SJC-12166

COMMONWEALTH vs. JULIO BRIAN LEIVA.

Hampden. September 10, 2019. - June 9, 2020.

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

Homicide. Robbery. Armed Assault with Intent to Rob. Fair Trial. Rules of Professional Conduct. Due Process of Law, Fair trial, Assistance of counsel. Constitutional Law, Fair trial, Assistance of counsel, Confrontation of witnesses, Double jeopardy. Witness, Expert. Evidence, Expert opinion, Relevancy and materiality. Practice, Criminal, Fair trial, Assistance of counsel, Confrontation of witnesses, Double jeopardy, Duplicative convictions, Capital case.

Indictments found and returned in the Superior Court Department on February 11, 2014.

The cases were tried before Daniel A. Ford, J.

Stephen Paul Maidman for the defendant.

David L. Sheppard-Brick, Assistant District Attorney, for the Commonwealth.

David Rassoul Rangaviz, Committee for Public Counsel Services, K. Neil Austin, & Michael Hoven, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

LOWY, J. A Hampden County jury convicted the defendant of murder in the first degree on theories of deliberate premeditation, extreme atrocity or cruelty, and felony-murder with attempted armed robbery as the predicate felony, in connection with the shooting death of William Serrano. The victim was shot seven times at close range, as he sat smoking a cigarette with his girlfriend on the back porch of the girlfriend's sister's Springfield home. Three men in dark hooded sweatshirts surrounded him, and one held a gun to his chest while the others searched his pockets. Trapped in his chair, the victim appealed to the men to "chill" and "leave me alone." Gun fire followed. At trial, the Commonwealth called the victim's girlfriend, who identified her ex-boyfriend, the defendant, as the shooter.

In this direct appeal from his convictions, the defendant contends that he is entitled to a new trial, principally due to his counsel's invocation of Mass. R. Prof. C. 3.3 (e), as appearing in 471 Mass. 1416 (2015) (rule 3.3 [e]), which "forced" him to testify by way of a narrative, causing myriad violations of his State and Federal constitutional rights.[1] The defendant also contends that (1) allowing the testimony of a

[1] We acknowledge the brief filed in support of the defendant by the Massachusetts Association of Criminal Defense Lawyers, as amicus curiae.

substitute medical examiner, who did not perform the victim's autopsy, but who relied, in part, upon the original medical examiner's autopsy report in forming an expert opinion, violated his witness confrontation rights where the Commonwealth failed to show that the original medical examiner was legally unavailable; (2) failure to sever the defendant's trial from that of his codefendant resulted in prejudicial error because the trial judge admitted ammunition evidence found at the residence of his codefendant; and (3) his conviction of and sentencing for both felony-murder, with attempted armed robbery as the predicate felony, and armed assault with the intent to rob violated the double jeopardy clause of the Fifth Amendment to the United States Constitution. The defendant also requests relief pursuant to G. L. c. 278, § 33E.

After a thorough review of the record, we discern no reversible error, and we decline to exercise our authority under G. L. c. 278, § 33E, to reduce or set aside the verdict of murder in the first degree.

Background. 1. The evidence and proceedings at trial may be summarized as follows, reserving certain details for our analysis of the issues raised on appeal. The victim's girlfriend had also previously dated the defendant "on and off" for about two years. Although their dating relationship had ended about six months prior to the shooting, the girlfriend and

the defendant remained friendly. The defendant visited Springfield several times per month, typically staying with friends on the third floor of an apartment building (friends' house). During those visits, he and the girlfriend saw one another regularly.

On the evening of the shooting, the victim accompanied the girlfriend to a family dinner that her sister was hosting at her residence. When the couple arrived with the girlfriend's mother between 5:30 P.M. and 5:45 P.M., the victim situated himself in the living room to watch football, while the girlfriend joined family in the adjacent kitchen for dinner. About twenty minutes later, they were just finishing the meal when the defendant arrived, uninvited, wearing a dark hooded sweatshirt with the "Sons of Anarchy" logo emblazoned on the back. The girlfriend's sister offered him dinner.

The defendant sat in the kitchen, eating and sending text messages on his cell phone for about one-half hour, and then left. He returned to the gathering about fifteen minutes later, now wearing a dark puffy coat on top of the sweatshirt, visited for another ten to fifteen minutes, and then departed again. The defendant left through the back door of the house, onto a landing, where there was a small porch to his right and stairs on his left, which led down to the yard. As the defendant stepped onto the landing, he passed by the victim, who was

sitting in a chair on the porch, smoking a cigarette with the girlfriend. From her seat on the victim's lap, the girlfriend saw the defendant walk down the stairs, then around to the right, and behind the porch.

