SJC-11696

COMMONWEALTH vs. LAQUAN MILLER.

Suffolk. April 6, 2020. - October 22, 2020.

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

Homicide. Constitutional Law, Assistance of counsel, Waiver of constitutional rights by juvenile, Admissions and confessions, Voluntariness of statement. Evidence, Admissions and confessions, Voluntariness of statement. Practice, Criminal, Capital case, Assistance of counsel, Admissions and confessions, Voluntariness of statement, Motion to suppress, Verdict.

Indictments found and returned in the Superior Court Department on September 28, 2011.

Pretrial motions to suppress evidence were heard by Charles J. Hely, J., and the cases were tried before Carol S. Ball, J.

John J. Barter for the defendant.
Ian MacLean, Assistant District Attorney, for the Commonwealth.

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

KAFKER, J. On June 6, 2013, the defendant was found guilty of murder in the first degree by deliberate premeditation of Wilfredo Martinez and assault with intent to murder Kareem Dowling. On appeal, the defendant argues that the motion judge erred in denying his motion to suppress statements made to police after he was arrested, and that the jury returned inconsistent verdicts when acquitting him of the charge of unlicensed possession of a firearm, yet convicting him of both murder and assault with intent to murder. We affirm the defendant's convictions and conclude that he is not entitled to relief under G. L. c. 278, § 33E.

1. Background. At the time of the shooting, around 10 P.M. on June 5, 2011, Martinez and Dowling were sitting near the basketball court on the back stoop of an apartment building in the Archdale housing development (Archdale) in the Roslindale section of Boston. They were speaking with their friend, Chris Colon, who was standing to the side of the stairs. After Martinez and Dowling had been sitting on the stoop and talking for about fifteen minutes, the back door to the apartment building burst open, and Martinez and Dowling were both shot.

Martinez was shot multiple times: one bullet struck him in the head, and three bullets struck him in the back. Dowling also suffered multiple gunshot wounds to his back. Colon fled the area when the shots began and was not injured.

Dowling, who survived the shooting, testified that while he was sitting on the steps of the apartment building, "[t]he door kicked open and I got shot in my back." He heard the sound of multiple gunshots. Dowling never saw who shot him or Martinez. None of the witnesses in the area saw who fired the shots. When police arrived, they found Martinez's body on the stairs of the apartment building. Martinez was pronounced dead at the scene. Dowling was still breathing, and police and first responders engaged in conversations with him to keep him alert.

One witness, Harold Hernandez, who lived in the apartment building, heard the gunshots and looked outside within seconds of hearing them. He saw the two victims on the doorsteps, as well as another individual in the middle of the parking lot wearing a black hooded sweatshirt. It looked as if the person had a gun in his hands. Hernandez did not see the individual's face, and testified that he would not be able to identify him. The person wearing the black hooded sweatshirt ran up Brookstone Street toward Washington Street, where he met another person. The two people then turned right and went down Washington Street together. Police arrived in the area shortly thereafter.

Another eyewitness, Wanda Iglesias, lived across the street from the house where the defendant and his friend Elvis Sanchez

lived in separate apartments on Washington Street.[2] At approximately 10 P.M., she got into her car to go to a coffee shop. She saw two people, whom she ultimately identified as Sanchez and the defendant, coming out of the house across the street. They walked toward Archdale. Video surveillance footage also shows that the defendant left his apartment about fifteen minutes before the shooting occurred, headed toward the apartment building.

Several minutes later, Iglesias returned to the same parking spot in front of her house and heard three gunshots. The shots came from the area of a nearby basketball court. She got out of her car and went toward her house. She saw the defendant coming from the area of the basketball court. She also saw Sanchez. Iglesias testified that she saw a silver gun in the defendant's hand at the time.

Another eyewitness also testified to seeing Sanchez with the defendant after hearing four or five gun shots around 10 P.M. that night. That eyewitness similarly testified to seeing what looked like a gun in the defendant's hand.

The defendant's mother testified that the defendant had left the house sometime after 9 P.M. with Sanchez. At about 10 P.M., she heard gunshots. She went outside to see where the

[2] Sanchez died in a separate shooting incident several weeks after the defendant's arrest.

defendant was, walking to the corner of Washington Street and Brookstone Street. She saw the defendant running up Brookstone Street toward Washington Street. She saw Sanchez coming from Washington Street, as if he were coming from Archdale Road. She did not look at the defendant's hands when he first came onto Washington Street, but she did not see a gun in his hands as he passed her and went to the house.

The defendant's father testified that, shortly after the defendant entered the apartment, the defendant said he knew the individual who had been shot. This took place approximately thirty minutes after the gunshots were fired.

