). Commonwealth v. Gambora, 457 Mass. 715, 733 (2010). The jury could have found, for instance, that the defendant shot

at Barros and then reached and began to enter the moving vehicle before the bullets from Barros's subsequent firing struck it. A determination whether the vehicle or the shooter was in motion does not resolve whether the defendant was already inside the vehicle, shot first, or acted with premeditation; it also begs the question whether, by shooting Barbosa, the defendant set in motion the chain of events that led to the bullet hitting Levin in the heard. In sum, the inconsistencies in the responses to the hypothetical questions did not violate due process.[9]

b. Evidentiary issues. i. Excluded evidence.[10] The defendant argues that certain evidence he sought to introduce

[9] The defendant argues that the lack of disclosure of the changes in Nunez's and the expert's testimony were Brady violations. Under Brady v. Maryland, 373 U.S. 83, 87 (1963), "[t]he Commonwealth must disclose to the defense any material, exculpatory evidence over which the prosecution has control." See Commonwealth v. Seino, 479 Mass. 463, 476 (2018). The expert's testimony as to the vehicle's and the shooter's movements, however, was presented as hypothetical scenarios. Therefore, it did not constitute "exculpatory evidence." With respect to Nunez's statement that she saw a gun in the defendant's hand, the defendant does not argue that the prosecutor had information that Nunez would make this statement. Brady applies to material, exculpatory evidence only where that evidence is in the Commonwealth's possession or control. See Commonwealth v. Rodriguez-Nieves, 487 Mass. 171, 177 (2021).

[10] The defendant's claims concerning the "destruction" of the vehicle in which Levin was seated (that was returned to its owner after forensic examination), thus precluding the defendant from conducting his own examination of the trajectory of the bullets through the shattered windows, an examination that he never requested, and the inability to cross-examine a witness as to why she deleted from her cellular telephone a photograph of

was excluded improperly. This evidence, he asserts, would have constituted exculpatory third-party culprit evidence, see Commonwealth v. Silva-Santiago, 453 Mass. 782, 800 (2009), or would have served as evidence of an inadequate police investigation, see Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980).

"A defendant has a constitutional right to present evidence that another may have committed the crime," Commonwealth v. Conkey, 443 Mass. 60, 66 (2004), S.C., 452 Mass. 1022 (2008), citing Commonwealth v. Tague, 434 Mass. 510, 515–516 (2001), cert. denied, 534 U.S. 1146 (2002), although introduction of such evidence is subject to ordinary considerations of relevance. To be admissible, the evidence "must have a rational tendency to prove the issue the defense raises, and [it] cannot be too remote or speculative" (citation omitted). Commonwealth v. Scott, 470 Mass. 320, 327 (2014). A defendant must demonstrate that "the acts of the other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of [the] defendant as the person who committed the crime." Conkey, supra, quoting Commonwealth v. Hunter, 426 Mass. 715, 716-717 (1998).

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the defendant she purportedly took on the evening of the shooting, warrant no further discussion.

The defendant unsuccessfully sought to introduce ballistics evidence that the Integrated Ballistics Identification System (IBIS) database of the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives showed a match between a .380 caliber shell casing found at the scene and a shell casing found at the scene of an unsolved 2006 murder of an individual who was affiliated with a gang that, the defendant asserts, was involved in a feud with Barros's gang at that time. The defendant argues that the match was relevant to a third-party culprit defense because it suggested that someone linked to Barros and Barbosa was responsible for the .380 casing found at the scene, rather than the defendant.

There was no error in the judge's decision to exclude this evidence as establishing a third-party culprit defense. Indeed, the ballistics match could have suggested to the jury that the defendant, rather than a third party, had been responsible for the unsolved killing. Evidence of the match could have confused the jury, absent further information about an unsolved killing and its connections to the individuals involved in the defendant's case; the introduction of such evidence, even if available, would have created a "trial within a trial," see Greenspun v. Boghossian, 95 Mass. App. Ct. 335, 341 (2019), distracting the jury from the determinations that were before them.

The defendant also sought to introduce evidence that rival gang members, who had motives to kill Barros or Barbosa, lived in the area. He argued that evidence that individuals who lived near the house where the party was held were involved in a feud with Barros and Barbosa was relevant to motive, and that the evidence had sufficient connection to the shooting because of the proximity of these individuals' homes to the scene.

"Evidence of a third party's ill will or possible motive is insufficient alone to support a defense under the third-party culprit doctrine." Scott, 470 Mass. at 328, quoting Commonwealth v. Wright, 469 Mass. 447, 466 (2014). The theory that possible rival gang members lived in the general vicinity of the shooting and might have shot at Barros was speculative at best. See Silva-Santiago, 453 Mass. at 801 ("feeble third-party culprit evidence . . . inevitably diverts jurors' attention away from the defendant on trial and onto the third party, and essentially requires the Commonwealth to prove beyond a reasonable doubt that the third-party culprit did not commit the crime"). There was no evidence, for example, that the rival gang members had been at the party, or anywhere nearby, during the shootout. Moreover, there was no evidence that anyone other than the defendant and Barros had been seen holding a gun.

The defendant also sought to introduce evidence that Barbosa and another guest had been arrested in the months prior

to the shootout and had been found in possession of .380 caliber ammunition, the same caliber that had been shot in the direction of Barros. The defendant argues that their arrests suggested that it was more likely that Barbosa or the other guest, as allies of Barros, were the source of the ammunition found at the scene, rather than the defendant.

Evidence that these individuals had been in possession of the same caliber of ammunition, which was not suggested to be rare or unique, several months prior to the shooting, lacked probative value, was unduly prejudicial, and was likely to divert the jury's attention. Excluding this evidence was not error. See, e.g., Commonwealth v. DiBenedetto, 427 Mass. 414, 420-421 (1998).

