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SJC-13025

COMMONWEALTH vs. SHAQUILLE BROWN.

Suffolk. February 7, 2022. - July 7, 2022.

Present: Gaziano, Cypher, Wendlandt, & Georges, JJ.

Homicide. Firearms. Identification. Intent. Evidence,  
Identification, Intent, Constructive possession, Grand jury  
proceedings. Grand Jury. Jury and Jurors. Practice,  
Criminal, Indictment, Grand jury proceedings, Instructions  
to jury, Jury and jurors, Examination of jurors, Voir dire,  
Argument by prosecutor, Capital case.

Indictments found and returned in the Superior Court  
Department on September 18, 2017.

A motion to dismiss was heard by Christine M. Roach, J.,  
and the cases were tried before Michael D. Ricciuti, J.

Elizabeth A. Billowitz for the defendant.  
Ian MacLean, Assistant District Attorney (David S. Bradley,  
Assistant District Attorney, also present) for the Commonwealth.

GEORGES, J. On the morning of June 28, 2017, Christopher  
Austin was shot in the left eye while walking to a subway  
station to get to his job at Logan International Airport. He  
died from the wound several days later. The defendant was

convicted of murder in the first degree, and the related charges of carrying a firearm without a license and possession of a firearm without a firearm identification (FID) card, for Austin's death.

On appeal, the defendant argues that the evidence was insufficient to support his convictions. He also challenges the denial of his motion to dismiss the indictments because the grand jury proceedings were impaired by the prosecutor's introduction of highly prejudicial evidence that had no probative value. In addition, the defendant argues that the trial judge's instructions on eyewitness identification improperly suggested that witnesses had positively identified the defendant, where none of the witnesses was asked to (or did) identify him, and instead simply described the appearance of the man they saw fleeing the scene of the shooting; the defendant maintains that this diminished the Commonwealth's burden of proof. He also argues that certain questions posed during voir dire of the venire yielded a jury who were biased in favor of the Commonwealth and that the prosecutor's closing argument was improper in a number of respects, as the prosecutor misstated the evidence, used language that was intended to inflame the jury, and improperly shifted the burden of proof to the defendant. Finally, the defendant asks us to exercise our

extraordinary authority to grant relief under G. L. c. 278, § 33E.

Discerning no error warranting a new trial, and no reason to exercise our extraordinary authority under G. L. c. 278, § 33E, to order a new trial or to reduce the degree of guilt, we affirm the convictions.

1. Background. We recite the facts the jury could have found, viewing them in the light most favorable to the Commonwealth, and drawing any reasonable inferences therefrom. See Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979).

a. The shooting. On the morning of June 28, 2017, the victim left his mother's house to walk to the Massachusetts Bay Transportation Authority's (MBTA's) Ashmont Station to take the subway to his job at Logan International Airport. En route, the victim stopped at a local grocery store.<sup>1</sup> When he arrived, two men were sitting in a blue Honda Accord that was parked in front of the store. One of the men, later identified as the defendant, got out on the passenger's side and stood next to the Accord while the victim completed his purchase inside.

As the victim left the store and walked down Ashmont Street, the defendant bent down toward the Accord before getting back into the vehicle and closing the door. Several minutes

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<sup>1</sup> Many of the events inside and immediately outside the store were captured on the store's video surveillance footage.

later, as the victim continued walking east on Ashmont Street, the Accord pulled away from the curb and traveled in the same direction down the one-way street.

Meanwhile, Barnett Harper, a neighborhood resident, was walking east on Ashmont Street. Harper recalled that a man wearing a backpack, later identified as the victim, was walking a few paces ahead of him. As they walked, a second man jogged from behind Harper and approached the victim. That man was wearing saggy khaki pants and a lightweight jacket. He was of medium build, was Black, and had a chipped or missing front tooth on the right. When Harper reached his apartment building, he walked up two flights of stairs, while the two men stood outside, a few houses away, talking to each other.

A few moments after entering his apartment, Harper heard what sounded like a gunshot. After pausing for a brief period of reflection, Harper looked out his window, and then he stepped onto his porch. He saw the man with the chipped tooth jogging west, in the direction of Washington Street. Harper went downstairs and walked a few steps east on Ashmont Street, where he saw a man lying on the pavement with a gunshot wound to his left eye. Harper called 911 at 9:57 A.M., and he stayed with the victim, who was still breathing, until emergency responders arrived. Later, at the police station, Harper told officers that the man who ran from the scene was between five feet, six

inches and five feet, nine inches tall (he described the man as a little taller than himself but by no more than three inches), with a medium skin tone, and in his early twenties.<sup>2</sup>

That morning, Conrad Gibson was sitting in his friend's living room, watching television, when he heard a gunshot. He looked out the window and saw a Black male jog by wearing baggy, sagging pants that he pulled up as he was running. Gibson also saw the legs of a person lying on the sidewalk, sticking out from behind a parked car. Gibson told police that the running man had a medium build, was between five feet, six inches to five feet, eight inches tall, and was clutching his pants as he ran.

b. Investigation. Within twenty minutes of the 911 call, Boston police officers arrived at the scene. They searched the area for ballistics evidence, but recovered none. The officers also knocked on the doors of nearby houses to try to locate anyone who might have seen or heard something relevant. During this canvas of the neighborhood, police spoke with Harper, who agreed to go to the police station for an interview. Police also obtained video surveillance footage from the grocery

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<sup>2</sup> Harper later told the defendant's investigator that the man had been light skinned, approximately twenty-five years old, and approximately five feet, ten inches tall.

store's security camera, as well as from two nearby private homes.

From the surveillance footage, police determined that the victim had entered the store approximately ten minutes before he was shot. They identified the man in the footage as the victim because he appeared to be wearing the same hat and backpack that the victim was found wearing. Police also used the surveillance footage to identify the owner of the blue Honda Accord as Marvin Smith. When officers showed Smith the surveillance footage, Smith and his wife identified the men in the Accord as the defendant and Keith Cousin.

