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SJC-10129

COMMONWEALTH vs. AARON LESTER.

Hampden. March 6, 2020. - November 18, 2020.

Present: Gants, C.J., Lenk, Lowy, Cypher, & Kafker, JJ.[1]

Homicide. Deoxyribonucleic Acid. Evidence, Expert opinion, Chart, Prior inconsistent statement. Constitutional Law, Public trial. Practice, Criminal, Capital case, Argument by prosecutor, Instructions to jury.

Indictments found and returned in the Superior Court Department on March 29, 2005.

The cases were tried before Cornelius J. Moriarty, II, J., and a motion for a new trial, filed on November 5, 2018, was considered by him.

Elizabeth A. Billowitz for the defendant.
Cynthia Cullen Payne, Assistant District Attorney, for the Commonwealth.

LOWY, J. This case arises out of the shooting deaths of Tyrone Lewis, Jr., and Adrian White. On March 29, 2005, a grand

[1] Chief Justice Gants participated in the deliberation on this case prior to his death.

jury indicted the defendant on eight counts, including two counts of murder.[2] On February 7, 2007, the Commonwealth proceeded to trial against the defendant, Aaron Lester, and two codefendants, Maurice Felder and Derrick Washington, under a joint venture theory.[3,4] After trial, the jury found the defendant guilty on both indictments charging murder in the first degree.[5] The defendant filed a notice of appeal on March 1, 2007.[6] On November 5, 2018, the defendant filed a motion for a new trial, which the trial judge denied on December 20, 2018.

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[2] The indictments also charged the defendant with three counts of armed robbery, one count of possession of a firearm during the commission of a felony, one count of possession of a firearm without a license, and one count of possession of a firearm or ammunition without a firearm identification card.

[3] We affirmed Felder's and Washington's convictions on direct appeal. See Commonwealth v. Washington, 459 Mass. 32, 33 (2011); Commonwealth v. Felder, 455 Mass. 359, 360 (2009).

[4] During trial, the judge allowed the defendant's motion for a required finding of not guilty as to two indictments charging armed robbery and denied the motion as to the other six indictments. The judge also denied the defendant's renewed motion for a required finding at the close of evidence.

[5] The jury also convicted the defendant on each of the four remaining indictments. On the murder convictions, the judge sentenced the defendant to two consecutive life sentences without the possibility of parole. The judge imposed additional terms of incarceration to be served concurrently on the other convictions.

[6] Over the subsequent years, the defendant filed a series of motions to stay or extend his appeal. The defendant also did not permit his attorney to file an appellate brief for several years.

We consolidated the defendant's appeal from that denial with his direct appeal.

On appeal, the defendant seeks reversal of his convictions, claiming that each of the following amounts to reversible error: (1) the judge's admission of a deoxyribonucleic acid (DNA) expert's testimony regarding a nonexclusion result; (2) the judge's admission in evidence of charts depicting DNA test results; (3) several of the prosecutor's closing argument statements; (4) the judge's jury instruction that prior inconsistent statements may not be considered substantively; and (5) the judge's denial of the defendant's motion for a new trial, asserting that court room closure during voir dire was unconstitutional. Following plenary review of the record pursuant to G. L. c. 278, § 33E, we affirm.

Background. 1. The murder. We recite the evidence in the light most favorable to the Commonwealth, reserving certain details for later discussion. See Commonwealth v. Tavares, 484 Mass. 650, 651 (2020). After drinking to excess at a friend's Super Bowl party, on Sunday, February 6, 2005, Mark Young became very intoxicated. At about 2:15 P.M., Young's girlfriend, Vanessa Fulton, brought Young home, helped him into bed, and, after a couple of hours, left with plans to return later that evening. Around 9 P.M., Young awoke to the sound of an incoming telephone call from Felder, Young's acquaintance and a

codefendant in this case, who said, "I'm downstairs." Young then went downstairs, opened the front door, and saw Felder with the defendant and Washington, the other codefendant.[7] Young permitted all three men to enter.

Around 10 P.M., the three visitors asked Young to contact Lewis to buy "crack" cocaine.[8] When Young refused, the defendant forced Young to telephone Lewis at gunpoint. The three assailants then forced Young to strip down to his boxer shorts, creating an excuse for Young to remain inside and thus ensuring that Lewis would enter Young's house once he arrived.

When Lewis arrived and entered the house about twenty minutes later, the three assailants beat him, forced him to strip down to his boxer shorts, and ordered him to contact his driver, White, and to tell White to come inside. When White entered the house, the three assailants forced him to strip down to his boxer shorts as well.[9]

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[7] Young knew the defendant from the neighborhood and knew that Washington "hung around" the defendant.

[8] Young had previously purchased crack cocaine from Lewis.