Police canvassed the area for evidence, finding shell casings in the first-floor hallway of the apartment building, near the entry where the shooting victims had been found. Other ballistics evidence, including bullets and fragments collected from the two victims, were sent with the shell casings to the firearms analysis unit of the Boston police department. No firearms were found the night of the shooting.

On June 7, 2011, a search of an empty apartment in the apartment building uncovered two firearms: a Marlin .45 caliber semiautomatic rifle and a Smith and Wesson .357 caliber revolver. Neither of the guns matched the shell casings, bullets, or fragments recovered from the crime scene. Two prints on the Marlin rifle were sufficient for comparison. One

was a match for Sanchez. Neither Sanchez nor the defendant could be excluded as matches for the other print. Two prints from the revolver were suitable for comparison, but neither matched the defendant or Sanchez. Boston police ballisticians concluded that the crime was committed with two firearms: a .45 caliber semiautomatic and either a .38 caliber or .357 caliber revolver. Neither type of weapon was ever found.

The defendant was arrested on July 24, 2011. On September 28, 2011, a grand jury returned indictments charging the defendant with murder, armed assault with intent to murder, and possession of a firearm without a license. The defendant filed motions to suppress his statements to detectives during two interviews conducted on July 24, the same day he was arrested. During those two interviews, the defendant gave conflicting accounts of his whereabouts on the evening of the shooting. As explained in more detail infra, the defendant first claimed that he was at home the entire evening. In the second interview, he admitted to being at the apartment building when the shooting occurred, but said he was not involved. After an evidentiary hearing, the motion judge denied the defendant's motions. The jury heard a redacted version of both these interviews, and thus both versions of the defendant's story.

On June 6, 2013, the jury convicted the defendant of murder in the first degree and armed assault with the intent to murder,

but acquitted the defendant of unlicensed possession of a firearm. Because the defendant was under eighteen years old at the time of the shooting, he was sentenced to life imprisonment with the possibility of parole after fifteen years for murder in the first degree, see Miller v. Alabama, 567 U.S. 460, 479 (2012), and a concurrent term of from eighteen to twenty years imprisonment for armed assault with the intent to murder. The defendant appealed from his convictions.

2. Discussion. a. Standard of review. Generally, "[i]n reviewing a ruling on a motion to suppress, we accept the [motion] judge's subsidiary findings of fact absent clear error but conduct an independent review of his ultimate findings and conclusions of law" (quotation omitted). Commonwealth v. Clarke, 461 Mass. 336, 340 (2012), quoting Commonwealth v. Scott, 440 Mass. 642, 646 (2004). It is then "[o]ur duty . . . to make an independent determination of the correctness of the [motion] judge's application of constitutional principles to the facts as found." Clarke, supra, quoting Commonwealth v. Bostock, 450 Mass. 616, 619 (2008).

Where the motion judge's findings of fact are premised on documentary evidence, however, "this court stands in the same position as did the [motion] judge, and reaches its own conclusion unaffected by the findings made by the [motion] judge." Clarke, 461 Mass. at 341, quoting Commonwealth v. Novo,

442 Mass. 262, 266 (2004). "To the extent the motion judge made credibility determinations relevant to his subsidiary findings of fact, we adhere to the normal standard of review," affording such findings substantial deference and accepting them "unless not warranted by the evidence" (citation omitted). Clarke, supra.

b. Motion to suppress. The defendant argues that the motion judge erred in denying his motion to suppress for two closely related reasons. First, the defendant argues that the detectives did not scrupulously honor his right to counsel after he invoked this right by saying: "Do I get a lawyer tonight?" Second, the defendant argues that his waiver of his Miranda rights was not intelligent, knowing, or voluntary and that his statements were not voluntary, due to what he characterizes as "now or never" interrogation tactics that overcame his ability to make a voluntary waiver. We will address each argument in turn, but first recite the relevant facts as found by the motion judge.

i. Key facts found by the motion judge. Detectives Frank McLaughlin and Gloria Kinkead of the Boston police department testified at the evidentiary hearing. The motion judge issued a written ruling denying the defendant's motion to suppress.[3] The

[3] After independently reviewing both the transcripts and audio and video recordings of the defendant's interviews with

judge found that, during the two interviews on July 24, the defendant made an intelligent, knowing, and voluntary waiver of his Miranda rights and that his statements were voluntary. The motion judge found that the defendant invoked his right to counsel after the first interview on July 24, but then voluntarily reinitiated discussions with the police before the second interview the same day.