The defendant argues also that this evidence should have been introduced because it was relevant to a Bowden defense. Evidence may be admissible to show "[t]he failure of the authorities to conduct certain tests or produce certain evidence." See Bowden, 379 Mass. at 485-486. "[I]nformation regarding a third-party culprit . . . may be admissible under a Bowden defense even though it may not otherwise be admissible under a third-party culprit defense" because, for purposes of a Bowden defense, the evidence is not offered for its truth, but rather to demonstrate that "the police knew of the possible

suspect and failed to take reasonable steps to investigate it." See Silva-Santiago, 453 Mass. at 802.

Although the trial judge denied the defendant's motion to introduce evidence of a third-party culprit defense, he allowed extensive cross-examination concerning possible gang rivalries and the .380 caliber ammunition for purposes of a Bowden defense. The jury thus heard evidence that Barbosa and another witness had been arrested for unlawful possession of .380 ammunition, as well as the extent to which the lead investigator relied upon that information. The jury also heard evidence concerning the purported gang memberships of Barros, Barbosa, and another witness; trial counsel cross-examined the lead investigator about his investigation of the rivalries between these individuals and other gangs (or the lack of such investigation).[11]

ii. Admitted evidence. The defendant challenges the admission of evidence that, he contends, was unduly prejudicial. First, the defendant challenges the use of exhibits during his trial that bore the numbered exhibit stickers from Barros's

[11] As discussed, the evidence concerning the match between the .380 caliber shell casing found at the scene and a casing found at the scene of an unrelated murder was excluded for purposes of a third-party culprit defense. The judge indicated that he would reconsider his ruling denying introduction of the evidence to establish a third-party culprit if counsel later moved to introduce the evidence to challenge the adequacy of the police investigation; counsel did not do so.

earlier trial.[12] When the defendant sought to exclude the stickers from the evidence at trial, the judge determined, over trial counsel's objection, that the stickers need not be removed. The judge instructed the jury that they should disregard the stickers and that a list of numbered exhibits would be provided to them during deliberations. See Commonwealth v. Bryant, 482 Mass. 731, 737 (2019) (best practice is to give limiting instruction at time evidence is admitted). Jurors are presumed to follow the instructions given. See Commonwealth v. Mendez, 476 Mass. 512, 520 (2017). Thus, there was no error in the judge's decision to permit the admission of the exhibits with the stickers, and the instruction cured any possible prejudice to the defendant.

In individual questioning of prospective jurors, the judge asked, "Mr. Barros has been tried for his role in the events you heard me describe. Do you have any knowledge of the first trial in this case?" The defendant maintains that the combination of the information that Barros already had been tried for his "role" in the shooting, and the exhibits with stickers from Barros's trial, violated his rights to due process and a fair trial because it conveyed to the jury that more than one person should be punished for Levin's death, thereby shifting the

[12] The exhibits were required, as marked, for the appellate record in the Barros trial.

burden to the defendant to prove that he had had no role in the shootout.

Conducting voir dire concerning a prior related trial in order to ensure that the jury are impartial generally is permissible. See Commonwealth v. Toolan, 460 Mass. 452, 462, 466-467 (2011). Here, the judge's question served to explain that a key actor in the case was being prosecuted separately, and to discern potential bias from prior exposure; the question properly was confined to the purpose of identifying jurors who might have such bias. Notably, before empanelment, defense counsel (as well as the prosecutor) submitted written requests asking the judge to question the members of the venire specifically to ferret out such bias, given the extensive media coverage of Barros's trial that had taken place approximately one month earlier, and the widespread publicity concerning that case. After a hearing on the requests, when the judge informed defense counsel that he would ask a more "open-ended" version of the questions she had proposed, but then would allow her to request follow-up questions, she responded, "Thank you, your honor." There was no abuse of discretion in the judge's decision to ask the members of the venire about any prior knowledge.

The defendant also argues that certain hearsay statements were erroneously admitted at trial, in violation of his rights

to due process and a fair trial. "[T]he rule against hearsay prohibits the admission of out-of-court statements offered to prove the truth of the matter asserted." Commonwealth v. Wardsworth, 482 Mass. 454, 462 (2019), citing Mass. G. Evid. § 801(c)(2) (2019). We review the admissibility of such statements to determine first whether the statement would be admissible under our rules of evidence, and, if so, whether introduction of the statement nonetheless would be precluded by the confrontation clause. See Commonwealth v. Linton, 456 Mass. 534, 548 (2010), S.C., 483 Mass. 227 (2019).

The defendant maintains that the admission, over his objection, of statements relayed by Nunez and attributed to the defendant was error because Nunez did not identify the defendant as the declarant. The introduction of statements by a defendant as a party opponent requires a showing by a preponderance of the evidence that the defendant was the declarant. See Commonwealth v. Bright, 463 Mass. 421, 431 (2012), citing Bourjaily v. United States, 483 U.S. 171, 175 (1987).

Here, Nunez testified that she heard a man in a black hat and glasses make derogatory statements to Barbosa to the effect that Barbosa did not belong at the party. Although Nunez was shown a photograph of the defendant, she did not identify him as the man she heard making the statements. Nonetheless, other evidence that had been introduced supported a conclusion that

the defendant was the man Nunez identified as having made the statements to Barbosa. Nunez's descriptions of the man, in terms of his appearance, his location within the house, and his actions in throwing a plate at and arguing with Barbosa, were corroborated by other witnesses who identified the defendant. Because a preponderance of the evidence indicated that the defendant was the declarant, the judge did not err in allowing the statements to be introduced as statements by a party opponent.

The defendant also maintains that the judge erred in permitting Levin's friend David Schiffrin to testify, over the defendant's objection, that, in the vehicle after Levin had been shot, Tony said to the defendant, "I can't believe you did that. Why did you do that? You shouldn't have done that, especially with, you know, with them here." Schiffrin did not remember the defendant as having responded.