Police then undertook to locate and arrest the two men. On July 11, 2017, officers went to the defendant's mother's house in the Mattapan section of Boston. They found the defendant in bed in a guest room that the defendant's mother rented out to friends and family members, and to which at least six or seven people outside her immediate family, both extended family and friends, had access at that point. The defendant was partially dressed and was with his girlfriend, who had spent the night. Officers saw a pair of khaki pants hanging from an open drawer and the defendant's cell phone on a nightstand. After the defendant was arrested (on an unrelated outstanding warrant), police obtained a search warrant to search the house. When they executed the warrant, they found, among other things, a .38

caliber revolver on the floor of a closet, under a pile of other items, and rounds of nine millimeter and .38 caliber ammunition in a cloth drawstring bag in the defendant's girlfriend's purse. The firearm did not contain the defendant's fingerprints and was not tested for deoxyribonucleic acid (DNA) evidence; the string on the drawstring bag contained a mix of DNA from at least four individuals that could not be used for matching with individual DNA profiles.

2. Discussion. In this direct appeal from his convictions of murder in the first degree, carrying a firearm without a license, and possession of a firearm without an FID card, the defendant argues that the evidence was insufficient to establish his identification as the shooter and to prove deliberate premeditation and constructive possession of the firearm. He also maintains that the motion judge, who was not the trial judge, erred in denying his motion to dismiss all of the indictments on the ground of impairment of the grand jury proceedings. In addition, the defendant challenges the judge's instructions on eyewitness identification as improperly suggesting that witnesses had made a positive extrajudicial identification of the defendant, where the witnesses were never asked to identify him and simply described the appearance of the man they saw fleeing the scene moments after a shot was fired. The defendant argues that the instructions reduced the

Commonwealth's burden of proof by suggesting that the witnesses indeed had identified him.

The defendant contends further that questions the prosecutor posed to the venire, intended to address the so-called "CSI effect," resulted in a jury biased in favor of the Commonwealth. The defendant also argues that numerous statements in the prosecutor's closing argument were improper, as they were not based on evidence before the jury, misstated the evidence, and were designed to appeal to the jury's emotions and to inflame their thinking, thus shifting the burden of proof toward the defendant. The defendant also asks us to exercise our authority under G. L. c. 278, § 33E, to grant him relief.

We conclude that there was sufficient evidence for a rational trier of fact to find the defendant guilty of all of the indicted offenses beyond a reasonable doubt. Although the prosecutor did introduce before the grand jury highly prejudicial prior bad act evidence that had no probative value, there was sufficient other evidence to satisfy the probable cause standard under which the grand jury ultimately indicted the defendant, and thus no error in the denial of the defendant's motion to dismiss. We also discern no abuse of discretion in the judge's decision not to instruct the jury on eyewitness identification using the specific language requested



by the defendant, and no error in the instructions given, which did not diminish the Commonwealth's burden of proof.

We agree that the prosecutor's questions to the members of the venire attempting to account for the so-called CSI effect were not felicitously worded and would have been better asked in another form, as the attorneys for the defendant and his codefendant each requested, but the defendant has not shown that the empanelled jurors, all of whom responded in the negative to the question, were biased toward the Commonwealth. With respect to the prosecutor's closing argument, most of the disputed statements constituted permissible enthusiastic rhetoric, rather than misstatements of the evidence. Although certain of the statements were improper, the judge immediately gave a curative instruction, which sufficiently cured any prejudice. In addition, we discern no reason to exercise our extraordinary authority under G. L. c. 278, § 33E, to order a new trial or to reduce the degree of guilt. Accordingly, we affirm the convictions.

a. Sufficiency of the evidence. The defendant contends that the evidence before the jury was inadequate to support his conviction of murder in the first degree. He maintains that the evidence was insufficient to establish his identity as the shooter or as having been present at the scene, that he acted

with deliberate premeditation, or that he constructively possessed the firearm used in the shooting.

In determining whether the evidence was sufficient to support a conviction, a reviewing court considers "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (citation omitted). Latimore, 378 Mass. at 677.

"Circumstantial evidence is sufficient to find someone guilty beyond a reasonable doubt[,] and inferences drawn from such circumstantial evidence 'need only be reasonable and possible; it need not be necessary or inescapable'" (citation omitted). Commonwealth v. Grandison, 433 Mass. 135, 141 (2001). "A conviction may not, however, be based on conjecture or on inference piled upon inference." Commonwealth v. Jones, 477 Mass. 307, 316 (2017).

i. Identification. The defendant argues that there was insufficient evidence that he was the person Harper and Gibson observed in the moments immediately before and after the shooting, or that the man they saw was the person who shot the victim. The defendant maintains that an extrajudicial eyewitness description of an individual observed near a crime scene, "in the absence of video of the scene or positive

eyewitness identification," provides "no probative identification evidence" for the jury.

The defendant's reliance on Commonwealth v. Amado, 387 Mass. 179, 188-189 (1982), in support of this proposition is misplaced. In that case, prior to trial, the witness identified the defendant from a photograph, provided his nickname, and "associated" the nickname with the defendant. Id. Then, at trial, the victim denied that the defendant was the assailant. Id. at 188. Contrasting that situation with circumstances where witnesses provide "inconsistent and contradictory" statements of identification in and outside court but there is at least one in-court identification of the defendant, "as well as other, less positive in-court references to the defendant[]," id., the court in Amado concluded that the latter situation merely created a credibility issue for the jury to decide, but that the former resulted in "no probative identification evidence for the jury" because the "probative value of the pretrial identification evidence is seriously impaired, if not negated, by the witness's own in-court testimony" that fails to identify the defendant. Id.

Here, there was no court room recanting of a prior extrajudicial identification. The two witnesses consistently described the man they had seen to the extent they were able to see him; although their recollections did not change, they also

never said that, in the brief moment that the shooter ran past, they had seen his face sufficiently to be able to identify it, so the absence of identification testimony at trial did not negate any prior extrajudicial statements. Moreover, there was positive identification of the defendant in the surveillance video footage, a few blocks from the scene of the shooting, approximately ten minutes before the shooting took place, by two witnesses who knew him. The question thus was whether the later two witnesses, who each saw a man running on Ashmont Street, saw the same man. See Commonwealth v. Vitello, 376 Mass. 426, 461 (1978) ("an extrajudicial identification may in an appropriate case provide a jury with a sufficient basis upon which to find a defendant guilty beyond a reasonable doubt").