[9] Between 10:30 P.M. and 11 P.M., Fulton, Young's girlfriend, called Young, and he told her to come over. When Fulton arrived around 11:30 P.M., she saw an unfamiliar gold car parked in front of Young's house. After knocking on the door for about five minutes, Young cracked open the door and told her to come back in twenty minutes. Fulton complied. When she returned, the same gold car remained parked outside, but Young answered neither his door nor his telephone. At trial, Fulton testified that shortly thereafter, she saw a black man on

Lewis offered to pay the three assailants $20,000 to release him and White. The assailants permitted Lewis to contact his girlfriend. After two telephone conversations with Lewis, Lewis's girlfriend handed a gift bag to an individual, whom she later identified as Felder,[10] who arrived at her home in a "goldish" car.[11] About twenty minutes later, Felder returned to Young's house, and Young then heard the assailants counting and dividing money in another room.

Shortly thereafter, the defendant asked Young to give him sheets and a pillow. After Young complied, the three assailants forced Young, Lewis, and White, at gunpoint, up to the attic and onto the floor, where the assailants used the bedding to restrain the victims. Specifically, the defendant used a pillowcase to tie up Young.

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Young's porch, whom she later identified as Felder, and two other black men in the immediate vicinity.

[10] Within one month of the murders, the police showed Lewis's girlfriend eight photographs, including a photograph of Felder, and she told the police that she could not be sure the photograph of Felder was of the individual who had picked up the bag. Shortly thereafter, she saw Felder on television being arraigned in court, at which point she identified Felder as the individual who had picked up the bag to police.

[11] Lewis's girlfriend did not look at the contents of the gift bag before she gave it to Felder. Lewis and his girlfriend had been saving money to move out of Springfield. About one month before the murders, they had about $18,000 or $19,000, sorted into $1,000 stacks, folded, and they had bound each stack with a black rubber band. Lewis' girlfriend had not seen the money since then.

Each assailant carried his own handgun. According to Young, the defendant held a nine millimeter, Felder held a .22 caliber Ruger, and Washington held either a .45 or .40 caliber gun. The defendant stood over Young, Washington stood over Lewis, and Felder stood over White. The assailants decided to kill the victims simultaneously, and as the assailants counted down, Young turned his head slightly, heard gunshots, and felt something hot brush his left cheek.[12] When Young opened his eyes, he saw that Lewis had been shot in the head. Young proceeded to "play dead." White then jumped up and ran down the stairs, the assailants chased him, and Young heard numerous gunshots coming from the stairwell.

After he heard the assailants run down the stairs, Young got up, went to a window, and saw two people get into a car. Young then went downstairs himself and saw White at the bottom of the stairwell, still alive. Young fled to get help. After knocking at several houses, one neighbor finally answered. The neighbor testified that Young was barefoot, wearing only boxer shorts, shivering, and looking "very, very scared." Young told the neighbor that two of his friends had been shot and killed. They called the police.

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[12] Young testified that he told police he had "a burn injury from the bullet grazing [his] face," but the responding police officers testified that they did not recall any such injuries.

2. The investigation. When the police arrived at Young's house shortly after midnight on February 7, they found White's body at the bottom of the attic stairs[13] and Lewis on the attic floor, still tied up and alive. Lewis died later due to multiple gunshot wounds. From Young's house, the police recovered discharge cartridge casings from three different weapons, the types of which matched Young's testimony regarding the types of firearms the defendants possessed.[14] The police observed a bullet hole next to where Young stated he had been lying down, which led through the attic floor and through the ceiling of the bathroom below. The police recovered one discharged nine millimeter cartridge casing from the attic, as well as one spent projectile that was consistent with the nine millimeter cartridge casing, from the bathroom floor.

Investigators tested several items and surfaces for DNA, including the pillowcase the defendant used to restrain Young. The pillowcase sample revealed DNA from multiple people, of which the defendant was a potential contributor.[15]

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[13] The autopsy revealed that White had been shot eight times and had died as a result of those injuries.

[14] During the autopsies, the police recovered six spent .22 caliber projectiles and one spent .45 caliber projectile from White's body and two .45 caliber projectiles from Lewis's body.

[15] Neither Felder nor Washington was a potential contributor.

In Young's statement to police, he initially lied and said he had been a victim of a home invasion by three masked intruders. After the district attorney agreed to dispose of Young's pending charges and assured Young that he could leave the Commonwealth, Young told the police the above described version of events.[16]

During a routine traffic stop later that afternoon, the police arrested the defendant and Washington. The police subsequently recovered $5,907 in cash from the defendant's pocket and $6,702 in cash in Washington's pocket. The police had already arrested Felder earlier that morning, at the hospital, where he was seeking treatment for a gunshot wound to his hand. Inside Felder's pants pocket, the police found $7,000 in cash, divided into seven bundles of $1,000, each of which was folded and bound with a black band.

