SJC-11693

COMMONWEALTH vs. NYASANI WATT (and nine companion cases[1]).

Suffolk. December 10, 2019. - June 4, 2020.

Present: Gants, C.J., Gaziano, Lowy, Budd, & Cypher, JJ.

Homicide. Armed Assault with Intent to Murder. Assault and Battery by Means of a Dangerous Weapon. Firearms. Evidence, Expert opinion, Prior violent conduct, Relevancy and materiality, Firearm. Constitutional Law, Sentence. Jury and Jurors. Practice, Criminal, Capital case, Jury and jurors, Deliberation of jury, Assistance of counsel.

Indictments found and returned in the Superior Court Department on December 21, 2011.

The cases were tried before Christine M. Roach, J., and motions for a new trial, filed on November 25, 2014, April 4, 2017, and June 21, 2017, were heard by her.

Elizabeth Doherty for Nyasani Watt.

Ruth Greenberg for Sheldon Mattis.

Dara Z. Kesselheim, Assistant District Attorney, for the Commonwealth.

Thomas H. Townsend & Jeanne M. Kempthorne, Assistant District Attorneys, for district attorney for the northwestern district & another, amici curiae, submitted a brief.

Ryan M. Schiff, for Gary Johnson & another, amici curiae, submitted a brief.

[1] Four against Nyasani Watt and five against Sheldon Mattis.

BUDD, J. A jury in the Superior Court convicted the defendants, Nyasani Watt and Sheldon Mattis, of murder in the first degree, aggravated assault and battery by means of a dangerous weapon, and related offenses,[2] in connection with a shooting that killed sixteen year old Jaivon Blake and injured fourteen year old Kimoni Elliott. The defendants appeal from their convictions and from the denial of their motions for a new trial. In addition, they ask us to exercise our authority under G. L. c. 278, § 33E, to order a new trial.

After full consideration of the record and the defendants' arguments, we affirm the defendants' convictions and decline to grant either defendant extraordinary relief pursuant to G. L. c. 278, § 33E. However, for the reasons discussed infra, we remand the issue of the constitutionality of Mattis's sentencing for an evidentiary hearing.[3]

Background. We summarize the facts the jury could have found, reserving certain details for discussion. On September

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[2] The defendants also were convicted of armed assault with intent to murder, in violation of G. L. c. 265, § 18 (b); possession of a firearm without a license, in violation of G. L. c. 269, § 10 (a); and carrying a loaded firearm, in violation of G. L. c. 269, § 10 (n).

[3] We acknowledge the amicus brief submitted by Gary Johnson and Tyshawn Sanders; and the amicus letter submitted by the district attorney for the northwestern district and the district attorney for the Berkshire district.

25, 2011, Elliott was visiting Blake at Blake's home near the intersection of Geneva Avenue and Everton Street in the Dorchester section of Boston. In the afternoon, Elliott walked from Blake's home to a nearby convenience store, located at the intersection of Geneva Avenue and Levant Street, to purchase rolling papers for marijuana cigarettes. He waited outside the store looking for someone old enough to make the purchase. An individual identified as Mattis approached on a bicycle and agreed to buy the rolling papers for Elliot. After doing so, Mattis asked Elliott where he was from; Elliott replied, "Everton." The two parted ways, and Elliott met Blake in a nearby parking lot.

As Elliott and Blake began to walk toward Blake's home, they were shot from behind by a male riding a bicycle. Witnesses described the shooter as wearing jeans, a red shirt, and a baseball cap; clothes fitting these descriptions were later seized from the defendants' houses, and two witnesses described Watt as wearing similar clothing on the day of the shooting. Blake suffered a single gunshot wound to the torso and died hours later at a hospital; Elliott survived gunshot wounds to his neck and right arm. Hours later, Watt had changed his clothes, and a friend helped him to take the braids out of his hair so that he could "change his look." Later that

evening, he, Mattis, and others were "celebrating because [of] something [Watt] did."

Jeremiah Rodriguez, a key witness for the Commonwealth, testified that he, Watt, and Mattis were playing football on Levant Street in front of Rodriguez's house when they watched Elliott walk to the convenience store. After Mattis went to the store to interact with Elliott, he returned to the area outside Rodriguez's house and said to Watt and Rodriguez, "[B]e easy, because that's them kids." A few minutes later, Rodriguez observed Mattis meet with Watt at the corner of Levant Street and Geneva Avenue, hand Watt a gun, and pat him on the back. Rodriguez also testified that he heard Mattis tell Watt, "[T]hat's them walking up there right now" and that he "needed to go handle that." Watt then rode away on the bicycle. At trial, Rodriguez identified Watt in a surveillance video recording depicting him riding toward the scene of the shooting shortly before it occurred and wearing clothes generally matching eyewitness accounts of the shooter's appearance. Soon thereafter, while on his back porch, Rodriguez heard gunshots.

At trial, the Commonwealth's theory was that Watt and Mattis jointly planned and executed the shooting as part of an escalating gang feud. The defendants' primary theories were misidentification of Watt as the shooter and the unreliability of Rodriguez's testimony establishing Mattis's participation.

The jury convicted both defendants of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty. Watt, who was seventeen at the time of the shooting, received a life sentence with the possibility of parole after fifteen years. Mattis, who was eight months older than Watt, and eighteen at the time, was sentenced to life imprisonment without the possibility of parole.

Discussion. 1. Direct appeal. On direct appeal the defendants raise various evidentiary issues, assert error with respect to the jury instructions, and challenge the constitutionality of their sentences.

a. Evidentiary issues. i. Gang expert testimony. To demonstrate that the motive for the shooting was gang-related, the Commonwealth presented the testimony of Detective Anthony Serra, who testified as both an expert and fact witness. Serra testified about gang activity in the Dorchester area surrounding the scene of the shooting, and specifically about the "Flatline" gang, based on Levant Street, and the Geneva-Everton gang, based in the neighborhood where Blake lived. He further testified that both defendants were associated with Flatline. The defendants were unsuccessful in moving in limine to exclude the testimony and objected to it at trial. On appeal, they argue that there was an inadequate basis for Serra to opine on the defendants' alleged membership in the Flatline gang and on the

alleged ongoing feud between Flatline and Geneva-Everton.[4] We agree that the testimony should not have been admitted; however, we conclude that the error was not prejudicial. See Commonwealth v. Sullivan, 478 Mass. 369, 375-376 (2017) (preserved issues reviewed for prejudicial error).