Both witnesses testified that they saw a Black man of medium build, approximately five feet, six inches to five feet, eight inches tall, jogging west on Ashmont Street moments after they heard a single gunshot. Harper, who saw the man from within two to three feet as he ran past, testified that the man had a chipped front tooth on the right side and a medium skin tone, and wore beige, baggy pants and a light jacket. Gibson, who saw the man over a shorter period, through a window and from further away, recalled that he saw a Black man who was wearing baggy, sagging pants that he was pulling up as he ran. Both witnesses described the man as approximately the same height and

testified that they saw no other people on the street after they heard the gunshot. These observations all support the Commonwealth's view that the defendant was the person both witnesses saw.

Moreover, the testimony by Harper and Gibson was not introduced in isolation. Rather, the Commonwealth attempted to connect the person the witnesses saw near the scene with the defendant through the video surveillance footage taken several blocks away, approximately ten minutes before the gunshot, in which members of the defendant's family positively identified the defendant as the person depicted (and also identified the codefendant). The surveillance footage shows the defendant first standing next to a blue Honda Accord, then heading toward the store window, and then getting back into the Accord and closing the door. The video footage later shows the defendant and the other man, in the Accord, traveling down Ashmont Street, shortly after the victim is seen leaving the store. The Accord is traveling in the same direction as the victim walked, less than two minutes after the victim left the grocery store. This also was the direction from which, minutes later, Harper and Gibson heard a gunshot and then saw a person who resembled the defendant running in the direction of the store. Video surveillance footage from a private home also showed a blue Honda Accord apparently traveling in the opposite direction,

back the way it had come, shortly after the shot was fired. Based on this evidence, the jury reasonably could have inferred that the defendant was the person both Harper and Gibson observed.

Harper telephoned emergency responders at 9:57 A.M., minutes after he heard the shot and a moment after he saw the man lying on the sidewalk with a gunshot wound to his eye. Harper did not see any other pedestrians or vehicles on the street when he looked out the window and saw the man leaving the area, or after he came downstairs and saw the victim and attempted to render aid. Harper estimated, however, that a few minutes had elapsed from the moment the shooting occurred, during which he was facing away from the road and was inside his house, and would not have had a clear view of the street. At 9:56:43 A.M., immediately prior to Harper's 911 call, surveillance footage from a house several blocks away from the store -- and several blocks closer to the scene -- showed a blue Honda Accord (the same make, model, and color as the vehicle seen in the store video surveillance footage), being driven away from the area of the shooting.

This court has concluded that there was sufficient evidence to prove guilt beyond a reasonable doubt where witnesses observed a man "who generally matched the description of the defendant" running alone, away from the victim, "clutching

something in his pocket consistent with a firearm." See Jones, 477 Mass. at 316. To support this conclusion, the court noted several connections between the "unidentified runner" and the defendant. Id. at 317.

The evidence implicating the defendant in this case is comparable. As in Jones, multiple witnesses saw a person resembling the defendant, and wearing similar clothing to that which the defendant had been seen wearing approximately ten minutes earlier and a few blocks away, running from the location where the shooting took place, moments after the fatal shot. Where, in Jones, a witness placed the defendant in a park near the scene of the crime, here, the store's surveillance footage showed the defendant traveling toward the scene, from a few blocks away, several minutes before the shooting.

As the defendant observes, "mere presence at the scene of a crime, without more, is not sufficient to support a conviction." Commonwealth v. Mazza, 399 Mass. 395, 399 (1987). Here, however, there was more. The evidence would have allowed a reasonable juror to find that a person resembling the defendant, wearing apparently the same clothing, was alone with the victim during the moments immediately before the shooting and immediately after; that the defendant had traveled toward the scene several minutes before the shot was fired; and that two witnesses saw no other pedestrians or vehicles on the street at

that time. This is in contrast to the facts in Mazza, supra, where there was "no evidence that [the victim] was killed while the defendant was at the [crime scene]." In sum, the evidence was sufficient for a rational juror to have found beyond a reasonable doubt that the defendant was the shooter.

ii. Premeditation. To establish that a defendant acted with deliberate premeditation, the Commonwealth must prove that the defendant intended to kill, and that he or she acted with deliberation, after a period of reflection; the length of that period is undefined and could be no more than a few seconds. See, e.g., Commonwealth v. Coleman, 434 Mass. 165, 168 (2001). A jury may infer that a defendant acted with deliberate premeditation "from the nature and extent of a victim's injuries, the duration of the attack, the number of blows, and the use of various weapons." See Commonwealth v. Whitaker, 460 Mass. 409, 419 (2011).

In this case, there was lay and medical evidence that the victim had been shot at close range through the eye. Emergency medical technicians attempting to treat the victim at the scene noted signs of stippling on his face, indicating that the shot had been fired from only a few feet away. Minutes before he heard the gunshot, a witness saw the victim standing and talking to a man whose physical characteristics matched the defendant's, and wearing clothes that appeared to match clothing the



defendant had been wearing less than ten minutes earlier. The two men appeared to be talking calmly and in a friendly manner. No one else appeared to be outside on either side of the street.

From this evidence, the jury reasonably could have inferred that the shooter, who had been talking to the victim as they stood near each other, decided to kill the victim, pulled out a gun, and shot him in the face at point-blank range. This, in turn, was sufficient for the jury to have found that the shooter acted with deliberate intent to kill the victim; any reasonable person would know that shooting someone in the head at close range almost certainly would result in death, and there was no evidence of any kind of sudden combat or self-defense.

iii. Constructive possession. The defendant also contends that the Commonwealth did not prove beyond a reasonable doubt that he constructively possessed the gun used to shoot the victim.