Discussion. 1. Pillowcase DNA. At trial, the Commonwealth's expert testified that with regard to the mixed DNA sample found on the pillowcase, the defendant was a potential contributor, but not a match, as it was impossible to discern a match from a mixed sample. We refer to such DNA evidence as a "nonexclusion" result, as opposed to an

[16] The district attorney's office then bought Young a one-way ticket out of Massachusetts and Young left about one month later. The district attorney's office also paid for Young to come back to Massachusetts to testify at the trial.

inconclusive result, the latter of which provides "no information whatsoever due to insufficient sample material, contamination, or some other problem" (quotations omitted and emphasis in original). Commonwealth v. Barnett, 482 Mass. 632, 639 (2019), quoting Commonwealth v. Mattei, 455 Mass. 840, 853 (2010). See Commonwealth v. Cameron, 473 Mass. 100, 106 (2015). The expert also testified that the "probability of a randomly selected unrelated individual having contributed DNA to [the pillowcase sample was] approximately . . . [one] in [twenty-one] of the African-American population."[17,18]

As part of his report, the expert compiled four DNA charts (original DNA charts) illustrating the DNA analysis.[19] For

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[17] In contrast, the expert testified that the DNA from a red brown stain located outside of Young's house matched Felder's DNA, that it did not include any other contributors, and that the "probability of a randomly selected unrelated individual having a DNA profile matching [the sample] obtained from [the sidewalk stain] is approximately . . . [one] in 28.77 quadrillion of the African-American population."

[18] Pursuant to our G. L. c. 278, § 33E, review, we note that the expert improperly testified that there was an indication that the defendant's DNA matched one of the allele locations from the pillowcase sample, but the DNA "fell below our threshold of the instrument" and, thus, that location could not be used in his final assessment. While this was error, it does not create a substantial likelihood of a miscarriage of justice.

[19] The expert illustrated the DNA using thirteen distinct points of reference, each of which contained at least two numerical values. The DNA charts contained the defendant's DNA makeup, as well as that of each DNA sample collected.

trial, the prosecutor both enlarged the original DNA charts and created new DNA charts by cutting and pasting parts of the original DNA charts onto two separate, smaller DNA charts (smaller DNA charts).[20] The prosecutor displayed all six DNA

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We note that the expert witness here created the DNA charts based upon his own testing. When an expert provides an opinion based upon the testing of another DNA analyst, the charts created by the nontestifying DNA analyst may not be admitted in evidence on direct examination. See Commonwealth v. Seino, 479 Mass. 463, 470 (2018). We have not squarely addressed, however, the issue whether the Commonwealth may offer in evidence a DNA chart created by a testifying expert who did not perform the DNA testing, but took the raw data from the electrophoresis test and then, from raw data and visualization of the electropherogram, charted the allele numbers at the various genetic locations. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 n.1 (2009) (not every person "whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case"); United States v. Summers, 666 F.3d 192, 202 (4th Cir. 2011), cert. denied, 568 U.S. 851 (2012) ("The numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine, are indistinguishable in character from . . . gas chromatograph data . . . and . . . chromatograph and spectrometer results"). Compare Commonwealth v. McCowen, 458 Mass. 461, 483 (2010) (expert's testimony regarding DNA profiles she developed herself was not hearsay, but "allele numbers derived from the testing . . . by another analyst that were included in [the expert's] chart were testimonial hearsay" and, therefore, admitted in error).

[20] On the first smaller DNA chart, the prosecutor put Felder's DNA profile directly above that of the samples from the red brown stains found outside Young's house. The numerical values for each DNA sample were identical, and the expert testified that both stain samples matched Felder's DNA. On the second smaller DNA chart, the prosecutor put the defendant's DNA profile directly above that of the pillowcase sample. As stated above, the expert testified that the pillowcase sample was a mixture of multiple individuals' DNA. As such, there were more

charts during the expert's testimony without objection. After the expert's testimony, however, the judge admitted all six DNA charts in evidence over the three defendants' objections.[21] The DNA charts did not include the expert's conclusions or any statistical analysis.

2. Admission of DNA charts in evidence.[22] The defendant argues that the judge abused his discretion by admitting the DNA

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than two numbers under each of the thirteen DNA markers, and some of those numbers matched the defendant's DNA profile.