"Where a party is confronted with an accusatory statement which, under the circumstances, a reasonable person would challenge, and the party remains silent or responds equivocally, the accusation and the reply may be admissible on the theory that the party's response amounts to an admission of the truth of the accusation." Commonwealth v. MacKenzie, 413 Mass. 498, 506 (1992). See Commonwealth v. Babbitt, 430 Mass. 700, 705, 707 (2000). The party must have heard and understood the

question, and must have had an opportunity to respond, and the context must be one in which the party would have been expected to do so. See Commonwealth v. Olszewski, 416 Mass. 707, 719 (1993), cert. denied, 513 U.S. 835 (1994). Here, there was evidence that the defendant and Tony were seated next to each other in the front seat, supporting the reasonable inference that they would have heard each other. Tony's statement was clear, and plainly solicited a response. See id. 718-719 (question, "Why did you do it?" followed by silence was admissible as admission by silence).

Thus, the defendant has not shown any error in the judge's decision to allow the introduction of his lack of response to Tony's question as evidence of an admission by silence. See Keo, 467 Mass. at 32, quoting Commonwealth v. Smiley, 431 Mass. 477, 484 (2000) ("Whether evidence is relevant . . . and whether the probative value of relevant evidence is outweighed by its prejudicial effect, are questions within the sound discretion of the judge . . . . [T]he judge's determination of these questions will be upheld on appeal absent palpable error").

The defendant also claims error in the admission of testimony by one of the guests that, after she heard gunshots, a man with braids ran into the kitchen and yelled, "Spank was

buggin'" and "They were shooting in the room."[13] Over the defendant's objection, and following a voir dire of the witness, the judge ruled that the statement was admissible as an excited utterance. See Commonwealth v. Correa, 437 Mass. 197, 201-202 (2002). "Under the excited utterance exception to the hearsay rule, a declarant's out-of-court statements are admissible where the utterance was made [(1)] under the influence of the exciting event it qualifies, characterizes, or explains, and [(2)] before the declarant has had time to contrive or fabricate." Id. Hearsay that is admitted as an excited utterance, even where the declarant is unknown, does not violate the confrontation clause. See id. at 202, citing Commonwealth v. Whelton, 428 Mass. 24, 29 (1998), overruled in part on another ground by Commonwealth v. Grady, 474 Mass. 715 (2016).

Here, the witness testified that the speaker was "hysterical" and came "running" into the room, shortly after gunshots had been fired inside the house, describing what had happened in the other room. There was no error in the judge's decision to allow this statement to be introduced as an excited utterance. See Correa, 437 Mass. at 201-202 (statement by

[13] The witness explained that the latter had been said in Creole and that she was "translating" the statements into English.

unknown person in crowd immediately after shooting properly was admitted as excited utterance).[14]

c. In-court identifications. The defendant also challenges the in-court identifications by three witnesses, to which he did not object at trial, as improper. At the time of the defendant's trial in 2009,[15] in-court identifications were permissible unless an identification was "tainted by an out-of-court confrontation . . . that [was] 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" Commonwealth v. Crayton, 470 Mass. 228, 238 (2014), quoting Commonwealth v. Carr, 464 Mass. 855, 877 (2013).

The first witness testified that he was introduced to the defendant at the party by the defendant's cousin. He was told that the defendant's name was "Manet," and described him as wearing "grill[s]" on his teeth." The witness identified the defendant in court, again using the name "Manet." The witness

[14] The defendant also argues that there was insufficient evidence that the witness was sober or reliable; "spontaneous utterances[, however,] are, by their very nature, considered reliable." Commonwealth v. McGann, 484 Mass. 312, 319 (2020). Moreover, the question whether the speaker was sober goes to the weight of the spontaneous utterance, not its admissibility. Id.

[15] In 2014, this court limited, prospectively, the admission of in-court identifications by witnesses who did not identify a defendant pretrial or made an equivocal identification to situations where there is "good cause" for admission. See Commonwealth v. Crayton, 470 Mass. 228, 241-242 (2014).

did not see the defendant shoot anyone. Likewise, the second witness identified the defendant as having been at the party, with Tony, but did not see him shoot anyone. The third witness, one of Levin's friends, identified the defendant as a person he met outside the night club, knew as "Spank," and spent time with at the party over the course of the evening. The witness confirmed that a photograph taken that night showed him with the defendant and friends. The defendant's objection to this testimony appears to be that the witness was intoxicated and under stress that evening. The witness's intoxication was made clear to the jury, who were able to assess the credibility of his testimony. There was no error in the admission of these in-court identifications.

d. Jury instructions. The defendant argues that a number of the jury instructions were erroneous and require a new trial.

i. Santiago instruction. The judge instructed the jury on all three elements of murder in the first degree necessary to establish the theory of deliberate premeditation: an unlawful killing; committed with malice; and with premeditation. See Colas, 486 Mass. at 836. In elaborating on the element of an unlawful killing, the judge gave the so-called "Santiago instruction," see Santiago, 425 Mass. at 503-504:

> "An act which in a natural and continuous sequence results in death, and without which death would not have occurred, is the cause of death. The defendant's acts need not be

> the sole or exclusive cause of death. The Commonwealth is not required to prove that the defendant fired the fatal shot in order to find the defendant guilty of murder in the first degree. By choosing to engage in a shootout, a defendant may be the cause of a shooting by either side because the death of a bystander is a natural result of a shootout, and the shootout could not occur without participation from both sides."

The judge then instructed on the elements of malice and deliberate premeditation. He also instructed on murder in the second degree and voluntary manslaughter. He explained that, in order to convict the defendant of murder, the jury would have to find an absence of mitigating circumstances, which could reduce the offense of murder to manslaughter. The judge told the jury that, in this case, they were required to consider the mitigating circumstances of heat of passion upon reasonable provocation or sudden combat. At the request of the defendant's counsel, the judge did not instruct on transferred intent.

The defendant maintains that the instructions were unconstitutionally vague, the judge erred in failing to define "shootout," the instructions permitted a conviction of murder in the first degree without proof of premeditation, and the instructions directed a verdict of murder in the first degree if the jury found that the defendant fired one shot.