As stated, police arrested the defendant at his mother's house approximately two weeks after the shooting. They then obtained a search warrant and searched the house. In the closet in the bedroom where the defendant was arrested (partially undressed and in bed with his girlfriend), police recovered a .38 caliber revolver from under a pile of items on the floor. They also found a cloth bag, of the kind in which bottles of whiskey are sold, in the girlfriend's purse; the bag contained

nine millimeter and .38 caliber ammunition. The defendant's mother testified that the room where the gun was found was not the defendant's bedroom. Rather, it was the defendant's brother's bedroom, where guests often slept. According to the defendant's mother, "about six or seven people" had had access to the room and could have slept in it. The closet had no lock and was full of "stuff." The defendant's mother was renting the room to help pay her own rent. She also said, however, that the defendant had been staying there for a "couple of nights," something he had done on other occasions; at other times in the summer of 2017, he had been staying with his girlfriend. When the defendant came to visit for a few days, he never brought any clothing with him.

As the defendant points out, no physical evidence tied him to the shooting, and no casings or projectiles tied the gun found in his mother's house to the victim; the prosecutor argued that the gun could have been the weapon, as it was a revolver and revolvers do not eject shell casings. The defendant's fingerprints were not found on the firearm, the firearm was not tested for DNA, and the DNA on the bag containing the ammunition could not be used to provide a match to any suspect.

Although people other than the defendant had had access to the bedroom that his mother rarely entered, the Commonwealth, in seeking to establish constructive possession, was not required

to prove that the defendant was the sole person who could have had access to the firearm. The fact that the defendant slept in the room for days at a time and never brought clothes when he came to stay; the location of the gun under a pile of objects on the floor of the closet, suggesting knowledge of the room and selection of a convenient hiding place; and the ammunition found in his girlfriend's purse, along with the fact that the defendant was staying with her at least part of the time when he was not staying at his mother's, were sufficient evidence for the jury to have found that the defendant had knowledge of the firearm and the ability to exercise dominion and control over it.

b. Impairment of grand jury proceedings. The defendant argues that the grand jury proceedings were fatally impaired by the prosecutor's misconduct, necessitating dismissal of the indictments. Specifically, the defendant maintains that the prosecutor's introduction of a significant volume of highly prejudicial, yet irrelevant, character evidence improperly influenced the grand jury's decision to indict the defendant on the charges of which he ultimately was convicted.

A defendant may be entitled to dismissal of an indictment if the integrity of the grand jury was impaired by a prosecutor's improper conduct in the introduction of certain evidence. See Commonwealth v. Mayfield, 398 Mass. 615, 621

(1986). To demonstrate that such impairment occurred, a defendant must establish that (1) the evidence was presented knowingly or with reckless disregard for its truth; (2) the evidence was presented with the purpose of obtaining an indictment; and (3) the improper evidence probably influenced the grand jury's decision to indict. Id. "Reckless disregard of the truth leading to the presentation of false or deceptive evidence could also warrant dismissal of an indictment." Id. See Commonwealth v. Freeman, 407 Mass. 279, 283 (1990).

In her May 25, 2018, ruling, the motion judge, who was not the trial judge, found that the prosecutor introduced the challenged records "in reckless disregard of their lack of probative value, compounded by their potential prejudicial effect, and that the records were presented with the intention of obtaining indictments." She then determined that the other evidence, although circumstantial, was adequate to establish probable cause and the "identity of the accused," and thus that the evidence presented to the grand jury "was sufficiently inculpatory to relieve the Commonwealth of the adverse consequences that might otherwise flow from its conduct of the grand jury proceedings." As a result, the motion judge found that the grand jury proceedings were not impaired by the prosecutor's deliberate misconduct.

When reviewing a motion judge's decision after an evidentiary hearing, this court will "accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of his [or her] ultimate findings and conclusions of law" (citation omitted). See Commonwealth v. Bartlett, 465 Mass. 112, 113, (2013). See also Commonwealth v. Isaiah I., 448 Mass. 334, 337 (2007), S.C., 450 Mass. 818 (2008) ("motion judge's findings of fact are binding in the absence of clear error" [citation omitted]).

Here, as part of their investigation into the victim's death, Boston police attempted to discern the relationship between the two individuals they sought to indict: the defendant and Cousin, the man who had been in the driver's seat of the Honda Accord when it was parked in front of the grocery store.<sup>3</sup> Initial investigation had revealed that the defendant and Cousin had been incarcerated together at Souza-Baranowski Correctional Center during the same few months in 2016, a year before the shooting. Prosecutors therefore issued a grand jury subpoena to the Department of Corrections (DOC) requesting all records pertaining to the incarceration of both the defendant

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<sup>3</sup> As discussed in part 2.e, infra, shortly before closing argument, the indictments against Cousin were dismissed on his own motion, after the trial judge found insufficient evidence that Cousin "shared the intent to commit this crime."

and Cousin beginning on January 1, 2000 (when the defendant was five years old), through the date of issuance of the subpoena.

The records the Commonwealth received from the DOC were voluminous. They contained "disciplinary reports citing each [codefendant] for numerous allegations of disruptive behavior -- including violent assaults on other inmates, manufacture of weapons, and threats against staff members while incarcerated." Nowhere in the more than one hundred pages of records, however, was there evidence of any connection between the defendant and Cousin during their incarceration together. As a result, the motion judge determined that the records had "no permissible probative value whatsoever." When a grand juror, looking at the voluminous records, asked the prosecutor whether he could summarize what the records said about the relationship between the defendant and Cousin, the prosecutor first asked whether the grand juror had read the records. After the juror responded that he had not, the prosecutor said that he would not be able to answer the question about summarizing the evidence. The juror then asked whether the grand jurors therefore could "enjoy" the records by themselves, and the prosecutor responded, "You can enjoy it by yourselves as much as you like, yeah." The motion judge rejected the Commonwealth's argument that because police had subpoenaed all of the DOC records related to each of the codefendants, the Commonwealth was obligated to present them

all to the grand jury; the judge also rejected the Commonwealth's argument that it was precluded from summarizing any of the documents for the grand jury.