[21] Felder's attorney, who raised the initial objection in which the other defense attorneys joined, clarified that he did not object to the admission of the smaller DNA charts, but rather to the portions taken from the original DNA charts that contained the mixed samples to which the expert was not able to make a definitive match. Counsel explained that he was concerned that the jurors would try to "make their own comparisons." Although no attorney specifically objected to the admission of the smaller DNA charts, because the smaller DNA charts contain the same information as the original DNA charts, we consider the objection preserved.

[22] For the first time on appeal, and only in a footnote, the defendant argues that the judge erred in admitting in evidence the nonexclusion result from the pillowcase sample because the result was more prejudicial than probative. While judges should not admit nonexclusion results "without accompanying statistical explanation of the meaning of nonexclusion," Cameron, 473 Mass. at 106, quoting Mattei, 455 Mass. at 855, we afford a judge's determination as to the admissibility of such results the same "substantial deference" as we do for other evidentiary decisions, Commonwealth v. Nesbitt, 452 Mass. 236, 253 (2008), quoting Commonwealth v. Mathews, 450 Mass. 858, 872 n.15 (2008).

Whether the defendant was a potential contributor to the pillowcase sample was particularly probative of the defendant's identity as one of the murderers and of Young's credibility. The latter is especially true where Young testified that the defendant used the pillowcase to restrain Young. Moreover, the

charts that contained the nonmatch results, over objection, without including the statistical analysis. We disagree.

We have repeatedly acknowledged the importance of statistical analyses to explain DNA matches to the jury, concluding that the probative value of a DNA match is negligible without such analysis. See Commonwealth v. Cole, 473 Mass. 317, 327 (2015), quoting Commonwealth v. Tassone, 468 Mass. 391, 402-403 n.2 (2014) ("evidence of a DNA match has little or no value without expert testimony explaining the significance of the match, namely, 'the mathematical probability that another person has this same DNA profile'"). See also Commonwealth v. Barbosa, 457 Mass. 773, 789 (2010), cert. denied, 563 U.S. 990 (2011), quoting Commonwealth v. Lanigan, 419 Mass. 15, 20 (1994) (evidence of DNA match "is meaningless without evidence indicating the significance of the match"). As a result, we have held that admitting nonexclusion results without the accompanying statistical analysis risks misleading the jury and unfairly prejudicing the defendant. See Mattei, 455 Mass. at

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defendant does not argue a heighted risk of undue prejudice, nor do we discern one. The expert testified that the defendant was not a match to the pillowcase sample and provided a statistical explanation regarding the probability that the DNA belonged to someone other than the defendant. See Mattei, 455 Mass. at 850-852, citing Commonwealth v. Curnin, 409 Mass. 218, 222 n.7, 230 (1991) (applying reasoning regarding need for statistical explanation for DNA matches to need for statistical explanation for nonexclusion results). The judge did not abuse his discretion.

852. That rationale, however, does not apply to the admission of DNA charts with the same force.

Here, the jury heard the expert's statistical analysis on direct examination, as well as on cross-examination and during the defendant's attorney's closing argument. "The expert's opinions were what mattered to the jury, who likely would have found the raw data incomprehensible without the accompanying" statistics. Commonwealth v. Seino, 479 Mass. 463, 471 (2018). We must trust that a reasonable juror would have understood the expert's thrice repeated testimony, no matter that they did not have the precise statistical analysis attached to the DNA charts during deliberation. While we conclude that the judge did not err in admitting the charts, we also note that the better course is to remind the jury that they must consider the charts in conjunction with the expert's testimony, including the expert's statistical analysis. See id., quoting Commonwealth v. McCowen, 458 Mass. 461, 484 (2010) (because "[t]he DNA charts merely displayed genetic locations, [and] not any information regarding a match or the statistical probability thereof," they alone "had no meaningful probative value").[23]

[23] We conclude that the same reasoning applies where an expert testified as to an inconclusive result and that inconclusive result was contained in a DNA chart admitted in evidence. See Commonwealth v. Cavitt, 460 Mass. 617, 635 (2011) ("testimony regarding inconclusive DNA results is not relevant evidence because it does not have a tendency to prove any

3. Prosecutor's closing argument. The defendant also argues that the prosecutor made several improper statements during her closing argument, which together or separately prejudiced the defendant and thus warrant a new trial. Specifically, the defendant argues that the prosecutor improperly (1) misstated DNA evidence, asserting that the defendant's DNA was on the pillowcase; (2) both defined reasonable doubt and urged the jury not to look for reasonable doubt; and (3) speculated that the defendant cooperated upon his arrest because he believed there were no living witnesses to the murders. Because the defendant objected to the first two allegedly improper statements, we review those for prejudicial error. See Commonwealth v. Alvarez, 480 Mass. 299, 305, S.C., 480 Mass. 1015 (2018) (no prejudicial error where error did not influence jury or had "very slight effect" on jury [citation omitted]). Because the defendant did not object to the third