In regard to the first interview on July 24, the motion judge found:

> "Officers took the defendant to the Homicide Unit at Headquarters. Detectives Frank McLaughlin and Brian Black interviewed the defendant there beginning at about 8:28 P.M. This interview was video recorded. The interview lasted about twenty-five minutes, not including periods when the detectives stepped out of the room and when they assisted the defendant in making telephone calls to his family. . . .
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> "At the beginning of the interview, a detective read complete Miranda warnings to the defendant one-by-one. He gave the defendant a Miranda warnings form and had the defendant read along as the detective read the warnings aloud. The defendant initialed each warning on the form after the detective read it to him. The detective and the warnings form also gave the defendant an additional warning. They told him: 'If you decide to answer now, you will still have the right to stop answering questions at any time.' The defendant acknowledged that he understood the warnings. He signed the Miranda warnings form under the line that states: 'I HAVE READ AND UNDERSTOOD THE ABOVE RIGHTS AS EXPLAINED TO ME.'"

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police, we conclude that the motion judge's factual findings discussed infra are amply supported by the record.

During the first interview with the detectives, the defendant claimed that he was playing video games at home with his brother when he heard the gunshots.[4] He claimed he did not learn who had been shot until the next morning. The motion judge found:

> "The detectives told the defendant that they did not believe his statement that he was in his apartment when the shooting happened. They told him that they had witnesses telling them that the defendant was outside at the time of the shooting. Throughout this interview, the defendant did not budge from his version that he was inside his family's apartment playing a video game with his brother when he heard the shots.
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> "When they finished asking the defendant questions about the shooting, a detective asked the defendant if he wanted to call someone to let them know where he was. The defendant said, 'I want to leave if I'm not under arrest.' The detective told the defendant that he was going to be under arrest and that's why he wanted him to call his mother and father to let them know. The detectives then spent several minutes in and out of the interview room making calls to the defendant's family and helping the defendant call his family.
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> "A detective told the defendant that he would be charged with the murder of Wilfredo Martinez, assault with intent to murder Kareem Dowling and possession of a firearm. The detective explained to the defendant that he would be arraigned in West Roxbury court first thing in the morning. He told him that he would have major case photographs and fingerprints taken and then he would be brought to District 5. The detective told the defendant, '[i]f there's something you want to change, we're available.' The defendant said, '[d]o I get a lawyer tonight?' The detectives explained that he would get a lawyer first thing in the morning unless there was a lawyer he knew that he

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[4] As the motion judge outlines in his findings, the defendant first told this version of the story in an interview with police on June 7, 2011 -- an interview that is not the subject of the defendant's motion to suppress.

> wanted to call. The defendant made a telephone call to a family member and said that he needed a lawyer. The interview ended at this point." (Citations omitted.)

The judge made the following additional findings of fact regarding the first July 24 interview:

> "The detectives spoke to the defendant in calm, businesslike tones. The Miranda warnings were carefully stated to the defendant. The defendant agreed that he understood the warnings. He signed the warnings form stating that he read the warnings and understood them.
>
> "The defendant remained outwardly calm and in control during the interview. Although he was seventeen, the defendant was capable of making and did make rational, voluntary decisions about whether to speak with the detectives and what to tell them. The detectives told the defendant that they did not believe his version about remaining in his apartment at the time of the shooting. The defendant persisted with this version despite the continuing questioning. There was no questioning of the defendant after he asked about a lawyer."

The motion judge also found that the defendant invoked his right to a lawyer when asking: "Do I get a lawyer tonight?"

The motion judge made the following findings of fact regarding the second interview on July 24:

> "The defendant was taken to the Boston Police station in West Roxbury. The defendant was booked at the West Roxbury station at approximately 9:40 P.M. on July 24. The booking took about twenty to thirty minutes. During the booking, Officer Daniel Smith gave the defendant Miranda warnings. The defendant signed a booking Miranda warnings form under the phrase, 'Yes, I understand.'
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> "Detective Gloria Kinkead was on duty in the West Roxbury station that night, but she was not involved in investigating the shooting incident that the defendant is charged with. She knew the defendant. Detective Kinkead's district included the Archdale project in Roslindale. It is one of her primary beats. She made a point of speaking