In addition to introduction of the DOC records, the prosecutor asked the defendant's girlfriend whether the defendant had ever called her from jail. The prosecutor also asked another witness to tell the grand jury about how the defendant had chipped his front tooth, to which the witness replied that the defendant had recently been released from "Shirley." The prosecutor gave no limiting instruction with respect to either of these statements. The prosecutor also presented all of the jail call logs from the defendant's telephone calls after his arrest, through a Boston police officer. Immediately after introducing the call logs, the officer testified that he only had listened to one of the calls and that it contained, as the judge reported, "nothing relevant to the investigation."

In her decision, the motion judge stated that what had occurred before the grand jury was "the opposite of best practice." She noted that "no thought appears to have been given at the beginning of the investigation to narrowing the subpoena to the [DOC], to focus more precisely on what the prosecution claims to have sought (and was allegedly unable to discover from another source): evidence of a direct

relationship between [the defendant] and Cousin, during a time frame in which [the defendant] could reasonably have been expected to have been housed at a Massachusetts prison." The judge agreed that there was "no dispute that a potential relationship between the two men was a legitimate area of investigation," but pointed out that "disciplined attention could well have been directed to which [DOC] documents (be they, for example, housing, discipline, or gang records) would have been more likely to contain that information." The judge also noted that "there is a woeful lack of evidence on this record that any professional judgment was exercised once the subpoenaed records were received, to assess whether they were in fact probative of a relationship between the two men."

The Commonwealth obtained the records on August 9, 2017, and they were produced to the grand jury on September 13, 2017. The judge pointed out that the police officer who introduced the records testified that he "had never read the [DOC] documents," and there was no explanation why he had not done so. In addition, the judge noted that the "record is notably silent as to whether the prosecutor himself ever reviewed the [DOC] documents, to make any responsible assessment of their probative value -- and, if so, why he chose to submit those records to the grand jury without foundation, and through a witness entirely ignorant of their content." The judge emphasized that "despite



the lack of assessment of probative value, there is no evidence that a qualified Commonwealth decision maker made any reasonable effort to weigh the fairness of offering -- to a grand jury assessing probable cause for joint venture first degree murder by shooting -- a set of highly inflammatory records demonstrating prior bad acts, proclivity to violence, and other general bad character of both [d]efendants."

The motion judge's determination supports the defendant's contention that the prosecutor was reckless in introducing such improper, unfairly prejudicial, and irrelevant evidence to the grand jury in order to obtain an indictment against the defendant. Indeed, the motion judge found no evidence that the prosecutor "made any responsible effort to weigh the fairness of offering . . . a set of highly inflammatory records demonstrating prior bad acts, proclivity to violence, and other general bad character of both [d]efendants." Therefore, she concluded that the first and second elements of the Mayfield inquiry had been satisfied. See Mayfield, 398 Mass. at 621.

The third element of the Mayfield inquiry, however, asks whether the improper evidence probably influenced the grand jury's decision to indict. In undertaking such an analysis, this court has considered how the improper evidence was placed before the grand jury. Evidence submitted in response to a question by a grand juror, for example, is less problematic than

evidence submitted "by the prosecutor's design." See Commonwealth v. Vinnie, 428 Mass. 161, 174-175, cert. denied, 525 U.S. 1007 (1998). In Vinnie, supra at 175, this court assessed the prejudicial impact of prior bad act evidence that had been introduced to the grand jury in order to obtain an indictment against the defendant. Ultimately, the court concluded that the improper evidence "probably [did not] influence[] the grand jury's decision to indict," because there was substantial other evidence of probable cause. In determining that the improper evidence likely had not had an impact on the grand jury's decision to indict, this court held that, "had there been less evidence incriminating Vinnie, [the improper evidence] could have led the grand jury to indict him improperly on the basis of his propensity to commit crime, rather than on the crime charged." Id.

Here, as there was less evidence incriminating the defendant than existed against the defendant in Vinnie, there was a concomitant greater likelihood that the improper evidence could have led the grand jury to "indict him improperly." Id. For instance, there was no evidence of any prior relationship between the defendant and the victim, and no indication that they were aware of one another's existence before they encountered each other a few minutes before the shooting. As a result, there also was no evidence of any previous hostility

between the victim and the defendant, as was the case in Vinnie. Further, the prosecutor presented testimony from only one witness, Harper. Harper testified that he saw a person generally resembling the defendant engage in a conversation with the victim, and then saw the same individual some minutes later jogging down the street, heading away from where the two had been standing, after a single gunshot rang out. Harper did not then, or at any later point, identify the running man as the defendant.

The prosecutor, however, also presented the video surveillance footage showing the defendant several blocks away from the scene of the shooting, approximately ten minutes earlier. As discussed, this footage depicts the defendant standing outside a grocery store as the victim departs the store and walks east on Ashmont Street. Shortly thereafter, the defendant enters a vehicle that is driven out of the camera's view (along a one-way street), in the direction that the victim walked.

This court has held that a prosecutor's "clear and relatively contemporaneous instruction presumably mitigated the prejudice from the introduction of prior bad acts evidence." See Commonwealth v. Rakes, 478 Mass. 22, 32 (2017). A curative instruction may be adequate where "the prosecutor promptly cautioned the grand jury to ignore completely the mention of the

prior arrests." Commonwealth v. Jenks, 426 Mass. 582, 587 (1998), S.C., 487 Mass. 1032 (2021). Here, the instructions the prosecutor provided to the grand jury were less than a model of clarity. The instructions first told the grand jurors, "You are only to take [the DOC documents] as evidence as it relates to this crime." The prosecutor then clarified that the grand jurors should "not use the fact that [the defendant and his codefendant] have been arrested before . . . in deliberations when [the jurors] determine whether or not they committed this crime." Although the prosecutor's instructions were by no means "clear," overall, they nonetheless explained that the grand jurors should exclude the prior bad act evidence from their consideration as to whether there was probable cause that the defendant had committed the crimes alleged. In sum, the instructions were given sufficiently promptly after the evidence was introduced, and sufficiently conveyed that the grand jurors should not use the prior bad acts to support a finding of probable cause.