A few minutes later, the defendant reemerged from behind the porch, followed closely by two other men in dark sweatshirts with raised hoods. The girlfriend recognized one of these other men as Amadi Sosa, one of the defendant's friends (codefendant). As the defendant mounted the stairs to the porch, the defendant pointed the sawed-off barrel of a shotgun at the girlfriend, who was then attempting to block the top of the stairway. As the three men pushed past her, the girlfriend opened the back door and shouted to her mother to call the police. The three men surrounded the victim, and the defendant held the barrel of the gun toward the victim's chest. The defendant instructed the other two men to "run his pockets," and they then bent over to reach into the victim's pockets.

The victim, trapped in the chair, protested to no avail. Standing at close range, the defendant shot the victim seven times; the two other men looked on. Screaming and bleeding, the victim managed to crawl inside, where police found him several minutes later, still alive and responsive. The victim was rushed to the hospital, where he died in surgery.

Immediately after the shooting, the defendant returned to the friends' house, entered through the back, and then locked the front door to the building and hid in an apartment one floor below his usual accommodations. Police came to the building and knocked on the door of the third-floor apartment; when no one answered, they waited for some period of time and then left. At about 7:30 P.M., the defendant telephoned a female friend (driver) who had driven him from Framingham to Springfield and back several times in recent months. He stated his desire "to hear her voice one last time," told her "shit went down," and then hung up. The defendant's friend "Ketchup" telephoned the driver shortly thereafter, prompting the driver to depart for Springfield to pick up the defendant. At 7:52 P.M., the defendant sent a text message to the driver, requesting pick-up at the codefendant's residence. The driver responded: "Babe, stay there." Shortly thereafter, the defendant messaged the driver with a different address for rendezvous. The driver knew this was the home of the defendant's friend "Ketchup," and had driven there for the defendant before.

When the driver arrived at Ketchup's residence, it was after 11 P.M. and the defendant was in a rush to leave Springfield. In the car, on the return trip to Framingham, the defendant appeared agitated, and the driver asked what had happened. In response, the defendant used the driver's cell

phone to access the Internet and showed her a local news headline about a recent shooting in Springfield, on the street where the girlfriend's sister lived. Back at the driver's Framingham residence, the defendant told her he "went to go rob somebody" but things went wrong. The defendant evaded arrest until approximately one year after the shooting, when he was located in San Diego, California, and taken into custody. Police never recovered the murder weapon.

At trial, the Commonwealth proceeded against the defendant on all three theories of murder in the first degree: deliberate premeditation, extreme atrocity or cruelty, and felony-murder, with the predicate felony of armed robbery or attempted armed robbery.[2] The prosecution's case primarily relied upon the eyewitness testimony of the girlfriend,[3] who identified the defendant as the shooter . During her trial testimony, the girlfriend also identified the codefendant and his brother as the two other men involved in the shooting,[4] and revealed that

---

[2] The defendant and the codefendant were tried jointly. The codefendant's appeal from his conviction of murder in the first degree remains pending.

[3] Other witnesses for the Commonwealth included sixteen members of the Springfield police department, the girlfriend's sister and their mother, and the driver, who testified under the terms of a cooperation agreement with the Commonwealth.

[4] The girlfriend testified that she was "210 percent" certain that the third man involved in the shooting was the codefendant's brother, John. She had identified all three of

she had seen the murder weapon at least once before the date of the shooting, at the codefendant's residence.

The Commonwealth also introduced video and ballistics evidence. The video footage, taken from surveillance cameras mounted in and around the friends' house, was probative as to certain details of the defendant's movements on the evening of the shooting.[5] The ballistics evidence demonstrated that certain rounds of live .22 caliber ammunition police seized upon executing a warrant to search certain areas of the codefendant's residence both bore the same common manufacturer's markings as the seven shell casings recovered at the crime scene and were of

---

the men from photographic arrays presented to her by police. A nolle prosequi was entered for the charges brought against the codefendant's brother when police brought charges against another individual instead. The Commonwealth consented to sever the trial of this third alleged coventurer from the trial of the defendant and the codefendant.