Expert testimony must be based on "facts within the witness's direct personal knowledge, facts already introduced in evidence, or unadmitted but independently admissible evidence" (quotations and citation omitted). Commonwealth v. Wardsworth, 482 Mass. 454, 466 (2019). See Mass. G. Evid. § 703 (2020). There is no indication that the basis for Serra's opinion fell into any of the above categories.

First, Serra indicated that his opinion that the defendants were members of the Flatline gang was based on the "collective knowledge" of other officers in the Boston police department. Because it is impossible to ascertain from the record what

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[4] The defendants argue that the trial judge abused her discretion in qualifying Detective Anthony Serra as an expert witness. However, they focus their arguments not on his qualifications as a gang expert, but on the basis for his opinion regarding the defendants' gang membership and Flatline's feud with Geneva-Everton. We note that the detective's years of experience with the Boston police department in Dorchester, including on the youth violence strike force -- a subdivision of the department focused on youth and gang violence in the city -- are sufficient to qualify him to give general expert testimony about gangs in Dorchester. Compare Commonwealth v. Barbosa, 477 Mass. 658, 668 (2017) (detective qualified as expert on gang territory and history in specific section of Boston based on years of experience as officer in that section).

portion, if any, of such "collective knowledge" was based on personal observations that would have been independently admissible, Serra's opinion regarding the defendants' alleged gang membership improperly was admitted. See Wardsworth, 482 Mass. at 467-468 ("That other officers had formed the opinion that the defendant fit the criteria [for entry on the gang database] does not constitute proper foundation for [the expert's] opinion; the gang database entry did not provide [the expert] with underlying facts or data to which he could apply his own expertise"); Commonwealth v. Nardi, 452 Mass. 379, 392 (2008) ("It is settled that an expert witness may not, under the guise of stating the reasons for his opinion, testify to matters of hearsay . . ." [quotation and citation omitted]).

Serra's testimony regarding the alleged feud between the two groups similarly was inadmissible. At trial, the detective explained that he first became aware of the feud when he heard about the fatal shooting of a resident of Geneva Avenue on New Year's Day in 2010. Although he had personal experience with individuals from Levant Street who were arrested in connection with the shooting, he had no direct involvement with that incident. He testified that his knowledge of the feud between Flatline and Geneva-Everton came from discussions with other investigators as well as residents in the area who provided tips and information. Again, because there was no indication whether

this information, which formed the basis of his opinion, would have been independently admissible at trial, his opinion on this topic improperly was admitted. See Wardsworth, 482 Mass. at 466-471.

Nevertheless, there was little, if any, prejudicial effect from this testimony. Multiple civilian witnesses who lived on Levant Street and knew both defendants testified that the defendants were affiliated with the Flatline gang. A friend of the defendants testified that Watt told her their group was called Flatline. Another testified that Watt told him that "they" were called Flatline and that they "owned" Levant Street. Two other of the defendants' friends who testified recounted similar conversations with the defendants. The number of witnesses testifying to this fact, combined with the witnesses' close friendship with the defendants, provided a strong case for the Commonwealth that the defendants were in fact members of the Flatline gang. Several of the same witnesses also testified regarding the feud between Flatline and Geneva-Everton. For example, one witness testified that both defendants told her that they had "problems with Geneva." Another witness stated that Mattis told him that he had weapons because they had "drama," and "an issue going on now," which included Mattis previously having been beaten by members of a rival gang.

As the erroneously admitted expert testimony regarding the defendants' connection to Flatline and the feud between Flatline and Geneva-Everton was cumulative of similar admissible testimony, the errors were harmless.[5] See Commonwealth v. Diaz, 426 Mass. 548, 551-552 (1998) (inadmissible hearsay statement regarding defendant's state of mind cumulative of other properly admitted statements and therefore not prejudicial); Commonwealth v. Perez, 411 Mass. 249, 260-261 (1991) (erroneous admission of defendant's inculpatory statements harmless where cumulative of properly admitted evidence).

ii. Evidence of prior shooting. Over the defendants' objection, the Commonwealth introduced evidence of a shooting on Levant Street that took place eleven days prior to the shooting of the victims. The Commonwealth offered the evidence in support of its theory that the victims were shot in retaliation for the earlier incident. On appeal, the defendants contend that admitting the evidence of the Levant Street shooting was error because the Commonwealth did not establish a connection between the two shootings. We disagree.

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[5] Had the expert witness testified after the civilian witnesses testified to their knowledge of Flatline, the defendants' membership in it, and their feud with Geneva-Everton, the expert's opinion on these issues likely would have been admissible, based on the facts already introduced in evidence. See Mass. G. Evid. § 703(b) (2020).

We begin by noting that evidence of motive need not be conclusive to be admissible. Commonwealth v. Ashley, 427 Mass. 620, 624-625 (1998). Rather, it need only provide a link in the chain of proof. Commonwealth v. Gomes, 475 Mass. 775, 784 (2016). The evidence of the Levant Street shooting was relevant to show a motive for a shooting that otherwise appeared senseless. See Commonwealth v. Walker, 460 Mass. 590, 613 (2011). The evidence connecting the two shootings included witness testimony that the defendants were members of the Flatline gang; that there was an ongoing conflict between the Flatline and Geneva-Everton gangs; that the location of the shooting was the headquarters of the Flatline gang; and that Elliot told Mattis that he lived on Everton Street just prior to the shooting. Finally, the two shootings occurred just eleven days apart.[6]

We further note that, because neither defendant was alleged to have been the shooter at the earlier shooting, there was no danger that the jury improperly would use the earlier shooting

[6] The defendants contend that there was no evidence that the defendants knew (or believed) that the victims were members of, or affiliated with, the Geneva-Everton gang. However, as mentioned supra, Kimoni Elliot testified that he told Mattis that he lived on Everton Street, which is part of the Geneva-Everton gang's territory. Although residing on a particular street is not by itself proof of gang membership, the jury could infer that the defendants believed that Elliot was affiliated with the Geneva-Everton gang because Elliot told Mattis that he lived on Everton Street.