"[T]he Commonwealth's burden of proof" to obtain an indictment is "relatively low," and "the defendant bears a heavy burden to show impairment of the grand jury proceeding" (citation omitted). Commonwealth v. Fernandes, 483 Mass. 1, 7 (2019). The probable cause standard requires the Commonwealth to provide "reasonably trustworthy information . . . sufficient

to warrant a prudent man in believing that the defendant had committed or was committing an offense." See Commonwealth v. Moran, 453 Mass. 880, 883 (2009). It is not evident that, absent the prior bad act evidence, the jury likely would not have decided to indict. Therefore, where the grand jury were presented with sufficient probable cause to issue the indictments, the prior bad act evidence did not sufficiently influence the grand jury's decision to indict to require dismissal of the indictments.

c. Instructions on identification testimony. The defendant maintains that the judge's instruction on eyewitness identification, which was not entirely based on the model jury instruction, was erroneous and requires a new trial. The defendant contends that, by declining to instruct the jury that they "should consider whether a witness ever failed to identify the victim," the judge "usurped" the jury's role as fact finder. The defendant also argues that the instructions subverted the purpose of jury instructions to "inform the jury of the Commonwealth's heavy burden of proof as to the accuracy of the identification, and to furnish the criteria by which the jury can assess the quality of the identification" (citation omitted). See Commonwealth v. Johnson, 470 Mass. 389, 395 (2015). The defendant maintains that the instruction improperly suggested that the witnesses' descriptions of the person they

observed near the scene constituted a positive identification of that individual as the defendant, where neither witness was asked to, or did, identify the person he saw running from the scene. In addition, the defendant argues that the judge improperly omitted to remind the jury that the Commonwealth bore the burden of proving beyond a reasonable doubt both that the defendant was the person the witnesses observed and that the person they saw shot and killed the victim.

As this court has noted, "eyewitness identification may be an important issue at trial even where no eyewitness made a positive identification of the defendant as the perpetrator, but where eyewitnesses have provided a physical description of the perpetrator or his clothing." Commonwealth v. Franklin, 465 Mass. 895, 912 (2013). Here, Harper described a Black man of medium build, approximately five feet, six inches to five feet, nine inches tall, with a medium skin tone, wearing baggy beige pants and a light jacket, who had a chipped front tooth on the right side. The man ran past Harper, approximately two to three feet from where Harper was standing on the sidewalk, heading in the direction of the MBTA station. Gibson recalled that he saw a Black man of medium build, approximately five feet, six inches to five feet, eight inches tall, wearing sagging pants that he was pulling up as he ran; at the same time, Gibson said that he saw his neighbor (Harper) outside on his porch. Both Harper and

Gibson testified that they had not seen anyone else on the street at that time, aside from the victim lying on the sidewalk.

Due to the specificity of the connection between the defendant and the person Harper observed -- that both had a chipped front tooth on the right side, and that both wore beige, baggy pants and a lightweight jacket -- the judge agreed with defense counsel that the defendant was entitled to a modified instruction on eyewitness identification. The defendant requested that the instruction include two specific sentences: one instructing that the jury should consider whether the witness ever failed to identify the defendant, and the second reminding the jury, "If you are not convinced beyond a reasonable doubt that the defendant is the person who committed the alleged crimes, you must find the defendant not guilty."

The judge declined to provide the first requested instruction, on the ground that none of the witnesses had failed to identify the person they observed on Ashmont Street as the defendant. Neither witness was ever asked to identify the person they had seen, so neither witness had had an opportunity to fail to identify that person as the defendant. Nor was either witness asked to identify the defendant in the courtroom. The judge implied that he believed the Commonwealth made a strategic decision to provide less evidence to the jury in

order to avoid the possibility that, if given the opportunity, either witness would attempt to identify the defendant and fail to do so. The defendant argues that permitting such a tactic "rewarded the Commonwealth for its evasion of standard police procedure."

Regardless of the merits of the judge's comment as to the officers' motives, witnesses who have not specifically identified a defendant routinely testify to such observations as they were able to make of an individual they saw at or near the scene of a crime, and prosecutors routinely introduce video surveillance tapes that do not permit identification of a particular individual, or even allow a glimpse of a suspect's face. In circumstances where eyewitnesses provide physical descriptions, but no positive identification of a defendant, this court has noted that, "where requested by the defendant, a judge should provide specific guidance to the jury regarding the evaluation of such eyewitness testimony through some variation of the approved identification instruction." See Franklin, 465 Mass. at 912.

Here, in particular, the defendant objected to the judge's repeated use of the word "identification" to describe the witnesses' observations. The defendant asserts that the use of this word "conflat[ed] the description [the witness] gave with a positive identification of [the defendant]." Although the



judge's use of the word "identification" might have been somewhat less clear than the word "description," that use would not have created sufficient confusion to cause a reasonable juror to disregard the fact that each witness clearly testified that he did not identify the person running from the scene as the defendant. Indeed, the judge noted that, in using the word "identification," he was referring to each witness's identification of specific clothing worn by the person each witness saw rather than to an identification of the person as the defendant. In sum, there was no abuse of discretion in the judge's decisions not to instruct in the precise language the defendant requested, in using the word "identification" rather than "description," and in omitting a reminder to the jury of the witnesses' "failure" to identify the defendant.

d. Voir dire of venire. The defendant argues that a new trial is required because certain of the prosecutor's questions to the venire, intended to detect potential jurors who were biased by the so-called CSI effect, resulted in a jury biased toward the Commonwealth and inclined to disregard a lack of evidence. See Commonwealth v. Wolfe, 478 Mass. 142, 152 n.1 (2017) (Lowy, J., dissenting). The defendant maintains that this line of questioning, and particularly the query whether the potential juror would "need scientific evidence" in order to decide the case, had "the effect of identifying and selecting

jurors who were predisposed to convicting the defendant based on evidence the Commonwealth would present." See Commonwealth v. Perez, 460 Mass. 683, 691 (2011).