[5] The Commonwealth properly authenticated and introduced the video footage as an exhibit in evidence through the testimony of several police witnesses. The Commonwealth further elicited testimony about the positioning of cameras and recording logistics, and surveillance practices from an agent for the property management company then responsible for the friends' house. The video recording provided the jury with evidence relevant to the timing, manner, and direction of the defendant's travels to and from the friends' house on the night in question. The movements reflected in the recording corroborated the girlfriend's testimony about the times the defendant was present at her sister's residence on the night of the shooting. At the outset of trial, the court brought the jury on a view of the crime scene and its surrounding area, including stops at the friends' house and the residences of the girlfriend's sister, Ketchup, and the codefendant.

a caliber identical to that of four bullets recovered from the victim's body, and to that of the single bullet and seven shell casings recovered at the crime scene. The Commonwealth's ballistics expert also testified as to his opinions, based upon personally performed prior testing of the seven shell casings and five bullets in evidence, that (i) all seven shell casings had been fired from the same unknown weapon capable of chambering and firing .22 caliber ammunition, and (ii) all five projectiles had been shot from the same unknown weapon capable of chambering and firing .22 caliber ammunition. Without a gun for use in testing, however, it was not possible for the expert to provide an opinion whether the same weapon had both ejected the casings and shot the bullets.

The theory of the defense relied on impeaching the girlfriend's credibility and criticizing the adequacy of the police investigation. The defendant exercised his right to testify in his own defense, which he did in the form of a narrative. He told the jury that he visited the residence of the girlfriend's sister early in the evening of November 10, 2013, and ate dinner there, but left no later than about 6:15 P.M. without returning. Afterwards, the defendant went for a ride with friends to buy some marijuana and then returned to the friends' house, where he smoked with another friend in her second-floor apartment. On cross-examination, the defendant

expressly denied that he shot the victim, and stated that he had not seen the codefendant during that mid-November trip to Springfield. When confronted with the Commonwealth's video evidence, the defendant agreed that he was the individual appearing in some portions of the footage, where his distinctive "Sons of Anarchy" sweatshirt was visible, but denied that he was the individual appearing in other segments of the film, including one showing an individual in a dark puffy coat and possibly carrying something running toward the friends' house from the direction of the crime scene, within minutes of the 911 dispatch, and another showing the same individual coming around to the back of the building and up the stairs to the second floor. During cross-examination, defense counsel objected when the prosecutor asked the defendant why he had decided to testify at trial; the judge sustained the objection, and the defendant did not answer.

In closing, defense counsel emphasized the presumption of innocence and the prosecution's high burden of proof: he challenged the girlfriend's credibility, highlighting her absolute certainty that the codefendant's brother was the third man at the shooting, where police had conclusively ruled him out; called attention to the unexplained gaps and incorrect times reflected in the Commonwealth's video evidence; and condemned the "shoddy" nature of the police investigation,

conducted by officers whose testimony suggested narrow understandings of their respective assignments, as each had disclaimed responsibility for various investigative acts they described as "other officers' job." At times during closing argument, defense counsel invoked portions of the defendant's testimony, including his treatment of the Commonwealth's video evidence, and the defendant's account of his interactions and conversations with the driver, but counsel did not reference the defendant's express denials that he shot the victim or saw the codefendant during his time in Springfield. The jury acquitted the defendant of armed robbery, but found him guilty of murder in the first degree on all three theories, guilty of armed assault with the intent to rob, and guilty of unlawful possession of ammunition.

2. The defendant's allegations of infringements upon his constitutional rights by reason of his counsel's invocation of rule 3.3 (e) arose from the following events. After the Commonwealth rested its case, the judge ordered a recess to allow defense counsel to confer with the defendant concerning whether the defendant would testify. Once the judge returned to the bench, defense counsel requested to approach sidebar with the defendant present. Upon confirming defense counsel did not seek an ex parte sidebar, the judge asked all attorneys to approach, but not the defendant.

At sidebar, the defendant's counsel reported that the defendant had decided to testify. Defense counsel also revealed that, on the night before, he had had a lengthy telephone conversation with counsel for the Board of Bar Overseers concerning defense counsel's obligations under rule 3.3 (e) "involving supporting perjury." After referring the judge to this court's opinion in Commonwealth v. Mitchell, 438 Mass. 535, cert. denied, 539 U.S. 907 (2003), defense counsel announced his intention to invoke rule 3.3 (e) upon the judge's permission for the defendant to join at sidebar, and to seek subsequent instruction from the judge as to how to proceed. There was no objection.