"Establishing an intent to kill requires proof that the defendant 'consciously and purposefully intended' to cause the victim's death." Colas, 486 Mass. at 837, quoting Commonwealth

v. Tejada, 484 Mass. 1, 5, cert. denied, 141 S. Ct. 441 (2020). "Specific intent, in turn, requires that a defendant 'not only . . . consciously intended to take certain actions, but . . . also consciously intended certain consequences.'" Colas, supra, quoting Commonwealth v. Gunter, 427 Mass. 259, 269 (1998), S.C., 456 Mass. 1017 (2010) and 459 Mass. 480, cert. denied, 565 U.S. 868 (2011). "If a defendant intends to kill one person, and mistakenly kills another, under the doctrine of transferred intent the defendant is treated as though he or she intended to kill the other individual." Colas, supra, citing Commonwealth v. Taylor, 463 Mass. 857, 863 (2012). "In Santiago, we considered the scope of criminal liability for combatants in a shootout that results in the death of an innocent bystander. In such circumstances, the Commonwealth is not required to prove that the defendant actually fired the fatal shot." Colas, supra at 845, citing Santiago, 425 Mass. at 503. A defendant's conduct "is the proximate cause of a shooting 'by either side because the death of a bystander is a natural result of a shootout, and the shootout could not occur without participation from both sides.'" Colas, supra, quoting Santiago, supra at 504.

Thus, contrary to the defendant's argument, the instruction did not remove from the jury's consideration the necessity of finding the elements of malice and premeditation. Compare

Colas, 486 Mass. at 845 (Santiago instruction did not convey to jury that they could convict solely on basis of finding defendant pointed "something" at opponent in shootout). Rather, the instructions, as a whole, explained that the jury not only had to determine the cause of the unlawful death, but also specifically had to find malice and premeditation. There was no error.

The defendant also contends that the Santiago instruction improperly relieved the Commonwealth of the need to prove that the defendant fired the first shot, or that he fired a weapon at all. "While the Commonwealth must prove beyond a reasonable doubt that the defendant was not acting in self-defense, . . . it need not prove that the defendant fired the first shot." Santiago, 425 Mass. at 503.

The evidence, however, supported a finding that the defendant fired first, inside the house. The chain of events, all within minutes, was sufficient to constitute one shootout, which was begun by the defendant. Levin's death was a direct result of this chain of events. The defendant's argument that the instructions relieved the jury of having to determine whether he fired a weapon at all is unsupported by the trial record; the judge informed the jury that they had to find "participation from both sides" in the shootout.

ii. Instruction on absence of self-defense. The defendant argues that the judge erred in instructing the jury that self-defense was not at issue because such a statement interjected the judge's own opinion and "likely left the jury with the impression that the [judge had] made the determination that it was [the defendant] and not Barros who fired the first shots." Notably, trial counsel requested that no instruction on self-defense be given.

Having instructed the jury that not all killings are unlawful, such as if done in self-defense, it was appropriate for the judge to clarify that self-defense did not apply in this case, before going on to instruct the jury on mitigation, which he told the jury could apply. That there was no question of self-defense did not, as the defendant now contends, communicate to the jury that the defendant must have fired the first shot once he and Barros were outside. The judge did not state that self-defense is unavailable to a first aggressor. There was no error in the instruction that the evidence raised no question of self-defense.

e. Court room security. Before trial, the Commonwealth requested that additional court officers be present in the court room, and that spectators be required to sign in and provide identification. The Commonwealth maintained that these measures were necessary in light of an incident at the Barros trial in

which two women purportedly spoke to a witness who also was to testify in the defendant's trial, and told the witness that if he had seen the defendant do bad things, he was not to tell the judge; other witnesses also had indicated that they were fearful of retribution for their cooperation with the investigation. The defendant objected to the additional security measures on the ground that there was no proof the interaction with the witness had taken place. The judge decided that the requested measures were minimally invasive and allowed the motion.

On appeal, citing Waller v. Georgia, 467 U.S. 39, 46 (1984), the defendant argues that these measures amounted to a court room closure, and thus structural error requiring a new trial. In Commonwealth v. Maldonado, 466 Mass. 742, 746, 751, cert. denied, 572 U.S. 1125 (2014), however, this court determined that requiring spectators to produce identification in order to enter a court room does not constitute a court room closure in the constitutional sense, and does not violate the right to a public trial under the Sixth Amendment to the United States Constitution. Because the requirement of producing identification documents did not amount to a closure of the court room, the factors set forth in Waller, supra at 48, with respect to a determination whether the closure was constitutionally permissible are not applicable. In order to impose a requirement that identification be provided, however,

"there must be an articulable risk of witness intimidation or court room disruption (or a comparable reason) that warrants the imposition of this condition on entry." Maldonado, supra at 752.

The defendant's trial involved a witness who reportedly had been approached in an intimidating manner during the Barros trial. The security conditions imposed were minimally invasive and were tailored to the issue of witness intimidation. See Maldonado, 466 Mass. at 752 ("When spectators must first identify themselves before entering a court room, they lose their anonymity and therefore become more accountable for their conduct in the court room . . ."). That some spectators who were unable to produce identification were barred from entry, as the defendant contends, does not change the analysis. The additional, nonintrusive security requirements were further limited when, on the defendant's request, the judge had the sign-in table moved away from the jury's view so as not to influence them.

f. Consecutive sentences. The defendant argues that his consecutive sentences, in which the sentence for the conviction of murder in the first degree is followed by "from and after" sentences on the other convictions, constitute cruel and unusual punishment and violate due process because the crimes flowed from one chain of events, and thus resentencing is required.

The defendant contends, in particular, that the consecutive sentences for murder and assault with intent to kill violate the protections against double jeopardy because the offenses were based on the firing of the same bullet.

That a shootout may support convictions of multiple distinct crimes, however, is not equivalent to multiple punishments for the same offense. The "same evidence rule" prohibits consecutive sentences for crimes that do not require proof of different facts. See Commonwealth v. Stewart, 375 Mass. 380, 391 (1978). The rule derives from the prohibition in the double jeopardy clause on imposing two punishments for the same offense. Thus, consecutive sentences for two offenses, one of which is a lesser included offense of the other, are impermissible. See Commonwealth v. Rodriguez, 476 Mass. 367, 371 (2017). Two offenses, however, "are not the 'same' within the meaning of the double jeopardy clause merely because they stem from the same conduct" (citation omitted). Commonwealth v. Woods, 414 Mass. 343, 350, cert. denied, 510 U.S. 815 (1993).