Both the defendant's trial counsel and counsel for his codefendant separately requested that the prosecutor's question be reworded to eliminate the use of the word "need."<sup>4</sup> After the prosecutor said that he routinely used that phrasing, the judge allowed him to continue to do so. The prosecutor then used peremptory challenges to remove any juror who expressed any hesitancy about the absence of forensic evidence.<sup>5</sup>

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<sup>4</sup> The codefendant's counsel asked, "In terms of the wording that you would need . . . I think maybe something along the lines of, could you be a fair and impartial without, need, implies almost a commitment that if they say they needed it, then they are out."

<sup>5</sup> Some of the prosecutor's exchanges included the following:

Q.: "The lack of forensic evidence would that be a problem with you in deciding this case do you think?"

A.: "No, I haven't heard anything yet."

. . .

Q.: "Do you think you can make a decision on a case where people see things and tell you what they saw instead of having forensics?"

A.: "Yes."

. . .

Q.: "Do you think being a scientist and having listened to some of those things you would need scientific evidence in order to make a decision on the case?"

The defendant maintains that these questions, specifically those inquiring whether a juror would "need" scientific evidence, in conjunction with the Commonwealth's use of peremptory challenges to dismiss every juror who waived in responding, produced a jury "predisposed to convicting the defendant based on evidence the Commonwealth would present."

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A.: "I don't think so. I think, you know, our job is to kind of judge the facts that are presented to us and if we don't have forensic evidence we can only [rely] on kind of . . . what's there."

. . .

Q.: "But do you think if there was no science you can make a decision about the case?"

A.: "I think so, yes."

. . .

Q.: "This case is likely to involve not a lot of forensic science but some witnesses, what they saw, maybe some video. Do you think you would need forensics science in order to make a decision on a case like this?"

A.: "No."

. . .

Q.: "Do you think you would need to have forensic science to make a decision on a criminal case?"

A.: "I think it would be helpful but --"

Q.: "But if there was none, do you think you could make a decision based on what would be presented?"

A.: "Yes."

See Perez, 460 Mass. at 690-691 & n.11 (discussing studies on subject and concluding that there is little empirical evidence showing existence of "CSI effect"). The defendant contends that this line of questioning is distinguishable from questions the court has deemed permissible, see Commonwealth v. Gray, 465 Mass. 330, 337-339, cert. denied, 571 U.S. 1014 (2013), and should be considered in light of Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980).

In Bowden, 379 Mass. at 485, the judge instructed the jury that, in deliberating, they were not to consider the lack of scientific evidence. We concluded that the instruction constituted reversible error, because the judge sought to preclude the jury from considering "a permissible ground on which to build a defense." Id. at 485-486. In Gray, 465 Mass. at 337, by contrast, the judge inquired of potential jurors, "Would the absence of DNA or fingerprint evidence prevent you from fairly evaluating the evidence in this case?" We determined that, in those circumstances, "[t]he question posed suggested to potential jurors that they should evaluate fairly the evidence introduced at trial," id. at 340; we also noted that "we remain[ed] skeptical that there is a need for voir dire questions designed to counter any 'CSI effect,' and again observe[d] that such questions should be posed sparingly," id. at 339.

Here, although the questions could have been better and more neutrally phrased, and in particular the use of the word "need" would have been best avoided, there was no abuse of discretion in the judge's determination that the questions about scientific evidence were appropriate in these circumstances. The questions were not identical in form, they were presented conversationally, and they were intended to assess whether any of the potential jurors harbored biases that could cause them to reject any case based largely on circumstantial and witness evidence, regardless of the strength of that evidence. See, e.g., Charles v. State, 414 Md. 726, 731-739 (2010) (abuse of discretion to ask jurors whether they could not convict defendant without "scientific evidence," because question suggested that finding defendant guilty was foregone conclusion).

e. Prosecutor's closing argument. The defendant argues that, in closing, the prosecutor referenced evidence not before the jury, misstated the evidence, and improperly attempted to inflame the jury's emotions and evoke their sympathy. In the defendant's view, the improprieties in the closing argument themselves require a new trial. Although the defendant is correct that quite a few of the prosecutor's remarks were improper, the improprieties do not warrant a new trial.

"[C]losing arguments must be limited to the facts in evidence and the reasonable inferences that may be drawn therefrom." Commonwealth v. Diaz, 478 Mass. 481, 487 (2017).

At the beginning of his argument, the prosecutor said,

"The moment [the defendant] decided to hunt down [the victim], execute him on Ashmont Street was the moment he saw him come out of that [grocery store]. . . . [The defendant] ducks down and begins to plot his execution of [the victim] on that street."

The prosecutor later told the jury to "look at the pictures" (the store surveillance video footage) and asserted, "You have the moment, this is the moment that shows when [the defendant] formed the intent and thought about, to plan and murder [the victim]." The prosecutor made these and other remarks as he replayed the surveillance video footage. At one point when the defendant bent slightly toward the open window as he was standing next to the Honda Accord, the prosecutor told the jury that the defendant was ducking down because he did not want the victim to see him, and "maybe pulling out the firearm, maybe not. He is doing something in that car. [Defense counsel] does not have an explanation for these actions coming up."

The defendant challenges the prosecutor's often reiterated characterization of the shooting as an "execution," repeated assertions that the defendant was hunting down the victim to execute him, and statements concerning the store surveillance footage as misstating the evidence and as unsupported by the

record. The defendant also contends that the prosecutor's repeated remarks that the defendant was "plotting," "planning," and "skulking" as he was running down Ashmont Street, as well as the descriptions of the shooting as an "execution," impermissibly were designed to inflame the jury's emotions. The defendant argues that the use of the words "execution" and "plot" were intended to suggest a "gang hit," something the evidence did not support. Further, the defendant points to the prosecutor's assertion that the surveillance footage shows the defendant pulling out a gun and "plotting" to kill the victim, as well as other comments about the defendant's actions, as descriptions of purported actions that are not actually depicted in the video surveillance footage. In particular, the surveillance footage shows nothing that could be considered to look like a gun, or the defendant pulling out anything from his clothing or the Honda Accord.