as propensity or "bad act" evidence. Compare Commonwealth v. Butler, 445 Mass. 568, 573-576 (2005). Thus, although the evidence of the shooting was detrimental to the defendants' legal strategy, it was not unfairly prejudicial. See Commonwealth v. Facella, 478 Mass. 393, 400-409 (2017). See also Commonwealth v. Wall, 469 Mass. 652, 661 (2014) ("Relevant evidence is admissible as long as the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice"); Commonwealth v. Keo, 467 Mass. 25, 32 (2014), quoting Commonwealth v. Smiley, 431 Mass. 477, 484 (2000). The judge did not abuse her discretion in admitting evidence of the prior shooting.

iii. Firearm evidence. Rodriguez testified that in the months preceding the shooting, both defendants possessed multiple firearms, including a "Glock" and a "40"; another witness testified that she saw Watt with a black gun during that same time period. The jury also learned that Watt was in possession of a .38 caliber firearm when he was arrested. On appeal, the defendants contend that the judge erred in admitting this evidence. Because the defendants failed to preserve this issue, we review to determine if admission of this evidence was

error and, if so, whether it created a substantial likelihood of a miscarriage of justice.[7]

It is true that evidence of other "bad acts," including the possession of firearms, is generally inadmissible to show one's propensity to commit a crime. Commonwealth v. Vazquez, 478 Mass. 443, 449 (2017). See Commonwealth v. McGee, 467 Mass. 141, 156 (2014). However, evidence of other instances of firearm possession is nevertheless admissible to demonstrate, for example, preparation or opportunity as long as the probative value of the evidence is not outweighed by the risk of unfair prejudice to the defendant. Vazquez, supra. See Mass. G. Evid. § 404(b)(2) (2020).

The Commonwealth's ballistics expert testified that the weapon used in the shooting was a .40 caliber firearm; further, a percipient witness testified to seeing the gunman with a black firearm. Thus, testimony that the defendants previously had been seen with a "Glock," a "40," and a black firearm was properly admitted to demonstrate that the defendants had access

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[7] The defendants raised this issue via motions in limine but did not object at trial. The trial preceded Commonwealth v. Grady, 474 Mass. 715, 718-719 (2016), in which we held that counsel need not object at trial to preserve their objection to the admission of evidence argued in motions in limine. Because Grady does not apply retroactively, we review the defendants' claims to determine whether any error resulted in a substantial likelihood of a miscarriage of justice. See Commonwealth v. Moore, 480 Mass. 799, 813 & n.12 (2018). In any case, as discussed infra, there was no prejudicial error here.

to the type of firearm that was used to kill Blake and injure Elliot.[8] See Commonwealth v. Barbosa, 463 Mass. 116, 122 (2012) ("A weapon that could have been used in the course of a crime is admissible, in the judge's discretion, even without direct proof that the particular weapon was in fact used in the commission of the crime").

However, the fact that Watt had a .38 caliber firearm on his person at the time of his arrest does not offer the same probative value, because the evidence established that the victims were shot with .40 caliber bullets. "Where a weapon definitively could not have been used in the commission of the crime, we have generally cautioned against admission of evidence related to it." Barbosa, 463 Mass. at 122. Although this evidence demonstrated Watt's familiarity with and access to firearms, by and large we "have not . . . viewed the tenuous relevancy of evidence of a person's general acquaintance with weapons as outweighing the likelihood that such evidence will have an impact on the jury unfair to a defendant." Commonwealth v. Toro, 395 Mass. 354, 358 (1985). The admission of the testimony that Watt was in possession of a .38 caliber firearm at the time of his arrest was therefore error. However, the error was not unduly prejudicial as the evidence was

[8] Glock is a firearm manufacturer that makes a variety of semiautomatic pistols, including several .40 caliber models.

overshadowed by and insignificant compared to the evidence that Watt had access to the type of firearm that was used in the crime. Compare Barbosa, supra at 127; Toro, supra at 358-359. The evidence of Watt's possession of the .38 firearm therefore did not create a substantial likelihood of a miscarriage of justice.

iv. Cellular telephone evidence. At trial, the Commonwealth presented evidence of the contents of Watt's cellular telephone (cell phone), including contact information, text messages, and incoming and outgoing cell phone calls. The defendants argue that this evidence was admitted in error and warrants reversal. The Commonwealth concedes that the cell phone evidence should have been suppressed, but argues that the error was harmless. We agree with the Commonwealth.

As an initial matter, we note that in Commonwealth v. White, 475 Mass. 583, 588-590 (2016), this court held that a warrant application must sufficiently demonstrate a nexus between the crime alleged and the article to be searched. Here, because the warrant application did not sufficiently demonstrate this nexus, the evidence obtained from Watt's cell phone should not have been admitted.[9] Because Watt moved to suppress the

[9] The decision in Commonwealth v. White, 475 Mass. 583 (2016), was released after the trial in this case. However, because the defendants' appeals still were pending, the standards set are applied retroactively. See Commonwealth v.

contents of his cell phone, the admission of this evidence is preserved constitutional error and the burden is on the Commonwealth to show that the introduction of the evidence was harmless beyond a reasonable doubt. See Commonwealth v. Charros, 443 Mass. 752, 765, cert. denied, 546 U.S. 870 (2005).

In evaluating whether introduction of inadmissible evidence was harmless beyond a reasonable doubt, "we consider the importance of the evidence in the prosecution's case; the relationship between the evidence and the premise of the defense; who introduced the issue at trial; the frequency of the reference; whether the erroneously admitted evidence was merely cumulative of properly admitted evidence; the availability or effect of curative instructions; and the weight or quantum of evidence of guilt" (quotation and citation omitted). Commonwealth v. Monroe, 472 Mass. 461, 472-473 (2015). Here, the cell phone evidence was cumulative of other evidence presented and posed little risk of prejudice to the defendants in light of the strength of the Commonwealth's case.