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particular fact that would be material to an issue in the case"). Neither the expert's testimony nor the data in the charts relating to the inconclusive DNA results should have been admitted in evidence. This error, however, did not create a substantial likelihood of a miscarriage of justice. See id. The inconclusive DNA evidence was "wholly neutral." Id. There was no insinuation at trial that the defendant was a potential contributor or match to the sheet sample. Indeed, Felder's defense attorney specifically asked the expert whether the defendant was a potential contributor to that sample, and the expert responded, "No." The expert even testified that he could not determine whether the mixture sample contributors were male or female.

statement, should we conclude it was erroneous, "we review for a substantial likelihood of a miscarriage of justice." Commonwealth v. Andre, 484 Mass. 403, 417 (2020).

We consider statements made during closing argument "in the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury." Commonwealth v. Felder, 455 Mass. 359, 368 (2009). Where the judge properly instructed the jury, "we must presume that the jury understood that instruction." Andre, 484 Mass. at 418, citing Commonwealth v. Kolenovic, 478 Mass. 189, 200 (2017).

a. Misstatements of DNA evidence. Despite the expert's testimony to the contrary, the prosecutor twice stated in her closing argument, over objection, that the defendant's DNA was on the pillowcase.[24] The prosecutor erred in misstating the evidence.[25] See Commonwealth v. Lao, 460 Mass. 12, 22 (2011), quoting Commonwealth v. Kozec, 399 Mass. 514, 516 (1987)

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[24] The prosecutor specifically stated: "Aaron Lester's DNA was on the pillowcase." Then, following the defendant's attorney's objection, which the judge overruled, the prosecutor reiterated: "The DNA evidence, it's Aaron Lester."

[25] Codefendant Felder raised this issue in his direct appeal. See Felder, 455 Mass. at 369. In that case, we discerned "no error in the prosecutor's characterization of the results of DNA testing on [the] pillowcase as not excluding [the defendant]." Id. We do not extend that conclusion here. Our description in Felder was inaccurate, as the prosecutor did not state that the sample did not exclude the defendant; rather, the prosecutor affirmatively asserted that the DNA on the pillowcase belonged to the defendant.

(prosecutor "may not misstate the evidence" [quotation omitted]). See also Commonwealth v. Holley, 476 Mass. 114, 127-128 (2016) (error for prosecutor to ask jury to infer that DNA came from police officer when DNA results were inconclusive). The prosecutor's error, however, did not prejudice the defendant. See Alvarez, 480 Mass. at 305.

"We consider four factors in determining whether an error made during closing argument is prejudicial: '(1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusions.'" Id. at 306, quoting Commonwealth v. Silva-Santiago, 453 Mass. 782, 807 (2009). Here, the defendant timely objected and, as acknowledged by the Commonwealth, the prosecutor's misstatements pertained both to Young's credibility and to the defendant's identity; thus, they went to "a critical issue in the case." Commonwealth v. Taylor, 455 Mass. 372, 384-385 (2009).

We next turn to the judge's instructions, which we evaluate "as a whole and interpret . . . as would a reasonable juror." Andre, 484 Mass. at 416, quoting Commonwealth v. Kelly, 470 Mass. 682, 697 (2015). We agree that given the defendant's

timely objection and the prosecutor's misstatements, a specific, curative instruction would have been the better course. However, the defendant's attorney did not request a specific, curative instruction, nor did he object to the judge's instructions as given. See Mass. R. Crim. P. 24 (b), 378 Mass. 895 (1979) ("No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, specifying the matter to which he objects and the grounds of his objection").

The judge's general instructions sufficiently mitigated the error: "if in the course of final arguments either attorney gave you an impression as to how they think you ought to find the facts, or expressed their own personal opinions to you about the facts, or talked to you about things that you didn't recall from the testimony, then ignore it, because it's your collective memory of the testimony that controls." The judge also provided three separate instructions that closing arguments were not evidence, including a thorough instruction just prior to closing arguments. Cf. Commonwealth v. Dirgo, 474 Mass. 1012, 1017 (2016) (new trial necessary where misstatements were not "offset by overwhelming evidence of . . . defendant's guilt" and judge's general instructions "did not specifically address, and were not enough to cure the cumulative effect of, the particular errors

we have identified"). We must presume the jury understood all four instructions. See Andre, 484 Mass. at 418.

Finally, and mostly importantly, under these circumstances, we cannot say that the prosecutor's misstatements, which only comprised thirteen words of her thirty-three page closing argument, "possibly made a difference in the jury's conclusions." Alvarez, 480 Mass. at 306, quoting Silva-Santiago, 453 Mass. at 807. As stated above, the jury heard the expert's clear testimony that the defendant was a potential contributor to the pillowcase DNA sample, as well as the required explanation of the statistical analysis. Moreover, while closing arguments are not evidence, the defendant's attorney reiterated the expert's testimony during his closing argument.