> with and getting to know the young men in this project with the hope of keeping them out of trouble. Detective Kinkead had known the defendant for five or six months.
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> "Detective Kinkead noticed the defendant while he was being booked at the West Roxbury station. She was surprised to see him. She did not know that the defendant had been arrested and charged with the Archdale homicide and shooting. She said to the defendant, 'what are you doing here?' This remark was an expression of Detective Kinkead's surprise and personal concern for the defendant. It was not interrogation. The defendant continued answering the routine booking questions presented by the booking officer. He did not reply to Detective Kinkead. The detective did not interrupt the booking. She continued with her other duties elsewhere in the station.
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> "Later that night, Detective Kinkead was walking by the cell area of the station while working on matters unrelated to this case. The defendant saw her. He called out to her: 'Hey, hey, hey, come here for a minute.' Detective Kinkead went to put her firearm in a secure area. She then returned to the cell area and entered the cell block. She spoke to the defendant from outside of his cell. Detective Kinkead said, 'what are you doing here?' The defendant said, 'They got me in here on some bullshit murder tip.' Detective Kinkead said, 'what are you talking about?' The defendant said, 'I talked to detectives earlier. I want to talk to them again.' Detective Kinkead did not know what homicide the defendant was talking about, although she did know that there had been a homicide in the Archdale project area."

The motion judge credited Kinkead's testimony that she then left the defendant to call Sergeant Detective John Brown, whom she knew to be a homicide detective, and that she had no further conversation with the defendant. The motion judge found:

> "Detective McLaughlin and Sergeant Detective Brown went to the West Roxbury station to talk with the defendant. They began a sound-recorded interview with him at 11:20 P.M. on July 24. The interview lasted one hour and fifty-one minutes. It ended at 1:11 A.M. on July 25.

"Detective McLaughlin again read to the defendant complete Miranda warnings and the right to stop answering questions at any time. He read the warnings one at a time from a warnings form. Detective McLaughlin again had the defendant read along from a printed Miranda warnings form. After each warning, the defendant agreed that he understood. The defendant initialed each warning on the form. He signed the warnings form, a form that was identical to the one he signed in [the] first interview earlier that night.

"Detective McLaughlin told the defendant that Detective Kinkead had called them and said that he wanted to speak with them. He asked the defendant if that was correct. The defendant said, 'yeah.' Detective McLaughlin reminded the defendant that the recorder was on. He then said to the defendant, 'we'll just let you go ahead and talk.'

"The defendant gave an account that was different from the one he had given in the first interview that night. He said that he and a friend named [Sharif] Jackson had been upstairs in a vacant apartment, an 'empty crib.' There was a party there. After the party, he and [Jackson] were taking apart some stereo equipment and cleaning up food. The defendant said that [Jackson] had a BB gun that he was going to sell. The defendant said that he heard ten or more gunshots as they were walking down from the second floor. They dropped the stereo system and ran through the back of the Archdale Community Center on a pathway. The defendant said he walked through the basketball court and he met his mother right there at the corner. His mother told him to go upstairs and he did so.

"The defendant told the detectives that [Jackson] gave him the BB gun and he put it in his hoodie to take it home. He said that he gave the BB gun back to [Jackson], and he sold it to his cousin.

"Detective McLaughlin told the defendant that he thought the defendant was not telling the truth. He told the defendant that he thought that he had shot the two men from the hallway while they were sitting on the stoop. The defendant continued to deny shooting anyone. He said, '[Martinez] and me was too close for me to even do anything like that.' The defendant said that 'the word is Elvis was supposed to have did this for an inside job.' He said that

> he heard that Elvis got paid for doing it, '[b]ut I didn't see it with my own eyes.'
>
> "The detectives continued to question the defendant and urge him to tell the truth. About halfway through the interview, the defendant said, 'All right. . . . I was there, but I was not the one who pulled the trigger.' The defendant said that he was coming down the steps and did not see the shooting. He said that Elvis told him the next morning that he did it and he got paid $500 for it. The defendant said that Elvis told him that Dariel did it with him and that they were going to get $500 each for it."

The motion judge further found: "The second interview was conducted in a professional manner. . . . Again there was no coercion or threats by the detectives." Finally, the judge found that Edwards v. Arizona, 451 U.S. 477, 484–485 (1981), was not violated when the detectives conducted the second interview on July 24, as "[i]t was the defendant who initiated the second interview when he said, 'I talked to detectives earlier. I want to talk to them again.'"

ii. Invoking the right to counsel. "When an accused has invoked his right to counsel during a custodial interrogation, the police must stop the interrogation until counsel has been made available to the defendant, unless the accused himself initiates further conversation with the police." Commonwealth v. Morganti, 455 Mass. 388, 396 (2009), S.C., 467 Mass. 96 (2014), citing Edwards, 451 U.S. at 484–485. A defendant's decision to terminate questioning must be scrupulously honored. Commonwealth v. Obershaw, 435 Mass. 794, 800 (2002). The

invocation of the right to counsel, however, must be unambiguous. Morganti, supra at 396-397. See Davis v. United States, 512 U.S. 452, 459 (1994). "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel," the police need not cease their questioning. Davis, supra. See Obershaw, supra ("We have repeatedly held that equivocal statements and musings concerning the need for an attorney do not constitute such an affirmative request"). To invoke the right to counsel, the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis, supra.