With the judge's permission, the defendant approached sidebar, whereupon defense counsel stated, "I'm invoking Rule 3.3 of the Massachusetts Rules of Criminal [sic] Conduct," and then requested guidance from the judge. Defense counsel added: "I do know if he takes the stand, I can ask him that one question . . . . I have advised him as to what I'm supposed to advise him." The judge then turned to the defendant and asked if this was true. The defendant agreed that his counsel "told [him] what Rule 3.3 consists of" and responded "Yes" to the judge's follow-up inquiry whether he understood what counsel had told him.

The defendant returned to counsel table, and the attorneys remained at sidebar while the judge reviewed rule 3.3 (e) and the opinion in Mitchell. As the judge alternated between reading certain portions of these authorities and commenting aloud, defense counsel stated the following relevant information: prior to invoking rule 3.3, he had determined that withdrawing from representation would prejudice the defendant; he had been practicing law for thirty years, with about eighty-five percent of his total engagements being in criminal defense matters; and his conduct at sidebar was limited to "invoking the rule," and "not making any representations of anything and I'm not allowed to."[6] The judge instructed counsel "to follow the suggestions set forth in Mitchell and I will permit [the defendant] to give a narrative." The judge also expressly prohibited all attorneys from making any reference to the rule or the form of the defendant's testimony, either during cross-examination of the defendant or in closing argument. Against counsel's advice, the defendant took the witness stand in exercise of his right to be heard in his own defense.

---

[6] In the process of reviewing Commonwealth v. Mitchell, 438 Mass. 535, cert. denied, 539 U.S. 907 (2003), the judge stated: "when the question of perjured testimony from a defendant arises, [rule 3.3 (e)] requires the lawyer before invoking the rule to act in good faith and firm basis in objective fact. I gather you have done that?" Defense counsel responded: "I have followed my obligations under the rule and the caselaw."

Responding to defense counsel's single request to "tell the jury what you would like to talk to them about, please," the defendant testified in the form of a narrative.

The judge clearly instructed the jury, on several occasions, that determinations of fact and witness credibility were solely and entirely for them to decide.[7] In his charge to the jury, the judge explained that "[a]ttorneys have very grave responsibilities . . . to present evidence which is most helpful to their respective positions," and that objections or requests for sidebar conferences out of the jury's hearing were not to deprive the jury of relevant information, but rather to ensure they would only hear evidence that was relevant and "hear it in such a way that you are given a fair opportunity to evaluate its worth." The judge did not instruct the jury regarding the presentation of the defendant's testimony in narrative form.

Discussion. 1. As-applied constitutional challenges to Mass. R. Prof. C. 3.3 (e). Rule 3.3 (e) and related procedures this court approved in Mitchell, 438 Mass. 535, govern the

[7] Prior to closing argument, the judge instructed the jury that "[t]he attorneys are not permitted to express their personal belief in the credibility or lack of credibility of any witness who testified in this case," and that witness credibility determinations were only for the jury to decide. In his charge, the judge stated that if any juror believed that, at any point during the trial, he made any statement or ruling "suggesting how [he] felt the case was going or how the facts ought to be found, ignore it."

ethical and legal obligations of criminal defense counsel confronting anticipated client perjury.[8] The primary duty of a

---

[8] Rule 3.3 (e) states:

"In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed.

"(1) If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation.

"(2) If, in the course of representing a defendant prior to trial, the lawyer discovers this intention and is unable to persuade the client not to testify falsely, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying.

"(3) If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client

criminal defense attorney who "knows that the defendant, the client, intends to testify falsely," is "strongly to discourage" the client from executing that intent, "advising that such a course [of conduct] is unlawful, will have substantial adverse consequences, and should not be followed." Mass. R. Prof. C. 3.3 (e). Where defense counsel encounters this dilemma after commencement of trial, and counsel's persuasive efforts fail, rule 3.3 (e) prohibits counsel from "examin[ing] the client in such a manner as to elicit any testimony from the client the lawyer knows to be false," and from "argu[ing] the probative value of the false testimony in closing argument or in any other proceedings, including appeals." Mass. R. Prof. C. 3.3 (e) (3).