The defendant was sentenced for five offenses that, although related, consisted of distinct elements; no conviction was a lesser included offense of any other. Assault with intent to kill, for example, requires an assault, see Rodriguez, 476 Mass. at 371, an element that is not an element of the offense of murder in the first degree. Similarly, murder in the first

degree requires a finding of premeditation, see G. L. c. 265, § 1, whereas assault with intent to kill does not. Because the convictions have separate elements, there was no violation of double jeopardy in the imposition of consecutive sentences.

g. Sufficiency of the evidence of assault with intent to kill. The defendant contends that the evidence was insufficient to convict him of assault with intent to kill Barros because it did not support a finding of an immediately threatened battery. In evaluating a claim of sufficiency, we "determine whether, viewing the evidence in the light most favorable to the Commonwealth, any rational finder of fact could have found each of the elements of the offense beyond a reasonable doubt." Commonwealth v. Jones, 477 Mass. 307, 316 (2017), citing Latimore, 378 Mass. at 676-677. "Assault with intent to kill consists of assault, specific intent to kill, and the mitigating factor of heat of passion induced by sudden combat or reasonable provocation." Nardone, 406 Mass. at 131. "Under the common law, an assault may be perpetrated in either of two ways. The crime may consist of an attempted battery or an immediately threatened battery." (Quotations, citation, and footnote omitted.) Commonwealth v. Melton, 436 Mass. 291, 294 (2002). Thus, a conviction of assault with intent to kill is supported by sufficient evidence so long as there is sufficient evidence

of either an attempted battery or an immediately threatened battery.

To establish an attempted battery, the Commonwealth must "prove that the defendant intended to commit a battery, took some overt step toward accomplishing that intended battery, and came reasonably close to doing so" (quotation and citation omitted). Commonwealth v. Porro, 458 Mass. 526, 530 (2010). A battery is "[a]ny touching with such violence that bodily harm is likely to result" (quotation and citation omitted). See Commonwealth v. Vieira, 483 Mass. 417, 423 (2019). Where an assault involves a threatened battery, "the Commonwealth must prove that the defendant engaged in 'objectively menacing' conduct with the intent to put the victim in fear of immediate bodily harm" (citation omitted). Commonwealth v. Gorassi, 432 Mass. 244, 248 (2000).

The evidence at trial was sufficient to support the defendant's conviction of assault with intent to kill. The evidence that the defendant fired a gun in Barros's direction supported a finding that the defendant attempted a battery. See Commonwealth v. Walker, 460 Mass. 590, 615-616 (2011) (attempt to shoot victim was sufficient to establish attempted battery). The jury also heard evidence of the defendant's specific intent to kill Barros, as the defendant had fired the gun moments earlier, shooting and severely injuring Barbosa and then

brandishing the loaded weapon at Barros. See, e.g., Tejada, 484 Mass. at 5 ("the use of a firearm at close range provides strong evidence of an intent to kill"); Commonwealth v. Buttimer, 482 Mass. 754, 772 (2019) (fact that defendant had used weapon earlier to kill victim supported finding of specific intent to kill police officer when defendant pointed weapon at officer). Finally, there was evidence of the presence of the mitigating factors of heat of passion induced by sudden combat or reasonable provocation, where testimony indicated that Barros also pulled out a gun and fired in the direction of the defendant.

Because the jury need not have indicated, and did not indicate, which theory they found, contrary to the defendant's assertion, we need go no further in determining that the evidence was sufficient to establish an immediately threatened battery. See Porro, 458 Mass. at 534; Commonwealth v. Arias, 78 Mass. App. Ct. 429, 432-433 (2010) (jury need not be unanimous in theory of assault they found nor must jury indicate theory on verdict slip).

h. Motion for a new trial. We turn to the remaining claims in the defendant's motion for a new trial that were not raised in his direct appeal. Many of these are closely related to claims previously discussed.

Confronted with an order by this court to decide the defendant's motion for a new trial, the motion judge inexcusably declined "to entertain the defendant's motion"; she stated that this court would resolve the issues under G. L. c. 278, § 33E, and it would not advance the interests of justice for her to "pre-judge legal issues that are made frequently by appellate courts." The only issues that the judge considered on the merits were the defendant's motion for an evidentiary hearing on several issues, which she denied. A remand for disposition by a different Superior Court judge (the motion judge having retired) would serve only to add further delay to a case that has been pending for more than twelve years. We therefore review the claims in the motion for a new trial, not raised in the defendant's direct appeal, de novo, under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001).

i. Sufficiency of evidence of murder in the first degree. The defendant contends that a new trial is necessary because the evidence was insufficient to show that he engaged in a shootout with Barros. He argues that Barros, alone, "caused" Levin's death because it was the bullet from Barros's gun that hit her in the head. This argument is unavailing. See Colas, 486 Mass. at 845, quoting Santiago, 425 Mass. at 504 (when defendant engages in shootout, defendant's conduct "is the proximate cause of a shooting 'by either side because the death of a bystander

is a natural result of a shootout, and the shootout could not occur without participation from both sides'"); Santiago, supra at 502 ("The Commonwealth need not prove an intent to kill the victim because intent could be transferred from the intent to kill one of the [other] men . . ." [citations omitted]).