This is not a case wherein the prosecutor referred to the DNA charts and "encouraged the jury to act as their own experts." Mattei, 455 Mass. at 856. Rather, the prosecutor briefly mentioned the DNA chart in reference to the expert's testimony. There was also significant evidence of the defendant's guilt, including Young's extensive eyewitness testimony, which was corroborated by the neighbor's testimony as to Young's demeanor and Young's statements on the night of the murders, the bullet hole in the attic floor where Young testified he had been lying down, the corresponding spent

projectile discovered in the bathroom below, and the cash in the defendant's and in his coventurer's pockets upon arrest.

b. Improper discussion of reasonable doubt. During her closing argument, the prosecutor (1) appeared to define reasonable doubt and (2) urged the jury not to "look for doubt."[26] We conclude that neither statement constituted error.

It is error for attorneys to provide their own definition of reasonable doubt in their closing arguments. To the extent that a prosecutor does so, that discussion must follow our uniform jury instruction on proof beyond a reasonable doubt. See Commonwealth v. Russell, 470 Mass. 464, 477 (2015). The prosecutor's discussion here, however, was not in error.

Regarding the prosecutor's first statement, while legal instruction falls squarely within the judge's province, see Commonwealth v. Szczuka, 391 Mass. 666, 674 (1984), S.C., 413

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[26] The prosecutor stated:

> "Reasonable doubt. His honor is going to tell it's not proof beyond all doubt. It's not a shadow of a doubt or mere doubt. You can't measure it; it's not this big or this big. Because when you think about it, everything that you have not seen with your own two eyes you will have a doubt about, because you haven't seen it yourself. You haven't heard it yourself. But that is not the doubt that the law talks about. . . . And you as jurors took an oath to find the truth. And that's what verdict means; it means to speak the truth. Not to look for doubt. Because if you look for doubt, if that's your mission, then you will find it. But if you search for the truth and you use your common sense and the law that His Honor gives you, I suggest that you will find the truth."

Mass. 1004 (1992), as both the prosecutor and the judge noted, the prosecutor's statements were not incorrect statements of law. She correctly explained that the concept of reasonable doubt is not "susceptible to quantification; it is inherently qualitative." Commonwealth v. Ferreira, 460 Mass. 781, 787-788 (2011), quoting Commonwealth v. Sullivan, 20 Mass. App. Ct. 802, 806 (1985).

As to the prosecutor's second statement, we conclude that the prosecutor did not err in encouraging the jury not to look for doubt. We have previously discerned no error where judges instructed the jury that they need not search for doubt. See Commonwealth v. Watkins, 425 Mass. 830, 836 n.9 & 839 (1997) (no error in instructing jury that "[a] reasonable doubt, for example, is not the doubt that might exist in the mind of a man or a woman searching for some doubt, for some excuse to acquit a defendant"); Commonwealth v. Randolph, 415 Mass. 364, 367 (1993), S.C., 438 Mass. 290 (2002) (no error in instructing, "[Y]ou're not to search for doubt").

Ultimately, however, the judge's proper reasonable doubt instruction ameliorated any possible confusion or prejudice caused by the prosecutor's statements. See Commonwealth v. Morales, 461 Mass. 765, 784 (2012), citing Szczuka, 391 Mass. at 673-674.

c. Improper speculation. During the routine traffic stop, during which the defendant and Washington were arrested, a police officer asked if there was anything in the car about which the officer should know. The defendant responded that he had $5,700 in his pocket. During closing argument, the prosecutor posited that the defendant only cooperated by telling an officer about the cash in his pocket because the defendant believed Young was dead.[27] On appeal, the defendant argues that this constituted improper speculation. We disagree.

The prosecutor's assertion was a reasonable inference based on the evidence admitted. See Commonwealth v. Fernandes, 478 Mass. 725, 741 (2018), quoting Kozec, 399 Mass. at 516 ("a prosecutor may argue 'forcefully for a conviction based on the evidence and on inferences that may reasonably be drawn from the evidence'"). Young testified that he pretended to be dead after the defendant stood directly over him and shot at his head, and the location of the bullet hole was consistent with his testimony. A police officer also testified that on the night of the murders, Young stated that "the suspects assumed he was dead."

[27] Specifically, the prosecutor stated: "He thought Mark Young was still dead. He didn't know he missed Mark Young. He thought he was dead."