In Mitchell, we considered a defendant's consolidated appeal from his conviction on two counts of murder in the first degree and the denial of his subsequent motion for a new trial. The defendant in Mitchell alleged ineffective assistance of counsel along with an assortment of other constitutional rights violations purportedly arising from (1) defense counsel's sidebar invocation of rule 3.3 (e) during trial, in the defendant's absence, and without sufficient grounds to "know"

> the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals."

Mass. R. Prof. C. 3.3 (e), as appearing at 471 Mass. 1416 (2015).

the defendant "intend[ed] to testify falsely;" (2) the consequential restriction of the defendant's testimony to narrative form; and (3) the notable absence of any reference to that testimony during defense counsel's closing summation. We determined that the affidavit of counsel filed in connection with the defendant's new trial motion established counsel's "knowledge" of the defendant's intent to testify falsely prior to invoking rule 3.3 (e), where counsel had reached this conclusion "in good faith based on objective circumstances firmly rooted in fact," and that, while the defendant's absence from the sidebar conference was error, it was harmless beyond a reasonable doubt. Mitchell, 438 Mass. at 546, 548. We further held that (1) "[t]he narrative form of testimony was properly directed" and compliant with counsel's ethical obligations, id. at 549; (2) counsel's well-reasoned and persuasive closing argument did not "denude" his client of a defense by omitting reference to the defendant's testimony, id. at 550; and (3) no colloquy was required where the record supported the judge's determination that the defendant's waiver of counsel's assistance with respect to his own testimony was knowing and voluntary, id.[9]

[9] To the extent that the court in Mitchell suggested that direction of narrative testimony requires a defendant's limited waiver of the right to counsel's assistance, we clarify that where a trial judge implementing rule 3.3 (e) exercises

On appeal from his convictions, the defendant here raises several as-applied constitutional challenges to rule 3.3 (e) and to certain procedures we approved in Mitchell. The defendant argues that, following his decision to testify in his own defense, his trial proceeded in such a way that rule 3.3 (e) functioned to (1) compel defense counsel to both suspend his proper role as advocate and improperly usurp the jury's role as fact finder; (2) confine the form of the defendant's trial testimony to an uninterrupted narrative, without the benefit of counsel's direction; and (3) prevent counsel from deploying critical exculpatory portions of the defendant's testimony in closing argument. Insofar as rule 3.3 (e) was thus applied to constrain counsel's advocacy and restrict the presentation of the defendant's trial testimony, based only on defense counsel's "knowledge" of the defendant's intent to testify falsely, the defendant specifically contends that the rule was implemented in violation of his State and Federal constitutional rights to an impartial jury, a fair trial, and the due process of law, as well as his privilege against self-incrimination, right to

---

discretion to direct that a defendant's testimony take narrative form (should the defendant persist in the decision to testify falsely), this does not leave the defendant "unrepresented" during that testimony. Where the defendant decides to testify under these circumstances, that decision carries a rule-based relinquishment of the right to direct examination by counsel, which counsel is accordingly duty-bound to explain as part of the remonstration requirement.

testify in his own defense, and right to the assistance of counsel. The defendant further alleges that the judge permitted his functional waiver of all these critical rights without adequate prior determination that the defendant's action was both knowing and voluntary.[10]

Following discussion of the purposes that rule 3.3 (e) serves, we consider the defendant's contention that the manner in which defense counsel and the trial judge deployed rule 3.3 (e) and the Mitchell protocol here gave rise to errors of constitutional proportion. Upon comprehensive review of the entire record in the defendant's case, we discern no error, constitutional or otherwise. We conclude that defense counsel and the trial judge exercised appropriate discretion in selecting from among the range of procedures we authorized in Mitchell to meet the demands of rule 3.3 (e), without resultant violation of this defendant's Federal or State constitutional rights.

---

[10] The defendant expressly does not challenge the sufficiency of defense counsel's factual basis for invoking rule 3.3 (e) at trial or otherwise assert an ineffective assistance claim. No motion for a new trial followed the verdicts, and the record on appeal does not contain an affidavit of trial counsel. Although nothing in this ruling precludes the defendant from filing a motion for a new trial challenging the basis of counsel's knowledge determination that the defendant intended to commit perjury, no appeal from an order ruling on such motion may lie unless first allowed by a single justice of this court. See G. L. c. 278, § 33E (to be allowed, postrescript appeal must "present[] a new and substantial question").