We hold that the evidence supports the motion judge's conclusion that the defendant's statement was a clear invocation of his right to counsel. As the motion judge found, after the defendant asked whether he was entitled to an attorney, the detective told him: "You'll get a lawyer first thing in the morning, unless there's a lawyer you know you want to call. You have a name and number for a lawyer or something you want to call[?]" When the defendant answered, "No," the detective asked him if he wanted to call his mother again and have her bring an attorney, which the defendant proceeded to do.

This exchange during the first interview on July 24 shows that the detectives reasonably understood the statement to invoke the defendant's right to counsel, as they helped the defendant telephone his mother to call an attorney and also stopped the interrogation. Contrast Commonwealth v. Corriveau, 396 Mass. 319, 324, 331 (1985) (no affirmative request to speak with attorney when defendant stated: "It's beginning to sound like I need a lawyer"; police responded, "You may use the telephone to call a lawyer and you may leave at any time if you wish to do so"; and defendant replied, "I don't want to leave and I don't want a lawyer").

The defendant also argues that the detectives impermissibly continued questioning after the defendant invoked his right to counsel by making two statements: "If something were to change, if there's something we need to know, please make sure that we do, okay?" and "You all set, bro? Is there anything else you want to tell us? You all good?" The defendant is correct that the motion judge did not make any findings or otherwise discuss these statements. As they undisputedly appear in the transcript and tapes of the interviews of the defendants, we independently review their legal significance in the context of the entire evidence. Commonwealth v. Tremblay, 480 Mass. 645, 654-655 (2018). We conclude that these statements are not legally significant for the reasons discussed infra.

The transcript of the interview states as follows:

> The interviewer: "You want to call your mother again and have her bring a lawyer? Okay. That's fine."
>
> The interviewer: "We're trying to be fair with you, you know that, right?"
>
> The defendant: "Yeah."
>
> The interviewer: "If you want to just dial the last number, just press that."
>
> The interviewer: "If something were to change, if there's something we need to know, please make sure that we do, okay?"

The defendant then spoke with his mother on the telephone. When he hung up, the interview then ended as follows:

> The interviewer: You all set?
>
> The defendant: [No audible response].
>
> The interviewer: "What did she say?"
>
> The defendant: "She's on her way."
>
> The interviewer: "She's on her way. All right. You all set, bro? Is there anything else you want to tell us? You all good?"
>
> The defendant: "Yeah."
>
> The interviewer: "Like I said, we're going to take you downstairs and process you and just kind of move through the system here, all right, bro?"

We conclude that the two brief, somewhat ambiguous questions posed by the detectives do not constitute an improper interrogation after the defendant had invoked his right to counsel. See Commonwealth v. Torres, 424 Mass. 792, 798 (1997),

quoting United States v. Taylor, 985 F.2d 3, 8 (1st Cir.), cert. denied, 508 U.S. 944 (1993) ("the mere fact that a police officer may be aware that there is a 'possibility' that a suspect may make an incriminating statement is insufficient to establish the functional equivalent of interrogation").

The statements must be understood in context. The interview was ending, and the defendant was attempting with some difficulty to reach his mother on the telephone. The officers then said to the defendant, "just dial the last number," and asked him to let them know "[i]f something were to change, if there is something we need to know." In this context, this brief statement is not an improper resumption of questioning, but rather an attempt to facilitate the telephone call, finish the interview, and move the booking process along. This is also true of the words, "You all set, bro? Is there anything else you want to tell us? You all good?" These statements came directly after the defendant had ended the telephone call with his mother, and similarly acknowledged the end of the interview and the transition to bringing the defendant to Boston's district five police station for the defendant to be processed. To the extent the officer asked if there was anything else the defendant wanted to tell police, this was directly followed with a seemingly rhetorical "You all good?" to ensure the defendant was finished using the telephone and ready to go downstairs.

Most importantly, the defendant did not say anything in response to these two remarks by the detectives and did not make any statements relevant to the shooting until the second interview that evening began hours later, after the defendant voluntarily reinitiated discussions when encountering another officer that he knew from the neighborhood.