Here, there was evidence that the defendant initiated the altercation inside the house, where he shot Barbosa, pointed his weapon at Barros, and walked outside; Barros followed. Once outside, the defendant exchanged fire with Barros. Guests at the party heard shots "from both sides", and shell casings recovered at the scene indicated that two weapons had been fired. The defendant and Barros were the only people seen holding firearms. This evidence "formed a mosaic of evidence such that the jury could conclude, beyond a reasonable doubt," that the defendant engaged in the shootout, and thus caused the death of Levin (citation omitted). See Commonwealth v. Ayala, 481 Mass. 46, 53 (2018).

ii. Newly discovered evidence. The defendant maintains that newly discovered evidence -- the ballistics match with a cartridge found at an unrelated crime scene, discussed supra, and a 2016 report by the President's Council of Advisors on Science and Technology on forensic science in criminal courts suggesting that ballistics comparisons as were done in this case are unreliable -- requires a new trial.

Assuming, arguendo, that this evidence qualifies as "newly discovered," it relates to the expert's credibility, see Commonwealth v. Sullivan, 478 Mass. 369, 383 (2017), on an issue that would not have been a real factor in the jury's deliberations. There was no evidence of error concerning the IBIS match of the cartridge casings at issue in this case, no other reason to challenge the expert's credibility, and no indication that the undisputed evidence concerning those cartridge casings weighed more heavily in the jury's thinking than did the witness testimony about the defendant holding a gun and shooting. Consequently, the defendant also has not shown that his motion for postconviction testing, in the form of "3D" imaging of the ballistics evidence here, is likely to produce evidence "that is material to the moving party's identification as the perpetrator of the crime in the underlying case." See Commonwealth v. Wade, 475 Mass. 54, 56 n.2 (2016), quoting G. L. c. 278A, § 7 (b) (4).

iii. Evidentiary rulings. In addition to the evidence the introduction of which he challenged in both his motion for a new trial and his direct appeal, the defendant also challenges several other rulings by the trial judge to allow the introduction of specific evidence, or to deny his motions to admit evidence. The defendant contests the judge's decision to allow the Commonwealth's motion to exclude evidence of prior bad

acts by Barros, which the defendant argues would have been relevant to the identification of the first aggressor. See Commonwealth v. Adjutant, 443 Mass. 649, 664 (2005). It is unclear what prior violent conduct of Barros the defendant is referencing. In any event, the evidence that the defendant fired the first shot inside the house was uncontradicted, and as discussed, the conviction based on participation in a shootout did not rely on a determination of who fired the first shot.[16]

iv. Expert testimony. The defendant argues that the trial judge erred in allowing the introduction of numerous statements by expert witnesses. The defendant challenged the reliability of purported expert testimony by a detective who testified to his "test" of the window of the vehicle in which Levin was shot, with respect to the likely position of the window when it was shattered;[17] testimony by a ballistics expert that, based on a hypothetical question posed by the prosecutor that the shooter

[16] The defendant also argues that the judge erred in allowing the introduction of a transcript of the defendant's statement to police that contained a one-word scrivener's error. After the parties agreed that there was an error in the transcription, the judge instructed the jury with respect to the error and informed them that that the correct word was "heard" rather than "had." There was no prejudice to the defendant from the introduction of the transcript containing a single one-word error, which the judge addressed with a curative instruction.

[17] The judge determined that the detective's testimony about the "test" of the windows was not offered as expert opinion, but rather as the detective's personal observations and "logical, commonsense conclusions." We agree.

was in a certain spot, the vehicle would have had to have been in motion at that time; and a trajectory expert's testimony that a shooter's action in twisting a gun when the gun is fired alters the angle at which the shell casing is ejected. The defendant also challenged the admission of testimony by two experts, on fingerprints and trajectories, that relied upon measurements taken by others, which the defendant asserted was in violation of the confrontation clause.

We review a judge's decision to allow the introduction of expert testimony as reliable under an abuse of discretion standard. See Commonwealth v. Camblin, 478 Mass. 469, 475 (2017). Expert testimony "must be based on facts of which the expert has direct personal knowledge or on facts in evidence which the expert has assumed pursuant to a hypothetical question, or on some combination of these sources." Assessors of Andover v. Innes, 396 Mass. 564, 565-566 (1986). These requirements were met in this case.

The defendant has not established an abuse of discretion in any of the judge's rulings on the introduction of the expert testimony, or that, had the testimony been excluded, the result would have been different. See Commonwealth v. Merola, 405 Mass. 529, 545 (1989) ("The scope and fullness of hypothetical questions must be left to [the] discretion of the trial judge" [citation omitted]). See also Commonwealth v. Barbosa, 457

Mass. 773, 791 (2010), cert. denied, 563 U.S. 990 (2011) (although expert "did not have personal knowledge of how [the analyst] conducted the testing, she was familiar with the protocols [the analyst] was taught to employ, [the analyst's] documentation of her work, and [the analyst's] work history"; defendant had adequate opportunity to cross-examine expert on reliability of data).

v. Errors in jury selection. The defendant contends that the judge erred in several respects during empanelment of the jury. An adequate voir dire is part of a criminal defendant's right to an impartial jury under the Sixth Amendment and art. 12 of the Massachusetts Declaration of Rights. See Commonwealth v. Espinal, 482 Mass. 190, 194 (2019); Commonwealth v. Dabney, 478 Mass. 839, 848, cert. denied, 139 S. Ct. 127 (2018). "The judge has broad discretion as to the questions to be asked, and need not put the specific questions proposed by the defendant." Commonwealth v. Sanders, 383 Mass. 637, 641 (1981).

The defendant argues that it was error for the judge to decline to ask potential jurors, "Would you hold it against [the defendant] if he didn't testify to prove his innocence?" The judge told members of the venire,

> "[T]he Commonwealth has the burden of proving beyond a reasonable doubt that the defendant is guilty. A failure to meet this burden of proof must result in a finding of not guilty;

> "And lastly, the defendant is not required to present any evidence in his behalf and is under absolutely no obligation to testify in this trial."

There was no abuse of discretion.