First, the contact list extracted from the cell phone included "Yosimidy," the nickname for Mattis, as well as "RG" and "Tmack," both of whom had been identified as being associated with the Flatline gang. Although this evidence was

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Augustine, 467 Mass. 230, 257-258 (2014), S.C., 470 Mass. 837 and 472 Mass. 448 (2015).

relevant to show Watt's connection with Mattis and other members of Flatline, multiple witnesses testified regarding the close relationship between Watt and Mattis, as well as Watt's association with Flatline. Thus, the information from the contact list was cumulative. See Commonwealth v. Hobbs, 482 Mass. 538, 550-551 & n.14 (2019) (improperly admitted cell site location information evidence was harmless because it was not incriminating and there was ample other evidence of defendant's guilt); Perez, 411 Mass. at 260-261 (erroneous admission of defendant's inculpatory statements harmless where merely cumulative of properly admitted evidence).

The Commonwealth also introduced evidence of a missed call from Watt to Mattis, followed by a text message to a friend stating, "Tell shedon [sic] to call me a.s.a.p its important please." The Commonwealth argued in closing that the missed call and text message were evidence of the defendants' joint venture, close relationship, and consciousness of guilt. Although the admission of this evidence was error, there was no prejudice stemming from it given that there was nothing inherently incriminating about it. See Commonwealth v. Broom, 474 Mass. 486, 497-498 (2016).

b. Instruction on involuntary manslaughter. The defendants argue that the judge erred by failing to provide an instruction on involuntary manslaughter. They contend that, had

the jury been given the option to consider involuntary manslaughter, they would have been entitled to find either or both of the defendants guilty under that theory instead. Because neither defendant requested such an instruction, we consider whether the absence of the instruction resulted in a substantial likelihood of a miscarriage of justice. We conclude it did not.

"Involuntary manslaughter is an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct" (quotation and citation omitted). Commonwealth v. Carrillo, 483 Mass. 269, 275 (2019). "Wanton or reckless conduct is conduct that creates a high degree of likelihood that substantial harm will result to another." Id., quoting Model Jury Instructions on Homicide 88 (2018) (involuntary manslaughter). See Commonwealth v. Welansky, 316 Mass. 383, 399 (1944). Based on the evidence presented to the jury, Watt, the apparent shooter, intentionally shot multiple times at the two victims. "Firing a [firearm] multiple times, directed toward specific individuals, provides a sufficient basis to conclude that the defendant understood the likely deadly consequences of his actions." Commonwealth v. Pina, 481 Mass. 413, 424 (2019), quoting Commonwealth v. Braley, 449 Mass. 316, 332 (2007). On the facts of this case, no

reasonable jury could conclude that Watt was the shooter but that his conduct was simply wanton or reckless.

Mattis, the coventurer, argues that he was entitled to an instruction on involuntary manslaughter because the jury could have concluded that he merely "recklessly" gave a firearm to Watt for self-protection, or to frighten the teen he encountered, but did not share Watt's intent to kill. See Commonwealth v. Rakes, 478 Mass. 22, 32 (2017). In support of this contention, he cites Commonwealth v. Tavares, 471 Mass. 430, 441 (2015), where we emphasized that it is possible for two or more defendants to participate knowingly in a criminal act with different mental states with respect to that act. We conclude that Mattis might have been entitled to receive an involuntary manslaughter instruction had he requested it, but that it was not error for the judge to fail to provide such an instruction where it was not requested and, in view of the evidence presented, the absence of the instruction did not result in a substantial likelihood of a miscarriage of justice.

Just prior to the shooting, Mattis provided a firearm to Watt along with the instruction, "go handle that."[10] That

[10] The defendants argue that their trial counsel were ineffective in failing to challenge Rodriguez on his ability to overhear Mattis speaking to Watt from where Rodriguez was located. As discussed infra, we disagree. See part 2.b. However, that issue has no bearing on entitlement to an instruction on involuntary manslaughter.

evening, after the shooting, the two defendants celebrated together. Given Mattis's conduct both before and after the shooting, it is extremely unlikely that a reasonable jury would have found that Mattis handed Watt the firearm solely for self-protection or to frighten the teen; if he had, one would not expect him to be celebrating after the shooting. See Commonwealth v. Dyous, 436 Mass. 719, 731-732 (2002) (defendant, whose coventurer shot into occupied motor vehicle, not entitled to involuntary manslaughter instruction as evidence "pointed singularly to an intent to kill," including bringing gun to victim's apartment complex and gloating immediately after murder).

We also note that the defendants mounted a third-party culprit defense. Because the defendants' theory of the case was that they were not involved in the shooting at all, neither defendant ever argued that the evidence only supported the finding that they now claim the jury could have found. And making such an argument would have been inconsistent with the focus of this defense.

For all these reasons, we conclude that the judge did not err in failing to provide an involuntary manslaughter instruction where it was not requested, and that its absence did not create a substantial likelihood of a miscarriage of justice.

c. Constitutionality of sentences. Both Watt and Mattis appeal from their mandatory sentences, contending that, due to their ages, seventeen and eighteen respectively, the sentences violate art. 26 of the Massachusetts Declaration of Rights and the Eighth Amendment to the United States Constitution.

i. Watt. In Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655 (2013) (Diatchenko I), S.C., 471 Mass. 12 (2015), we held that a sentence of life without the possibility of parole pursuant to G. L. c. 265, § 2, is unconstitutional as applied to juveniles, that is, those under the age of eighteen. Id. at 658, 660. See G. L. c. 265, § 2, as amended through St. 1982, c. 554, § 3. In effect, our holding reduced the mandatory life sentence for juveniles convicted of murder in the first degree to the next-most severe sentence under the sentencing statute, a mandatory sentence of life with the possibility of parole after fifteen years, which was then the sentence for murder in the second degree.[11] See Diatchenko I, supra at 672-673.