Moreover, the prosecutor directly responded to, and offered a different interpretation of, the defendant's attorney's closing argument that the defendant's cooperation was indicative of consciousness of innocence. See Commonwealth v. Preziosi, 399 Mass. 748, 753 (1987) (prosecutor's rebuttals of defense's suggestion that police cooperation demonstrated consciousness of innocence "were within the proper realm of suggesting opposing inferences which could be drawn from the evidence"). See also Fernandes, 478 Mass. at 741, quoting Commonwealth v. Smith, 404 Mass. 1, 7 (1989) ("prosecutor entitled to point out the weaknesses of the defendant's case and 'make a fair reply to the defendant's closing argument'"). Finally, as stated above, the judge made it abundantly clear that closing arguments were not evidence. There was no reversible error.

4. Prior inconsistent statements instruction. The defendant next argues that the judge erred in instructing the jury, sua sponte, that they may only consider prior inconsistent statements in relation to a witness's credibility, and not as substantive evidence.[28] The defendant further argues that this

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[28] The judge instructed:

> "When there is a prior inconsistent statement made on some other occasion outside of the courtroom, that evidence is offered for the single and only purpose of impeaching the credibility of that witness. If you find that it does impeach the credibility of that witness, that's entirely up to you. If someone comes in here to court and testifies in

error prejudiced his defense because his attorney had sought to use the statement Fulton, Young's girlfriend, made to the police and adopted shortly after the murders, which differed from her trial testimony, to discredit Young's testimony. We agree that the judge's instruction as it related to Fulton's adopted statement to the police was erroneous, but the error did not prejudice the defendant as to require a new trial. Commonwealth v. Odgren, 483 Mass. 41, 46 (2019) (where defendant's attorney objected, we review for prejudicial error).

At trial, Fulton testified that she observed three men outside Young's house around the time of the murders. In her adopted statement to the police, however, Fulton stated that she had observed four men; the three men she mentioned at trial and one more man sitting in the gold car outside of Young's house.[29]

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> a substantially different way than something else he or she said on a prior occasion, it's up to you to say whether or not you think it affects that witness' present credibility. Please remember that the substance or truth of the earlier statement made outside of the courtroom is not affirmative evidence in the case. It simply goes to the credibility of the witness."

[29] The Commonwealth argues that Fulton's adopted statement to the police was not actually inconsistent with her trial testimony, but rather completed her trial testimony because she was not able to recall whether there was a fourth man in the gold car. While we agree with the general principle that the true failure of present memory on a certain matter is not necessarily inconsistent with a previous statement on the same matter, see Commonwealth v. Gil, 393 Mass. 204, 220 (1984), here, there was an inconsistency. Fulton testified that she observed three men outside Young's house on the night of the

As both parties now agree, the judge properly admitted Fulton's adopted statement to the police in evidence, over the Commonwealth's objection, under the past recollection recorded exception to the rule against hearsay. See Commonwealth v. Evans, 439 Mass. 184, 189, cert. denied, 540 U.S. 923 and 540 U.S. 973 (2003) (describing factors to admit statement under exception); Mass. G. Evid. § 803(5) (2020) ("A previously recorded statement may be admissible if [i] the witness has insufficient memory to testify fully and accurately, [ii] the witness had firsthand knowledge of the facts recorded, [iii] the witness can testify that the recorded statement was truthful when made, and [iv] the witness made or adopted the recorded statement when the events were fresh in the witness's memory"). The evidence, therefore, had a dual relevancy. The statement was admitted both for its truth and to impeach Fulton's in-court testimony.

To the extent that judges provide a jury instruction, like the one provided here, that states that prior inconsistent statements made during the trial are admissible only to impeach

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murders, but she previously stated that she had observed four. Both cannot be true. See Commonwealth v. Parent, 465 Mass. 395, 400 (2013), quoting Commonwealth v. Hesketh, 386 Mass. 153, 161 (1982) ("It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness whom it is sought to contradict").

and not as substantive evidence, that instruction, in some circumstances, may be incorrect. In some trials, at least some prior inconsistent statements are also admitted as substantive evidence.[30]

It is unrealistic to expect that during the course of a trial, the judge is going to be able to catalog every out-of-court statement, and then give an appropriate final instruction as to whether each out-of-court statement was admitted substantively or to impeach in the absence of a request from counsel. Moreover, because out-of-court statements, like the one here, often have a dual relevancy -- they are admissible for their truth and to impeach -- the party concerned about the purpose for which the prior inconsistent statement is admitted has the burden of requesting the appropriate instruction from the judge at the time the statement is admitted. It is better practice for judges to instruct the jury at the time of the statements' admission as to the purpose for which they were