The defendant also argues that the judge abused his discretion in questioning potential jurors as to whether they had any feelings about the Boston police department that would interfere with their ability to serve as jurors, and whether they would be able to assess the evidence fairly without deoxyribonucleic acid or fingerprint evidence. We have upheld such instructions where they were "tailored to ensure that seated jurors were capable of deciding the case without bias and based on the evidence," Commonwealth v. Gray, 465 Mass. 330, 340, cert. denied, 571 U.S. 1014 (2013), quoting Commonwealth v. Perez, 460 Mass. 683, 691 (2011), and would not "automatically vote to acquit due to lack of scientific evidence," see Gray, supra at 339, quoting Commonwealth v. Young, 73 Mass. App. Ct. 479, 485 (2009). There was no abuse of discretion.

Finally, we decline the defendant's suggestion that we again revisit our ruling that age is not a protected class for purposes of jury selection. See Commonwealth v. Lopes, 478 Mass. 593, 597-598 (2018); Commonwealth v. Hyatt, 409 Mass. 689, 692 (1991), S.C., 419 Mass. 815 (1995). To the extent that the prosecutor tended to challenge young jurors, there was no constitutional violation.

vi. Instruction on self-defense. In addition to his argument regarding the judge's instruction to the jury that self-defense was not at issue in this case, see part 2.d.ii, supra, the defendant asserts that the judge erred in not providing an instruction on self-defense, notwithstanding that trial counsel specifically requested that such an instruction not be given and told the judge she agreed that the evidence did not support a claim of self-defense, and the judge confirmed that position directly with the defendant in open court.[18]

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[18] The colloquy with trial counsel proceeded as follows:

The judge: "And you do not want me to give an instruction on self-defense, correct."

Trial counsel: "I believe the Court said we didn't have the evidence for self-defense, and I understand that ruling."

The judge: "All right. Well, do you wish me to instruct on self-defense?"

Trial counsel: "No, your Honor."

The judge: "All right. Have you discussed that issue with [the defendant]?"

Trial counsel: "Yes, your Honor."

The judge: "And, Mr. Andrade, please rise."
[The defendant complies.]

The judge: "Have you discussed that issue about self-defense with [your attorney]?"

The defendant: "Yes."

"Self-defense is generally not available to a defendant who provokes or initiates an attack . . . ," Commonwealth v. Rodriguez, 461 Mass. 100, 110 (2011), unless the initial aggressor "withdraws [from the fight] in good faith and announces his intention to retire" and "the other party continues to attack," Commonwealth v. Castillo, 485 Mass. 852, 857 (2020), quoting Rodriguez, supra. "This is so because someone who provokes or initiates an attack cannot be said to be taking advantage of every opportunity to avoid the combat." See Commonwealth v. Harris, 464 Mass. 425, 435 (2013). As discussed, see part 2.d.ii, supra, the evidence supports the judge's determination that the defendant was not entitled to an instruction on self-defense.

vii. Exclusion of missing witness defense. The defendant argues that he was precluded from developing a missing witness defense and having the jury receive a missing witness instruction concerning a witness (Kenneth Lopes) who had been with Barros at the party.

"The decision whether to provide a missing witness instruction to the jury is within the discretion of the trial judge, and will not be reversed unless the decision was

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The judge: "Do you agree with her request not to give that instruction?"

The defendant: "Yes."

manifestly unreasonable." Commonwealth v. Saletino, 449 Mass. 657, 667 (2007). Because the inference with respect to a missing witness "can have a seriously adverse effect on the noncalling party -- suggesting, as it does, that the party has wilfully attempted to withhold or conceal significant evidence -- it should be invited only in clear cases, and with caution" (citation omitted). Commonwealth v. Anderson, 411 Mass. 279, 282 (1991).

In any event, "it has been frequently held that where a witness is equally available to either party no inference may be drawn against either for not calling him [or her]." Commonwealth v. Franklin, 366 Mass. 284, 293 (1974). Such is the case here, where the defendant was as capable of calling Lopes as was the Commonwealth. See Commonwealth v. Niziolek, 380 Mass. 513, 524 (1980).

viii. Other asserted errors in instructions. The defendant objects to the lack of an eyewitness identification instruction that would have told the jury that the Commonwealth must prove the identity of the shooter beyond a reasonable doubt. The judge instructed the jury that the Commonwealth must prove its case beyond a reasonable doubt. This was sufficient to inform them that, in order to find the defendant guilty beyond a reasonable doubt, they would have to believe beyond a reasonable doubt that it was the defendant who committed the

crimes. As to all the other instructions that the defendant now asserts should have been given (such as on honest but mistaken identification, issues with eyewitness identification, and inaccuracy in cross-racial identifications) or should not have been given (such as that the jury have a duty to find a defendant guilty of the most serious offense the Commonwealth has proved beyond a reasonable doubt) or that should have been worded differently, the defendant has made no showing of an abuse of discretion in the judge's rulings on these instructions, and has shown no reason why a new trial is warranted on this basis.

ix. Improper remarks by prosecutor.[19] The defendant contends that numerous assertions in the prosecutor's closing argument were improper. In particular, he argues that the prosecutor misstated the evidence and sought to inflame jury sympathy. Only two of the defendant's current nine claims with respect to improper statements in the prosecutor's closing were raised at trial.

While prosecutors are entitled to argue "forcefully for the defendant's conviction," closing arguments must be limited to

[19] The defendant's arguments concerning the "threatened" prosecution of his cousin Tony, who invoked his right under the Fifth Amendment to the United States Constitution and declined to testify at trial, and the absence of any instruction on the Santiago theory at the grand jury, do not suggest any reason to grant a new trial.

facts in evidence and the fair inferences that may be drawn from them. See Commonwealth v. Wilson, 427 Mass. 336, 350 (1998). A prosecutor must not misstate the evidence or refer to facts not in evidence, interject personal belief in the defendant's guilt, or play upon the jury's sympathy. See Commonwealth v. Teixeira, 486 Mass. 617, 630 (2021); Commonwealth v. Beaudry, 445 Mass. 577, 580 (2005).

Most of the statements to which the defendant objects were permissible inferences drawn from evidence introduced at trial. See Teixeira, 486 Mass. at 631. There are a few exceptions, such as the statements that the defendant had "malice in his heart" at the party and that, as a result of the shootout, the defendant received "exactly what he wanted." These few improper comments, however, did not result in a substantial likelihood of a miscarriage of justice. They were limited, not repeated, and the judge properly instructed the jury that closing arguments are not evidence.