[11] In 2014, after our decision in Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655 (2013) (Diatchenko I), S.C., 471 Mass. 12 (2015), the Legislature amended the sentencing statute to specify increased penalties for juveniles convicted of murder in the first degree. See G. L. c. 279, § 24 (b), as amended through St. 2014, c. 189, § 6; Commonwealth v. Okoro, 471 Mass. 51, 55 n.4 (2015). Under the new sentencing scheme, a juvenile convicted of murder in the first degree based on extreme atrocity or cruelty is subject to a mandatory sentence of life imprisonment with the possibility of parole

Watt, who was seventeen at the time of the killing, was sentenced to life in prison with the possibility of parole after fifteen years. He essentially maintains that a mandatory life sentence for juvenile homicide offenders, even with the possibility of parole, is unconstitutional and that instead he is entitled to an individualized sentencing hearing in which his juvenile status is considered.[12]

We have considered and rejected identical claims in the past. In Commonwealth v. Okoro, 471 Mass. 51 (2015), we rejected the defendant's claim that a mandatory sentence of imprisonment for life with parole eligibility after fifteen years is unconstitutional for a juvenile offender convicted of murder in the second degree. Id. at 55-58. Although we left open the question whether ongoing scientific and legal developments might cause us to reconsider our holding, see id. at 58, last year in Commonwealth v. Lugo, 482 Mass. 94 (2019), we reaffirmed Okoro's holding that "a mandatory life sentence

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after thirty years. See G. L. c. 279, § 24, second par. However, the defendants in this case were sentenced for first-degree murder in 2013, when the sentencing statute, as limited by Diatchenko I, mandated a sentence of life with the possibility of parole after fifteen years. See Diatchenko I, supra at 673.

[12] Watt's argument on this issue consisted of a statement that he "adopts the arguments of Mr. Lugo and amici," referring to the defendant in Commonwealth v. Lugo, 482 Mass. 94 (2019), a case that had yet to be decided when the defendants filed their brief.

with parole eligibility after fifteen years for a juvenile homicide offender . . . is constitutional." Id. at 100, citing Okoro, supra at 60. At that time, we were "unpersuaded that the law and science [had been] firmly established to warrant further consideration." Lugo, supra. As Watt advances no further reasons to revisit our recent holding, we conclude that his sentence is constitutional.

ii. Mattis. Mattis, who turned eighteen years old approximately eight months before the shooting, received a mandatory sentence of life without the possibility of parole pursuant to G. L. c. 265, § 2. He contends that such a sentence is unconstitutional for any individual under the age of twenty-two. We previously have acknowledged that, because juveniles have "diminished culpability and greater prospects for reform, . . . they do not deserve the most severe punishments" (quotations omitted). Diatchenko I, 466 Mass. at 660, citing Miller v. Alabama, 567 U.S. 460, 471 (2012).[13] We therefore concluded that a term of life without the possibility of parole for an individual under the age of eighteen violates the

[13] In Miller v. Alabama, 567 U.S. 460, 470 (2012), the United States Supreme Court held that imposing a mandatory sentence of life in prison without the possibility of parole is a violation of the Eighth Amendment to the United States Constitution as applied to juveniles.

prohibition against cruel or unusual punishment contained in art. 26. Diatchenko I, supra at 671.

Mattis points to research that shows that the same developmental traits that exist for those under the age of eighteen apply to those between eighteen and twenty-two years old. Thus, he argues, we should expand our holding in Diatchenko I so that, like those under the age of eighteen, homicide offenders between the ages of eighteen and twenty-two are eligible for parole after fifteen years.[14]

In the six years since we decided Diatchenko I, we repeatedly have declined to extend its holding to individuals over eighteen years of age. See Commonwealth v. Garcia, 482 Mass. 408, 413 (2019); Commonwealth v. Colton, 477 Mass. 1, 18-19 (2017); Commonwealth v. Chukwuezi, 475 Mass. 597, 610 (2016). However, we also repeatedly have acknowledged that "researchers continue to study the age range at which most individuals reach adult neurobiological maturity, with evidence that . . . [certain] brain functions are not likely to be fully matured

[14] Alternatively, like Watt, Mattis argues for a sentencing hearing in which a judge is able to determine an appropriate sentence based on his particularized circumstances. For the reasons discussed infra, we do not have sufficient information to determine whether G. L. c. 265, § 2, is unconstitutional as applied to those eighteen years of age and older; we likewise lack a sufficient basis to determine whether individuals older than eighteen years of age are entitled to an individualized sentencing hearing.

until around age twenty-two," and that such "research may relate to the constitutionality of sentences of life without parole for individuals other than juveniles." Garcia, supra at 412-413, quoting Okoro, 471 Mass. at 60 n.14. See Lugo, 482 Mass. at 100.

As research in this area has progressed since Diatchenko I was decided, it likely is time for us to revisit the boundary between defendants who are seventeen years old and thus shielded from the most severe sentence of life without the possibility of parole, and those who are eighteen years old and therefore exposed to it. We can only do so, however, on an updated record reflecting the latest advances in scientific research on adolescent brain development and its impact on behavior. See Diatchenko I, 466 Mass. at 669-670.

Although we do not fault defense counsel, the record here is insufficient. In Mattis's first motion for a new trial, he challenged the constitutionality of his sentence and requested an evidentiary hearing on the question. He requested funds to retain an expert on brain development in teens and young adults.[15] At the hearing on Mattis's first motion for a new trial, the Commonwealth opposed the request for evidence to be

[15] Mattis further requested that the judge hold an evidentiary hearing on the question, and then "report it to the Supreme Judicial Court for resolution."

taken on the ground that the "already known science" would permit the defendant to make his argument."[16] After the hearing, the judge denied the requests for an evidentiary hearing and expert funds. Mattis again challenged the constitutionality of his sentence in his renewed motion for a new trial, this time submitting expert testimony and a related trial court order from a Kentucky case regarding the imposition of the death penalty on defendants younger than twenty-one years old. The judge ultimately denied Mattis's renewed motion for a new trial.

Because Mattis was prepared to present additional evidence on this issue, it would be manifestly unjust to reject Mattis's constitutional argument based on the insufficiency of the record. Compare Commonwealth v. Epps, 474 Mass. 743, 767 (2016) ("our touchstone must be to do justice," including where "a defendant was deprived of a substantial defense . . . [due to] the inability to make use of relevant new research findings"). We therefore take this opportunity to remand this case to the Superior Court for development of the record with regard to research on brain development after the age of seventeen. This will allow us to come to an informed decision as to the

[16] On appeal, the Commonwealth appears to have switched gears, arguing that the available record is not sufficiently developed to provide a sufficient basis upon which to resolve the question.

constitutionality of sentencing young adults to life without the possibility of parole.[17]

2. Motions for a new trial. The defendants also appeal from the denial of their motions for a new trial based on juror issues discovered posttrial as well as ineffective assistance of counsel.

a. Jury contamination. The defendants argue that the judge improperly denied their motions for a new trial based on a tainted jury. We conclude that there was no significant error of law or abuse of discretion in declining to grant the defendants a new trial on this basis. See Commonwealth v. Grace, 397 Mass. 303, 307 (1986), and cases cited.