We also take this opportunity to reexamine and reaffirm our conclusions in Mitchell, albeit with certain prospective emphases intended to clarify our rule 3.3 (e) doctrine, and confirm the availability of additional tools to defense counsel and trial judges to mitigate any derivative harshness that may otherwise inure to the defendant's detriment. These include (1) the ability to conduct direct testimony as to portions of the defendant's intended testimony other than what counsel "knows" to be false, where, in counsel's exercise of professional judgment, this will mitigate potential for prejudice; (2) the ability to marshal portions of the defendant's testimony other than those parts counsel "knows" to be false in support of closing argument, where, in counsel's exercise of professional judgment, it will mitigate potential for prejudice; (3) providing that the judge should conduct a sidebar colloquy with defense counsel, in the defendant's presence, following counsel's invocation of rule 3.3 (e); and (4) providing, absent the defendant's expressed preference to the contrary, that the judge shall instruct the jury that they may not derive any inference from or otherwise consider the form of any witness's testimony.

a. Purpose of rule 3.3 (e). The dimensions of the problem facing "defense counsel who knows that . . . [his or her] client . . . intends to testify falsely" at trial have not altered in

the seventeen years since we last assessed them, in Mitchell. Mass. R. Prof. C. 3.3 (e). Rule 3.3 (e) governs circumstances wherein a defense attorney's duties as a loyal advocate, "to present the client's case with persuasive force . . . while maintaining confidences of the client," collide with counsel's fundamental duty as an "officer" of the court, who "must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."[11] Mass. R. Prof. C. 3.3 comment 2. This intractable ethical dilemma strikes infrequently,[12] but the potential impact of how we define

[11] The solution this court reached in Commonwealth v. Moffett, 383 Mass. 201 (1981), sought to achieve a similar balance with respect to a defendant's right to counsel on appeal and counsel's ethical duty not to pursue frivolous legal arguments. Where the defendant seeks to direct his or her appellate defense in a manner that would violate counsel's ethical obligations, the defendant may elect to proceed without counsel's assistance in certain limited respects, while still retaining the benefits of that right with respect to the remainder of the defense.

[12] These circumstances arise infrequently at trial. A significant majority of criminal matters in this Commonwealth are resolved by entry of a guilty plea. With respect to those criminal matters resolved by verdict following trial, the majority of defendants who exercise the right to trial also choose not to testify. The majority of defense counsel representing defendants who decide to testify at trial are not faced with eve-of-trial or midtrial "knowledge" of the defendant's intent to testify falsely. When defense counsel does encounter those circumstances, we expect that, a majority of the time, "a sharp private warning" from defense counsel, Mitchell, 438 Mass. at 546, as is required under rule 3.3 (e), will be effective in dissuading the defendant from carrying out planned perjury, negating any need for counsel's formal invocation of rule 3.3 (e) and allowing counsel to call and

a defense attorney's proper response implicates foundational constitutional safeguards, professional standards, and institutional objectives. In other words, the integrity of our criminal justice system requires a sound established protocol.

The objective of rule 3.3 (e) is to promote the honest administration of criminal justice. In Mitchell, we recognized a "core principle of our judicial system that seeks to make a trial a search for truth." Mitchell, 438 Mass. at 551. See United States v. Havens, 446 U.S. 620, 626 (1980) ("There is no gainsaying that arriving at truth is a fundamental goal of our legal system"). Of course, "[t]ruth is only one of the ingredients of justice. Its whole is the satisfaction of those concerned" that a verdict is reached fairly. Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3, 12 (1951). Our construct of a fair trial embraces a defendant's individual right to answer to the State's charges, or, in the language of art. 12 of our Declaration of Rights, "to be fully heard in [one's] defense by [one]self or [one's] counsel, at [one's] election." Among other things, this right to present a defense encompasses a defendant's right to counsel and right to testify at trial.

---

question the defendant in the usual manner, without ethical reservation. See, e.g., Nix v. Whiteside, 475 U.S. 157, 161-162 (1986) (denying ineffective assistance claim arising from defense counsel's successful effort to convince his client not to testify falsely at trial).