The defendant argues that the prosecutor impermissibly inflamed juror sympathy by arguing that the road where the shooting occurred is a "street not unlike the streets many of you live in," and a place where people live their daily lives. The defendant also challenges the prosecutor's statement that it is "immoral, illegal and it's unacceptable" to open fire on a

crowded city street, and that the defendant was defending his "turf."

The jury should not be asked to "put themselves 'in the shoes' of the victim" (citation omitted). See Commonwealth v. Rutherford, 476 Mass. 639, 646 (2017). To the extent that the prosecutor asked the jury to imagine the events occurring in a neighborhood like their own, such an appeal to sympathy was inappropriate. At the same time, the remark was not overly inflammatory, and did not create a substantial likelihood of a miscarriage of justice. Compare id. at 645 (closing argument that victim was "crawling away to die," "after giving up any hope of survival," was impermissible and speculative play upon juror sympathy).

The defendant also asserts that the prosecutor argued inappropriately that trial counsel was accusing investigators of manufacturing trajectory evidence. The prosecutor, in essence, told the jury that if they believed trial counsel's view of the reliability of the trajectory evidence, then the police experts "belong[ed] in handcuffs." While a prosecutor of course may dispute trial counsel's attempts to discredit the Commonwealth's experts, the prosecutor should not have attacked trial counsel personally for arguing that there were weaknesses in the trajectory evidence, and should not have suggested, even in jest, the inappropriate alternative of the experts being put "in

handcuffs." See Commonwealth v. Grandison, 433 Mass. 135, 143 (2001) (prosecutor should not have attacked trial counsel for challenging truthfulness of police). Nonetheless, this statement likewise did not create a substantial likelihood of a miscarriage of justice. The strengths and weaknesses of the experts' testimony were thoroughly drawn out at trial, and we presume the jury are able to understand that the prosecutor is an advocate. See, e.g., Wilson, 427 Mass. at 350 (statements that are "[e]nthusiastic rhetoric, strong advocacy, and excusable hyperbole" do not require new trial [citation omitted]).

Trial counsel did object to two statements in the prosecutor's closing argument that the defendant continues to challenge in his motion for a new trial. The first was a statement that Nunez had identified the defendant as the shooter. The judge clarified to the jury that this was an inference; thus, there was no prejudice. See Commonwealth v. Martinez, 476 Mass. 186, 194 (2017) ("We presume, as we must, that a jury understand[] and follow[] limiting instructions" [citation omitted]). Counsel also objected to the prosecutor's statement that there was no evidence of a third-party culprit; the defendant contends that this argument impermissibly shifted the burden to him, where the third-party culprit evidence he had

sought to present was excluded. The judge overruled the objection.

As discussed supra, the third-party culprit evidence was properly excluded; thus, there was no error in the judge's decision. Moreover, defense counsel argued in closing that the investigators failed to investigate other possible suspects who might have wanted to harm Barros. Drawing the jury's attention to the lack of another suspect was permissible argument. See Commonwealth v. Mattei, 90 Mass. App. Ct. 577, 583 (2016) (prosecutor's statement that there was "only one person" to whom evidence pointed was proper where statement constituted permissible inference and was responsive to defense argument).

x. Court room closure during jury empanelment. In his motion for a new trial, the defendant maintains that the court room was closed during jury empanelment, in violation of his Sixth Amendment right to a public trial; he seeks an evidentiary hearing on this issue.

At one point during empanelment, trial counsel responded to a question by the court room clerk as to whether she knew where the defendant's family was with the comment, "They were right outside. I'm sure they were removed," and then the two proceeded with setting up the court room for individual voir dire. The transcript also indicates that a number of potential

jurors, but apparently not all of them, also were removed to the hallway.

Denial of the right to a public trial is a structural error requiring reversal. See Commonwealth v. Cohen (No. 1), 456 Mass. 94, 105-106 (2010), citing Presley v. Georgia, 558 U.S. 209, 212-213 (2010). This court has determined, however, that objections to that denial may be waived. See Commonwealth v. Morganti, 467 Mass. 96, 101-102, cert. denied, 574 U.S. 933 (2014). Indeed, counsel may choose to waive that right without informing the defendant. Id. at 102, citing Commonwealth v. Lavoie, 464 Mass. 83, 88-89, cert. denied, 569 U.S. 981 (2013). Here, the transcript indicates that trial counsel did not object to the removal of the defendant's family from the court room, and counsel does not argue otherwise. The defendant also does not aver that he sought to have friends or family members in the court room and was precluded from doing so, and does not challenge trial counsel's effectiveness. See Morganti, supra ("where defense counsel was aware that the court room was closed to the public to facilitate jury empanelment and did not object, we conclude that the defendant's right to a public trial during that portion of the proceedings has been waived"). Accordingly, any claim of error in the purported closure of the court room during empanelment, as was common in some court houses at the time of the defendant's trial, see id. at 103-104, is waived.

xi. Denial of an evidentiary hearing. The defendant argues that an evidentiary hearing is required on his claims for withheld evidence, newly discovered exculpatory evidence, newly available scientific evidence, and public trial violations. The motion judge determined that none of these claims warranted an evidentiary hearing. We agree. An evidentiary hearing is required if the motion and affidavits raise a "substantial issue" (citation omitted). See Commonwealth v. Vaughn, 471 Mass. 398, 404 (2015). For the reasons discussed, the defendant's motion for a new trial does not do so.

i. Review under G. L. c. 278, § 33E. We have considered the case as a whole, as is our duty under G. L. c. 278, § 33E, and we discern no reason to exercise our extraordinary authority to reduce the verdict or to order a new trial.

3. Conclusion. The judgments of conviction and the order denying the defendant's request for an evidentiary hearing on his motion for a new trial are affirmed. The motion for a new trial is denied.

So ordered.