After trial, Mattis's counsel became aware that a juror reported seeing Mattis "throwing gang signs" at the surviving

[17] Mattis additionally argues on appeal that because he and Watt are only eight months apart in age, the disparity between their sentences violates equal protection guarantees because there is no principled reason to sentence Mattis to life without the possibility of parole and Watt, the shooter, to life with parole eligibility after fifteen years. However, we have held on more than one occasion that "there is a rational basis for making determinations of parole eligibility based on age." Commonwealth v. Chukwuezi, 475 Mass. 597, 610 n.21 (2016). See Commonwealth v. Wiggins, 477 Mass. 732, 748 (2017). See also Roper v. Simmons, 543 U.S. 551, 574 (2005) (age of eighteen "is the point where society draws the line for many purposes between childhood and adulthood").

victim during the victim's testimony.[18] Thereafter, in response to a posttrial motion, the judge sent letters to each of the twelve deliberating jurors asking whether they had observed any hand gestures during the trial. The judge conducted a voir dire of the two jurors who indicated that they observed the hand gestures. Based on the jurors' testimony, the judge found that Mattis made gestures that both jurors believed to be "gang signs" directed at the victim,[19] and that there was "tension between both defendants and the victim in the form of sustained mutual glaring." The judge further found that there was "at least some discussion" of the gestures during jury deliberations "by at least these two jurors."[20]

Based on the voir dire of the two jurors, the judge determined that the jury were not exposed to an extraneous influence, and that there was no showing that any juror harbored

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[18] After trial, the juror mentioned the incident to his neighbor, who was a friend of Mattis's trial counsel. Appellate counsel for Mattis disclosed the juror's comments to the judge.

[19] The first juror questioned was a journalist who had written articles regarding gang-related problems in and around Boston. He stated that he became familiar with gang symbols while working with police assigned to the gang unit. The second juror stated that he recognized the gestures as being similar to those he had seen on television.

[20] When asked whether he spoke with any of the other jurors before or during the deliberations about the gestures, the second juror questioned stated that during deliberations he spoke with another juror who also saw the gestures.

racial animus. She therefore denied the defendants' requests for a further inquiry of all jurors and denied their motions for a new trial. We conclude that the judge neither abused her discretion nor erred in her handling of the posttrial claims of jury contamination.[21]

i. Extraneous influence. The defendants contend on appeal that the "independent prior knowledge" upon which two jurors relied to conclude that the gestures they observed were gang-related was extraneous information that tainted the verdicts.[22] See note 21, supra. To succeed on such a claim, the defendants

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[21] In arguing that the judge failed to investigate thoroughly the impact of the hand gestures and failed to inquire whether racial bias may have affected the outcome of the trial, the defendants contend that the judge erred in light of Commonwealth v. Moore, 474 Mass. 541 (2016). We disagree. In addition to clarifying that, with certain exceptions, Mass. R. Prof. C. 3.5 (c), as appearing in 471 Mass. 1428 (2015), allows attorneys to speak to jurors without court authorization, in Moore, we made clear that "[n]othing in rule 3.5 (c) changes the standards governing requests for and the conduct of postverdict evidentiary hearings." Moore, supra at 553. In accordance with those standards, the judge here properly placed the initial burden on the defendants to demonstrate that the jury were exposed to an extraneous influence. See Commonwealth v. Fidler, 377 Mass. 192, 201 (1979). Had the defendants met their burden, the Commonwealth would have been required to demonstrate that the defendants were not prejudiced by the extraneous influence.

[22] The defendants do not press here the argument made in their posttrial motions that the hand gestures themselves were the extraneous information. We have long held that juries are "entitled to observe the demeanor of the defendant[s] during the trial." Commonwealth v. Smith, 387 Mass. 900, 907 (1983). See Commonwealth v. Houghton, 39 Mass. App. Ct. 94, 100 (1995) ("The demeanor of a witness in a courtroom has been considered evidence even if the witness does not take the stand").

were required first to demonstrate that the jury were actually exposed to an extraneous matter.[23] Commonwealth v. Fidler, 377 Mass. 192, 201 (1979). Here, after an evidentiary hearing, the judge concluded that neither the gestures nor any ensuing discussion about them constituted extraneous influences. This determination was not an abuse of discretion. See Commonwealth v. Bright, 463 Mass. 421, 441-443 (2012) (determination regarding existence of extraneous influence reviewed under abuse of discretion standard).

The defendants' argument conflates extraneous information with the knowledge and experience that individuals bring with them when they sit as jurors. "An extraneous matter is one that involves information not part of the evidence at trial 'and raises a serious question of possible prejudice.'" Commonwealth v. Guisti, 434 Mass. 245, 251 (2001), quoting Commonwealth v. Kater, 432 Mass. 404, 414 (2000). Examples include unauthorized views of the crime scene, improper communications with third parties, and consideration of documents or events not introduced in evidence. See Fidler, 377 Mass. at 197 (collecting cases). See also Commonwealth v. Kincaid, 444 Mass. 381, 387 (2005) (jurors improperly considered fact of defendant's flight, which

[23] Had the defendants met the threshold showing, the burden then would have shifted to the Commonwealth to show beyond a reasonable doubt that the defendants were not prejudiced by the extraneous matter. Fidler, 377 Mass. at 201.

was not in evidence); Commonwealth v. Cuffie, 414 Mass. 632, 635 (1993) (unauthorized visit to crime scene by juror). Thus, extraneous information in this context refers to "specific facts not mentioned at trial concerning one of the parties or the matter in litigation." Fidler, supra at 200.

Here, the two jurors made observations of nonverbal interactions between the defendants and the victim in the court room during the victim's testimony.[24] Each came to the same conclusion regarding the gestures they saw. Whether the jurors were mistaken about the nature of the gestures will likely remain a mystery. However, both applied their life experiences to understand what they saw, as they were instructed to do. See Commonwealth v. Salazar, 481 Mass. 105, 117 (2018) ("It is well established that it is proper to ask a jury to rely on their common sense and life experience in assessing evidence and credibility"); Commonwealth v. Beal, 474 Mass. 341, 346 (2016) ("Jurors are permitted to draw reasonable inferences from the evidence based on their common sense and life experience").