A prosecutor is entitled to argue forcefully for a conviction, and the jury are presumed to understand that a certain amount of hyperbole is forceful advocacy, not evidence. See Commonwealth v. Rutherford, 476 Mass. 639, 643-644 (2017); Commonwealth v. Wilson, 427 Mass. 336, 350 (1998). Although a prosecutor may urge the jury to draw reasonable inferences from the evidence, a prosecutor may not engage in speculation or

surmise, or ask the jury to do so. See Commonwealth v. Walters, 485 Mass. 271, 290-291 (2020).

Here, the absence of evidence of a "plot" between the defendant and Cousin, the other man in the vehicle outside the store, is evidenced by the fact that the trial judge allowed the codefendant's motion for a directed verdict before closing argument; at that point, the jury were instructed that the codefendant was no longer part of the case and that they were not to speculate as to the reasons that was so. To the extent that the word "plotting" can be applicable to a single individual making a plan, that was clearly not the prosecutor's implication, as he repeatedly drew the jury's attention to the car with the codefendant sitting in it and claimed (unsupported by the video surveillance footage) that the footage showed the defendant repeatedly "ducking" into the car and "conversing" with the codefendant, "talking back and forth."

The repeated use of the word "execution" to describe an apparently motiveless shooting has been deemed "improper" and "beyond mere hyperbole." See Commonwealth v. Andrews, 427 Mass. 434, 444 (1998). At the same time, the characterization of shooting the victim in the head at close range as an "execution," or the defendant waiting by his vehicle and then running after the victim as "skulking," has been viewed as strong but permissible language for actions that were described



by a witness or seen on video footage. Compare Commonwealth v. Francis, 450 Mass. 132, 141 (2007), S.C., 477 Mass. 582 (2017) (prosecutor's characterization of killing as "execution-style" was "permissible comment on the evidence"); Commonwealth v. Beauchamp, 49 Mass. App. Ct. 591, 608-609 (2000), S.C., 481 Mass. 1030 (2019) (use of word "ambush" was not overly inflammatory characterization of evidence that showed defendant "lured the victim into his apartment . . . and began shooting upon entry of the victim").

The prosecutor's comments that the surveillance footage showed the defendant pulling out a gun or forming a plan "the moment he saw [the victim] come out of that [grocery store]," or showed the defendant repeatedly "ducking" into the car and talking to the codefendant, are clearly misstatements of the videotape and were improper. See Diaz, 478 Mass. at 489. On the other hand, the prosecutor's comments that the defendant looked in the store window, ran after the victim, ran past Harper and waited for him to go inside to be sure the victim was alone, and then "execut[ed]" the victim, are either directly supported by the evidence or reasonable inferences to be drawn therefrom. See Francis, 450 Mass. at 141 (prosecutor's description of killing as "execution-style" was "permissible comment on the evidence"). Contrast Andrews, 427 Mass. at 444

(court concluded that "[n]o evidence supported [the Commonwealth's] characterizations of the shooting").

In addition, the defendant argues that, throughout the prosecutor's closing, he attempted to shift the burden to the defendant to disprove that he was guilty of the crimes charged. The defendant points to the prosecutor's remark that defense counsel had "no explanation" for some of the actions by the defendant seen in the video surveillance footage, the prosecutor telling the jury that defense counsel was trying to "distract" them, and the prosecutor asking defense counsel to "explain" the defendant's actions. The defendant objected to the last of these remarks and sought a mistrial. The judge allowed the objection and immediately added that the defendant "doesn't have any obligation to prove anything." The judge also instructed, before and after closing arguments, that closing arguments are not evidence. Moreover, the judge began his final charge by explaining,

"Ladies and gentlemen, let me explain two of the rulings I made and fill in some of the instructions that I inadvertently left out. First of all, to the extent that the Commonwealth made an argument that the defense didn't have an explanation for a piece of evidence, I sustained that objection, the defense doesn't have to explain anything. The defendant doesn't even have to close. The burden of proof is on the prosecution it always remains on the prosecution it never shifts to the defense, so the question for you to resolve is, has the Government proven its case beyond a reasonable doubt? I just wanted to make that clear."

The prosecutor's suggestion that the defendant should have offered an explanation for his behavior, and disparagement of defense counsel, were improper. "A prosecutor cannot comment on a defendant's failure to contradict testimony and cannot make statements that shift the burden of proof from the Commonwealth to the defendant." Commonwealth v. Nelson, 468 Mass. 1, 12 (2014). It also was improper for the prosecutor to "suggest[] that the defendant has an affirmative duty to bring forth evidence of his innocence, thereby lessening the Commonwealth's burden to prove every element of a crime" (citation omitted). Commonwealth v. Johnson, 463 Mass. 95, 112 (2012).

In assessing the prejudicial impact of improper burden shifting, a reviewing court considers the statements in the context of the entire case. Here, the judge's contemporaneous curative instruction, in conjunction with the more detailed and pointed instruction at the beginning of the final charge, cured the error to a significant extent. In addition, with respect to many of the misstatements about the video footage, the jury had the footage before them while deliberating, and could have decided for themselves whether the defendant was ducking down or pulling out a gun, as well as whether the footage showed what he was thinking. Thus, any prejudice was not so significant as to require a new trial. See Commonwealth v. Caputo, 439 Mass. 153, 166-167 (2003) (prosecutor's improper statement in closing that

defendant had "no good explanation" for particular piece of evidence unfavorable to defendant "should not have been made" and "improperly placed a burden on the defendant to produce evidence"; in context of entire case, however, and given judge's curative instructions, error did not require new trial). Contrast Commonwealth v. Coren, 437 Mass. 723, 731-733 (2002), citing Commonwealth v. Kozec, 399 Mass. 514, 518 (1987) (multiple material misstatements in prosecutor's closing required new trial, where judge's curative instruction was vague and general, and it was not clear whether curative instruction alone would have been enough to cure prejudice from jury having heard misstated evidence).

f. Review under G. L. c. 278, § 33E. Having carefully reviewed the record pursuant to our duty under G. L. c. 278, § 33E, we discern no reason to exercise our extraordinary authority to reduce the degree of guilt or to order a new trial.

Judgments affirmed.