We also discern no error in the motion judge's conclusions that the defendant himself reinitiated discussions with the police, waived his Miranda rights, and made the statements voluntarily. As the motion judge found, the defendant voluntarily reinitiated contact when he called out to Kinkead from the cell area where he was being held the night of July 24 and told her, "I talked to detectives earlier. I want to talk to them again." We agree that Kinkead did not violate the defendant's rights when she asked the defendant what he was doing at the station, as this question was one of personal concern for the defendant -- whom she knew and was surprised to see -- and not an interrogation likely to elicit an incriminating response. See Rhode Island v. Innis, 446 U.S. 291, 300-302 (1980); Commonwealth v. Colon, 483 Mass. 378, 393 (2019). Kinkead did not say anything to convince the defendant to talk to the detectives again; this request came solely from the defendant. See Commonwealth v. Sanchez, 476 Mass. 725, 739-740 (2017) (where, after invoking right to counsel one day

earlier, defendant told officer walking by his cell he wanted to speak to detectives, police did not initiate conversation and there was no violation of defendant's invocation of his right to counsel). We therefore agree with the motion judge's application of constitutional principles to the facts as found.

The defendant seeks to suppress the statements made in the second July 24 interview based on various other grounds, arguing for a bright line rule that, once a minor has invoked his or her right to counsel, he or she cannot reinitiate discussions. The defendant also argues that confusing statements made about his right to counsel supported a conclusion that he did not waive his Miranda rights intelligently, knowingly, and voluntarily, and that "now or never" tactics by the detectives rendered the statements involuntary. Commonwealth v. Tremblay, 460 Mass. 199, 206 (2011) (even where there has been valid waiver of Miranda rights, we must consider voluntariness of defendant's statement, as "a confession or an admission is admissible in evidence only if it is made voluntarily").

We decline to adopt the bright line rule advanced by the defendant, who argues that police must always decline to reengage with any minors who have invoked the right to counsel regardless of whether the minor reinitiates contact with the police. Age is already a factor in our analysis when we determine whether a defendant has voluntarily waived his or her

rights. See Colon, 483 Mass. at 390; Commonwealth v. Libby, 472 Mass. 37, 41-42 (2015). The motion judge properly took the defendant's age of seventeen years into account here, but nonetheless concluded that the defendant had voluntarily reinitiated discussions, waived his Miranda rights, and made the statements themselves voluntarily. We need not recite all of these detailed findings again, which are clearly supported by the record. We do address separately the defendant's arguments that the police misinformed him about his right to counsel and his right to speak to the police later if he terminated questioning.

We disagree with the defendant's characterization of the detectives' explanation of his right to counsel as "confusing," thus rendering any waiver unknowing and involuntary. The detectives did not mislead the defendant in regard to his rights and, by contrast, gave the defendant accurate information concerning his right to an attorney. When the defendant asked a question about whether he was entitled to an attorney that evening, the detectives accurately responded: "You'll get a lawyer first thing in the morning, unless there's a lawyer you know you want to call." Detectives offered to have the defendant call his mother again to have her bring an attorney, thus taking active steps to help the defendant realize his right to counsel. This is far different from the misrepresentations

made in other cases that rendered defendants' waivers involuntary. See Libby, 472 Mass. at 54 (officers "effectively precluded [the defendant] from understanding his ability to exercise his right to counsel" when they told defendant that attorneys "don't just come running out and sit in an interview"); Commonwealth v. Hoyt, 461 Mass. 143, 154 (2011) (concluding defendant's waiver was not voluntary where "the officers did not correct the defendant's manifest misunderstanding of his right to appointed counsel"). We therefore conclude that the defendant knowingly, intelligently, and voluntarily waived his rights when reinitiating contact with the detectives.

We likewise reject the argument that the detectives used a "now or never" theme in their questioning. Before the defendant invoked his right to counsel, the detectives said to the defendant:

> "Sometimes there's reasons for things that we can't uncover in our investigation without someone telling us. We don't know. We're giving you that opportunity, so this is your chance. It might be your only chance to actually sit and tell us, so it's up to you what you want to do here. The ball is in your court."[5]

[5] The motion judge did not discuss this statement in his findings of fact when denying the defendant's motion to suppress, but the statement is in the transcript of the detectives' first interview with the defendant on July 24.