To expect jurors to perform their duties without the benefit of their life experiences is unrealistic and undesirable. "We cannot expunge from jury deliberations the

[24] As noted by the judge, in addition to the hand gestures made by Mattis, she found that both defendants and the victim engaged in "sustained mutual glaring" during the victim's testimony.

subjective opinions of jurors, their attitudinal expositions, or their philosophies." Fidler, 377 Mass. at 199, quoting Government of the V.I. v. Gereau, 523 F.2d 140, 151 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976). See Commonwealth v. Williams, 481 Mass. 443, 451 (2019) ("It would neither be possible nor desirable to select a jury whose members did not bring their life experiences to the court room and to the jury deliberation room").

Because we conclude that no extraneous influences were injected into the jury deliberations, the judge did not err in denying the requests for further inquiry of all jurors and the motions for a new trial on that basis.[25]

ii. Alleged racial bias. The defendants also argue that the judge erred in failing to inquire whether the jurors' interpretation of Mattis's gestures as gang signs (and thus

[25] As neither the gestures themselves nor the "independent prior knowledge" that two jurors utilized to make sense of them were extraneous influences, the fact that the gestures were discussed amongst some jurors prior to and during deliberations is not a reason to question the validity of the verdict. "With few exceptions, we adhere to the principle that 'it is essential to the freedom and independence of [jury] deliberations that their discussions in the jury room should be kept secret and inviolable.'" Commonwealth v. Pytou Heang, 458 Mass. 827, 858 (2011), quoting Fidler, 377 Mass. at 196. See Commonwealth v. Mahoney, 406 Mass. 843, 856 (1990) ("any disregard by jurors of instructions from the judge not to discuss the case prior to deliberations would not provide a basis to conclude that the verdicts were tainted, in the absence of any concrete facts that the discussions involved matters not in evidence").

indicia of gang membership) was the product of racial bias. "The presence of even one juror who is not impartial violates a defendant's right to trial by an impartial jury." Commonwealth v. McCowen, 458 Mass. 461, 494 (2010), quoting Commonwealth v. Vann Long, 419 Mass. 798, 802 (1995). However, the defendants failed to make any preliminary showing that racial bias was at play.

To demonstrate that a postverdict juror inquiry regarding possible racial bias is warranted, a defendant bears the burden of proving by a preponderance of the evidence that a racially charged statement was made. McCowen, 458 Mass. at 497. See Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) ("For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict"). "If the defendant meets this burden, the burden then shifts to the Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the jury's exposure to [the] statements." McCowen, supra. However, "[i]f the judge finds that the statements were not made, the judge need make no further findings." Id. at 495.

Here, although the defendants asked the judge to question each juror regarding potential racial bias, the defendants provided no proof, and in fact did not even allege, that any

juror made a statement or otherwise indicated that he or she harbored any racial animus at all. The defendants' hypothesis that the verdicts were tainted by jurors who were not African-American jurors, who interpreted "innocent gestures" by young African-American defendants as gang signs due to implicit or explicit bias, was not borne out by the judge's voir dire of the two jurors or by any other proof.

Because the defendants have failed to meet their initial burden of demonstrating by a preponderance of evidence that the two jurors' observations had anything to do with racial bias, the judge did not err in denying the defendants' request to inquire about such bias. See McCowen, 458 Mass. at 495.

b. Ineffective assistance of counsel. The defendants' ineffective assistance of counsel claims center on the testimony of Rodriguez, a key witness for the Commonwealth. At trial, Rodriguez testified that, prior to the shooting, he heard Mattis tell Watt, "[Watt] needed to go handle that," presumably referring to Elliott, whom Mattis had met at the convenience store. This testimony contradicted Rodriguez's earlier statements to police and to the grand jury, where he testified that he did not hear either defendant say anything before the shooting. Based on Rodriguez's testimony, the Commonwealth argued at closing that Mattis was guilty of joint venture murder

in the first degree because he specifically targeted the victims and directed Watt to shoot them.

Posttrial, the defendants alleged in a supplemental claim in support of a motion for a new trial that it would have been impossible for Rodriguez to have heard Mattis's statements to Watt from Rodriguez's location, and that trial counsel were ineffective for failing to investigate Rodriguez's surprise testimony.[26] The defendants supported this contention with an affidavit from a private investigator who averred that neither he nor his assistant could hear anything said by the other when standing in Rodriguez's and the defendants' purported positions. The defendants further requested funds to engage an acoustic expert to prove that Rodriguez's testimony that he heard Mattis speak to Watt was false. The judge denied the request for funds and the motions for a new trial.

On appeal, the defendants renew their claim of ineffective assistance of counsel. To determine whether defense counsel was ineffective in defending a charge of murder in the first degree, we ask whether there was an error, and if so, whether the error "was likely to have influenced the jury's conclusion."

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[26] Rodriguez testified that the defendants were at the corner of Geneva and Levant Streets and that he was on the front porch of his home on Levant Street when he overheard Mattis. The record is silent as to the distance between those two points.

Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014) (substantial likelihood of miscarriage of justice standard). See G. L. c. 278, § 33E. If the claimed error relates to an attorney's strategic or tactical decision, the decision constitutes error "only if it was manifestly unreasonable when made" (citation omitted). Commonwealth v. Coonan, 428 Mass. 823, 827 (1999).

Without affidavits from trial counsel, we cannot say whether the alleged misstep was a strategic choice. Either way, however, we conclude that the failure to investigate Rodriguez's physical ability to overhear Mattis did not amount to ineffective assistance on the part of either defendant's trial counsel.