[30] By way of example only, the following are often admitted substantively: statements of a party opponent, see Mass G. Evid. § 801(d)(2)(A) (2020); prior inconsistent statements made under oath at certain proceedings, see Mass G. Evid. § 801(d)(1)(A); spontaneous utterances, Mass G. Evid. § 803(2); coconspirator statements, see Mass. G. Evid. § 801(d)(2)(E); and statements for the purposes of medical diagnosis and treatment, see Mass G. Evid. § 803(4); to say nothing of the fact that where an out-of-court statement is admitted without a limiting instruction, it is admitted substantively, Gil, 393 Mass. at 221.

admitted. Where no request is made, that does not mean that the evidence was not admissible substantively in the absence of a sustained objection. It just means that the proponent of the evidence may not be heard to object during the final instructions as to the instruction on the limited use of prior inconsistent statements.[31]

The defendants' trial strategy centered on discrediting Young, including his testimony that there were only three assailants -- the defendants. Thus, the defendant argues that by preventing the jury from considering Fulton's adopted police statement substantively, a statement in which Fulton contradicted Young's trial testimony, the judge effectively bolstered Young's credibility. We disagree.

While all three defense attorneys pointed to Fulton's statement as a reason to doubt Young's testimony, the attorneys also put forth ample evidence, both substantive and impeachment, separate from her statement, which was designed to discredit Young. The defense attorneys elicited testimony from Young on cross-examination regarding his inconsistent statements as to

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[31] Finally, we remind prosecutors that when evidence the Commonwealth offered was clearly admissible only to impeach but there is no objection, if the Commonwealth argues the evidence substantively, on appeal the issue would still be analyzed under the substantial risk of a miscarriage of justice standard and, in cases of murder in the first degree, under the substantial likelihood of a miscarriage of justice standard.

the alleged injury to Young's face and whether his assailants were wearing masks. The defense attorneys later bolstered these inconsistencies through testimony and evidence from the officers who interviewed Young on the night of the murders.[32] The attorneys also highlighted the deal Young made with the Commonwealth in exchange for identifying the defendants. Moreover, the defense attorneys spent the majority of their thorough closing arguments describing the multiple reasons why the jury should not trust Young's testimony.

As such, Fulton's adopted statement to the police was one relatively small part of the defense's over-all strategy to discredit Young and the adopted statement maintained its relevance for that purpose. Moreover, the defendant's attorney, in his closing argument, used this statement for its truth. Thus, we cannot say that "there is a reasonable possibility that the error might have contributed to the jury's verdict." See Odgren, 483 Mass. at 46, quoting Commonwealth v. Wolfe, 478 Mass. 142, 150 (2017).

5. Public trial. The defendant finally renews the argument he made in his motion for a new trial, claiming that he

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[32] Primarily, the reports of two responding officers indicated that Young had stated that three masked men forced Young and three other men into the attic. Both officers testified that the number of victims was a typographical error, but also admitted that that was the first time they had mentioned such an error.

is entitled to a new trial because the court room was closed during voir dire, violating his right to a public trial. In support of his motion, the defendant included a portion of the trial transcript referencing court room closures and affidavits from himself, his mother, and his trial attorney, among others. The defendant did not object at trial. The motion judge, who was also the trial judge, denied the motion.

Here, the judge explicitly stated: "I remember the trial well. The courtroom was not closed to the public. I do not credit the affidavits that the defendant's motion and friend [included] to the contrary." Nothing in the record indicates that the judge erred. The portion of the transcript that the defendant included with his motion reflects a conversation between the prosecutor and the judge in which the prosecutor explicitly asked about closed court rooms "just for edification" and, notably, the judge responded that the court room will not be closed. Moreover, neither attorney who submitted an affidavit -- the defendant's attorney or Washington's attorney -- recalls any court room closure, and a judge need not credit a defendant's affidavit. See Commonwealth v. Leng, 463 Mass. 779, 787 (2012). See also Commonwealth v. Sanchez, 476 Mass. 725, 742 (2017) ("judge may consider the affiant's self-interest or bias").

6. Review under G. L. c. 278, § 33E. We have reviewed the entire record of this case pursuant to our responsibilities under G. L. c. 278, § 33E. We conclude that there is no basis for reducing the defendant's sentence on the murder conviction or ordering a new trial. We affirm the defendant's convictions and the order denying his motion for a new trial filed on November 5, 2018.[33]

So ordered.

[33] Almost six months after oral argument, the defendant filed a second, pro se motion for a new trial. Due to the delayed nature of the filing, we remand this motion to the trial judge for hearing and determination. See G. L. c. 278, § 33E. However, because the defendant filed the motion prior to issuance of the rescript in this case, should the appeal from a denial of this motion reach our court, the "gatekeeper" provision of G. L. c. 278, § 33E, would be inapplicable. See Commonwealth v. Raymond, 450 Mass. 729, 729 n.1 (2008).