We have previously concluded that "now or never" interrogation tactics that lead a defendant to believe that the conversation with police will be his or her sole opportunity to tell his or her story render a statement involuntary. In Novo, 442 Mass. at 264, detectives falsely and repeatedly told the defendant that, if he did not answer their questions and present his side of the story to the detectives, the defendant would never get a chance to present his side of the story to the jury: "if you don't give us a reason . . . right now why you did this, a jury's never going to hear a reason." The detectives echoed this theme over eighteen times throughout the interview, and at least twelve of those times "explicitly made reference to the jury never hearing [the defendant's] story unless he told it to the officers." Id. at 264 n.2. "Once introduced, this now-or-never theme persisted up to and through [the defendant's] confession." Id. at 267. We concluded:

> "The misrepresentation of [the defendant's] right to defend himself at trial, repeated incessantly, is a particularly egregious intrusion on rights that art. 12 [of the Massachusetts Declaration of Rights] declares to be fundamental. It is different in degree from false statements regarding the strength or existence of incriminating evidence, which we have criticized, see, e.g., Commonwealth v. Jackson, 377 Mass. 319, 328 n.8 (1979), but not always found to be determinative of voluntariness, see, e.g., Commonwealth v. Edwards, 420 Mass. 666, 671 (1995). It is conduct that casts substantial doubt on the voluntariness of a subsequent confession and on the integrity of the interrogation process leading up to it. This doubt would be extremely

> difficult for the Commonwealth to overcome in any case, and it has not done so here." (Footnote omitted.)

Id. at 268-269.

Similarly, in Commonwealth v. Thomas, 469 Mass. 531, 542 (2014), we held that the defendant's statements to detectives after invoking her right to counsel were involuntary due to detectives' use of a "last chance" tactic to imply that the defendant would no longer have a chance to tell her side of the story to police. After the defendant invoked her right to counsel, detectives told her, "You had your chance, you just lawyered up," implying she could no longer speak to police, and chastising her for invoking that right. Id. at 537, 552c n.18. We further reasoned that statements like this that are made after the right to counsel has been invoked were improper, as "[t]here is nothing that would bar a suspect, after consulting with counsel, from deciding to speak with the police, and there is no sound reason why the police would refuse such a request." Id. at 542.

Novo and Thomas are readily distinguishable from this case. The statements the officers made here were more nuanced and not misstatements of the law. In contrast to Novo and Thomas, the officers here did not state that it was the defendant's last chance, but only that this "might" be his last chance. During

the second interview, this point was also more fully explained. After the defendant had invoked his right, the detectives said:

> "Your right to counsel, once you're arraigned -- [e]verything has to go through your attorney. Which we can still talk to you, but it has to go through your attorney. You won't be able to contact us anymore. Once we end this conversation here, that's pretty much it for your opportunity to talk to us as we're talking right now. Tomorrow clearly if you say to your attorney, 'I want to talk to them,' your attorney hopefully will listen to you and get in touch with us. But we can't contact you and say, 'Hey, we want to talk to you again.'"

This is not a misstatement of the law. The defendant was also not chastised for invoking his right to counsel or misinformed about his ability to testify at trial. In sum, the police here did not employ the "now or never" tactics that we condemned in Novo and Thomas.

c. Inconsistent verdicts. The next issue is whether the jury returned inconsistent verdicts when convicting the defendant of murder in the first degree and assault with the intent to murder, but acquitting him of the unlicensed possession of a firearm.[6]

"While legally inconsistent verdicts may not stand, factually inconsistent verdicts may." Commonwealth v. Resende,

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[6] The defendant also contends that he should have been entitled to a special verdict slip so the jury could indicate whether they were unanimous that the defendant was the principal or the joint venturer, a distinction that this court eliminated in Commonwealth v. Zanetti, 454 Mass. 449, 464, 467 (2009). The defendant asks that we revisit Zanetti, which we decline to do.

476 Mass. 141, 147 (2017). Verdicts are legally inconsistent when they involve mutually exclusive crimes, most notably where one purported coconspirator is convicted and all other coconspirators were acquitted at the same trial. Id. See Commonwealth v. Fluellen, 456 Mass. 517, 520 (2010) (verdicts are legally inconsistent where crime is charged that, by its nature, requires combination of individuals; there is single trial of all participants in that crime; and all but one of participants is acquitted). Verdicts are factually inconsistent when, "considered together, [the verdicts] suggest inconsistent interpretations of the evidence presented at trial" (citation omitted). Resende, supra. Factual inconsistencies in verdicts "do not afford a ground for setting aside a conviction as long as the evidence is sufficient to support a conviction on the count on which the guilty verdict was reached" (citation omitted). Id. That is because such guilty verdicts "can result from any number of factors having nothing to do with the defendant's actual guilt," such as acquittal out of compromise or compassion. Commonwealth v. Hamilton, 411 Mass. 313, 324 (1991), quoting Commonwealth v. Cerveny, 387 Mass. 280, 285 (1982).