First, the defendants assert that, had counsel investigated this claim, they would have been able to prove conclusively that it would not have been possible for Rodriguez to have overheard Mattis. In our view, however, the potential usefulness of an investigation is entirely speculative. The defendants failed to explain how an acoustic expert would have been able to determine with any degree of certainty Rodriguez's physical ability to overhear Mattis, especially where the record does not indicate

the conditions under which Rodriguez allegedly heard Mattis's statements, including the volume of Mattis's voice.[27]

We further note that the jury, who were taken on a view as part of the trial, had the opportunity to observe in person areas connected with the shooting, including the distance between Rodriguez's front porch and the corner of Geneva and Levant Streets. They therefore were able to consider, and determine for themselves, the likelihood that Rodriguez physically was able to overhear the conversation. Commonwealth v. Francis, 390 Mass. 89, 99 (1983) ("When the question whether expert testimony would aid the jury is close, the likelihood of prejudice from the admission or exclusion of that testimony is slight. It is not surprising, therefore, that appellate courts have given great deference to the rulings of trial judges in this area of the law of evidence"). See Commonwealth v. Kingsbury, 378 Mass. 751, 753-754 (1979) (jurors permitted to rely on common sense in determining time of sunset in late October); Commonwealth v. Fitzgerald, 376 Mass. 402, 420 (1978) (jurors able to rely on view and common knowledge to determine that fear might exist in public housing projects).

[27] The affidavits attached to the defendants' posttrial motion for expert funds similarly lacked details regarding the conditions under which the investigator performed his experiment. For this reason, they are of questionable value.

In any case, even if information helpful to the defendants would have been uncovered had the matter been investigated, its use would have been limited to the impeachment of Rodriguez. Generally, failing to impeach a witness in a particular way does not constitute ineffective assistance. See Commonwealth v. Jenkins, 458 Mass. 791, 805 (2011), citing Commonwealth v. Bart B., 424 Mass. 911, 916 (1997) ("Failure to impeach a witness does not, standing alone, amount to ineffective assistance"). See also Commonwealth v. Hudson, 446 Mass. 709, 715 (2006), quoting Commonwealth v. Fisher, 433 Mass. 340, 357 (2001) ("it is speculative to conclude that a different approach to impeachment would likely have affected the jury's conclusion"). Even on the more favorable standard of review under § 33E, a claim of ineffective assistance based on failure to use particular impeachment methods is difficult to establish. Hudson, supra, quoting Fisher, supra. Contrast Commonwealth v. Haggerty, 400 Mass. 437, 441-442 (1987) (counsel's failure to investigate whether defendant's conduct proximately caused victim's injuries deprived defendant of only available defense and constituted ineffective assistance of counsel).

Here, in a joint effort,[28] the defense impeached Rodriguez vigorously with regard to his credibility. On cross-

[28] Comparatively speaking, Mattis's counsel conducted a majority of the cross-examination of Rodriguez and devoted a

examination, counsel homed in on Rodriguez's inconsistent statements to the grand jury and investigators, and focused sharply on what he claimed to have seen and heard. For example, counsel painstakingly walked Rodriguez through his statements to police and to the grand jury, and then his testimony on direct examination, regarding what Mattis wore the day of the shooting, demonstrating how Rodriguez's story changed for each audience. Counsel also directly questioned Rodriguez about his changing testimony regarding his ability to overhear Mattis and Watt's conversation, asking him to admit who he had lied to about his changing testimony.

In addition to calling attention to Rodriguez's varying accounts of his observations of the defendants, trial counsel also effectively explored other avenues of impeachment, including Rodriguez's long history of auditory and visual hallucinations, his motive for testifying for the Commonwealth, and his demonstrated penchant for lying in other circumstances. During closing arguments defense counsel maintained that, given Rodriguez's extreme credibility issues, his testimony inherently was unreliable.

In short, Rodriguez's shortcomings as a witness were thoroughly exposed, especially with regard to his credibility

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larger share of her closing to raising doubts about his credibility.

and dishonesty. Even assuming an investigation would have turned up additional impeachment material demonstrating that Rodriguez was untruthful, it would have been cumulative of the ample information trial counsel already had available and used effectively. See, e.g., Commonwealth v. Vaughn, 471 Mass. 398, 414 (2015) (failure to provide cumulative impeachment testimony not ineffective assistance).

Because it is speculative to assume that an investigation would have yielded the result desired by the defendants, and any such result would have been limited to providing additional impeachment material regarding Rodriguez's credibility, an avenue thoroughly explored by the defense, we do not fault trial counsel for not pursuing (or considering) this strategy midtrial.[29] See Commonwealth v. Satterfield, 373 Mass. 109, 115

[29] Mattis argues that without Rodriguez's testimony that Mattis told Watt that Watt "needed to go handle that," the jury would have had insufficient evidence of joint venture murder in the first degree. This argument is unavailing. Evidence of Mattis's actions prior to the shooting, including his interaction with Elliott, his statements to both Rodriguez and Watt upon his return from his encounter with Elliott, and his handing a firearm to Watt, together with evidence of motive, consciousness of guilt, and "celebrating" after the shooting, provided sufficient evidence of joint venture murder even without Mattis's overheard statements to Watt just prior to the shooting.

Mattis further argues that there was no evidence of intent with respect to the murder victim, Blake, because Blake was not present when Elliott told Mattis that Elliott was from Everton. To the contrary, there was evidence that Mattis was aware of, and intended harm to, both teenagers. When Mattis returned from

(1977) ("in a case where ineffective assistance of counsel is charged, there ought to be some showing that better work might have accomplished something material for the defense"). We therefore conclude that counsel did not err and that, in any case, no substantial likelihood of a miscarriage of justice occurred.

3. Review under G. L. c. 278, § 33E. The defendants contend that, as a result of all the aforementioned issues in combination, justice requires that they be granted a new trial under G. L. c. 278, § 33E. For the reasons explained supra, we decline to exercise our extraordinary power to grant such relief pursuant to that statute.

Conclusion. For the foregoing reasons, the defendants' convictions and the orders denying their motions for a new trial and for postconviction relief are affirmed. However, the matter of Mattis's sentence shall be remanded for an evidentiary hearing consistent with this opinion.

So ordered.

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the convenience store, he told Watt and Rodriguez, "[B]e easy, because that's them kids." He then went on to provide Watt with a firearm and patted Watt on the shoulder prior to the shooting. Even if there was evidence that Mattis had the requisite intent only as to Elliott, "a defendant's intent . . . encompasses completely unintended victims (including victims of whom the defendant was unaware) who happen to suffer along with the intended victim." Commonwealth v. Melton, 436 Mass. 291, 297-298 (2002).