In Hamilton, 411 Mass. at 324, we concluded that the defendant could be convicted of armed robbery and murder in the first degree even though the same jury found him not guilty of

carrying the shotgun used in the murder. Much like the defendant in this case, the defendant in Hamilton argued the inconsistent verdicts "demonstrate[d] that the jury rejected the factual theory on which the cases were submitted to them," since "all of the evidence presented by the prosecution identified the defendant as having a shotgun at the scene." Id. at 323-324. It followed, the defendant argued, "that the jury's disbelief of his possession of a shotgun undermines the prosecutor's entire case and is manifestly inconsistent with their guilty verdicts." Id. at 324. We disagreed, concluding that "[t]he rule is well established in criminal cases that mere inconsistency in verdicts, one of which is an acquittal, will not render the verdict of guilty erroneous even though such inconsistency may have indicated the possibility of compromise on the part of the jury." Id., quoting Commonwealth v. Scott, 355 Mass. 471, 475 (1969).

Here, the defendant makes the same argument we rejected in Hamilton. He contends that, since the jury concluded that the Commonwealth failed to establish that he possessed a firearm, "[i]t stands to reason that the Commonwealth failed to establish that [the defendant] had a gun or that he shot a gun that night," which "invites analysis of whether there was sufficient evidence that [he] knowingly participated in the crime charged with the required intent" (quotation and citation omitted).

In making this argument, the defendant partly relies on the question submitted by the jury on the second day of deliberations. The jury sent a note asking: "For the possession of a firearm charge we are assuming the charge refers to the weapons kept in the empty . . . apartment, correct?" The judge responded "no," and then gave the jury a more thorough instruction: "in response to your question about Count 3 which is the possession of a firearm charge, the allegations in Count 3 involve any weapon used in the shooting of Wilfredo Martinez and/or Kareem Dowling. There are no charges pending against [the defendant] related to the guns found in the empty apartment . . . on June 7, 2011."[7]

Regardless of the question, there is ample evidence in the record to support the defendant's convictions of murder in the first degree and assault with intent to murder. The defendant lived on Washington Street, close to where the shooting took place. Video footage confirmed that the defendant left the apartment and went toward the apartment building about fifteen minutes before the murder. One witness saw the defendant wearing a dark hooded sweatshirt and holding what appeared to be a gun after hearing gunshots. That witness testified that the

[7] As discussed supra, neither of the guns found in the empty apartment on June 7 matched the shell casings, bullets, or fragments recovered from the crime scene.

same individual left the area and headed up Brookstone Street toward Washington Street. He met someone at the corner, and they together continued toward Washington Street. The defendant's own mother testified that she saw him running up Brookstone Street toward Washington Street with Sanchez coming from Washington Street at the same time. Two other witnesses saw the defendant moments later on Washington Street, wearing a dark hooded sweatshirt and carrying a silver gun. The defendant told his father that he knew who had been killed less than thirty minutes after the murder took place. The defendant's multiple inconsistent stories also reflect consciousness of guilt.

Further, the story the defendant told the detectives during the second interview on July 24 was contradicted by at least three witnesses. The defendant claimed that Da'Nasia Pocowatchit was one of the people who attended the party in the vacant apartment. However, Pocowatchit testified at trial and denied having been in the vacant apartment that day. The defendant also claimed that Jackson helped him move stereo equipment and also gave him a BB gun to sell that evening. Jackson testified at trial and denied helping the defendant move stereo equipment, owning a BB gun, or giving one to the defendant. The defendant claimed he dropped stereo speakers in a yard near a fence as he was running from the apartment

building, and that Dariel Mejia acquired the speakers later. Mejia testified at trial and denied ever assisting the defendant with any stereo equipment, or even being with the defendant on that night.

We therefore conclude that the evidence was sufficient to support convictions on the counts on which the guilty verdicts were reached, such that the factual inconsistencies in the verdicts provide no grounds to set aside the defendant's convictions. Resende, 476 Mass. at 147.

3. Conclusion. We affirm the motion judge's ruling on the defendant's motion to suppress. Although the defendant unambiguously invoked his right to counsel, he voluntarily reinitiated contact with the detectives. His waiver of his Miranda rights was intelligent, knowing, and voluntary, and the detectives did not engage in any misleading or deceptive conduct to overbear the defendant's will or inaccurately explain the defendant's rights. The factually inconsistent verdicts are no grounds to set aside the defendant's convictions of murder in the first degree and assault with the intent to murder, as ample evidence supports both convictions. Given the foregoing, and upon review of the entire record, we conclude that the verdict of murder in the first degree is consonant with justice, and we decline to exercise our authority under G. L. c. 278, § 33E, to

order a new trial or direct the entry of a verdict of a lesser degree of guilt.

So ordered.