The right to counsel is critical to secure a defendant's right to a fair trial. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975). See United States v. Cronic, 466 U.S. 648, 655 (1984) ("truth . . . is best discovered by powerful statements on both sides of the question" [citation omitted]). That foundational proposition tying partisan advocacy to just results demands an accused's access to defense counsel who projects "[t]he manifest appearance of a believer" in the defendant's chosen plea of "not guilty," Curtis, supra at 14, and delivers on the constitutional guaranty that a defendant "need not stand alone against the State at any stage of the prosecution . . . where counsel's absence might derogate from the accused's right to a fair trial," United States v. Wade, 388 U.S. 218, 226 (1967). See Penson v. Ohio, 488 U.S. 75, 84 (1988) ("Absent representation . . . it is unlikely that a criminal defendant will be able adequately to test the government's case"); Strickland v. Washington, 466 U.S. 668, 685 (1984) (Sixth Amendment to United States Constitution "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results"). "[E]ven when no theory of defense is available,

if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." Cronic, supra at 656 n.19. See Mass. R. Prof. C. 3.1 comment 3, as appearing in 471 Mass. 1414 (2015) (sanctioning defense counsel in "put[ting] the prosecution to its proof in all circumstances").

A defendant's right to testify is another of an accused's fundamental rights to ensure a fair trial. Where a represented defendant elects to answer the State's charge in his own voice, and present the fact finder with "his own version of events in his own words," Rock v. Arkansas, 483 U.S. 44, 52 (1987), he is entitled to take the stand and provide sworn testimony as a witness in his own behalf -- with counsel's direction enabling that testimony to proceed "in an organized, complete and coherent way," Ferguson v. Georgia, 365 U.S. 570, 591 (1961). Even where counsel advises against it, the final decision whether a defendant takes the stand belongs to the defendant.

Notably, this right to testify in one's own behalf, which we consider fundamental today, is of relatively recent vintage. At common law, defendants were disqualified from testifying at trial:

> "[T]he theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors."

Benson v. United States, 146 U.S. 325, 336 (1892) (diagnosing "[f]ear or perjury" as "the reason for the rule"). That practice prevailed in this Commonwealth, until 1866. See St. 1866, c. 260; Commonwealth v. Stewart, 255 Mass. 9, 16 (1926). To assuage the fears of those opposing change, the 1866 law "in relation to evidence in criminal prosecutions" rendered defendants competent to testify, but expressly prohibited "any presumption against the defendant" owing to "neglect or refusal to testify." See Ferguson, 365 U.S. at 578 (citing fear of "erosion of the privilege against self-incrimination and the presumption of innocence" to explain "lag" in legislation).

Experience under the new law soon gave rise to an understanding that permitting criminal defendants to testify at their sole election would be "equally serviceable for the protection of innocence" and "the detection of guilt." Id. at 581, quoting 1 Am. L. Rev. 396 (1867). The advent of witness competency statutes thus suggests increased communal trust in both the power of cross-examination to elicit truth, see 5 Wigmore, Evidence § 1367, at 32 (Chadbourn rev. 1974) (hailing cross-examination as "the greatest legal engine ever invented for the discovery of truth"), and the jury's ability to deploy collective common sense and life experience to judge credibility accurately, Commonwealth v. Woodward, 427 Mass. 659, 672 (1998). Subjecting the evidence to rigorous adversarial testing and

entrusting an impartial fact finder as the judge of credibility are critical components of a functioning adversary justice system.

The right to trial by a fair and impartial jury is a pillar of our democratic liberty and "a vital restraint on the penal authority of government," as much so as any of the constitutional rights that ensure the individual criminal defendant a fair opportunity to state a defense. Illinois v. Allen, 397 U.S. 337, 348 (1970) (Brennan, J., concurring). Nothing provides ballast for these procedural pillars other than the people's confidence in their legitimacy as means to produce accurate and fair settlement of social disputes. "The Constitution would protect none of us if it prevented the courts [and its officers] from acting to preserve the very processes that the Constitution itself prescribes." Id. at 350. Along those same lines, "the mere invocation of [a fundamental individual] right cannot automatically and invariably outweigh countervailing public interests." Taylor v. Illinois, 484 U.S. 400, 414 (1988).

Attorneys, including those who represent criminal defendants on trial, are officers of the court. In this Commonwealth, every attorney, as a statutory condition to licensure, swears an ancient oath to "do no falsehood, nor consent to the doing of any in court," and to "conduct [oneself]

in the office of an attorney within the courts according to the best of [one's] knowledge and discretion, and with all good fidelity as well to the courts as [one's] clients."[13] G. L. c. 221, § 38. A decision to elevate the standard of knowledge required to compel a defense attorney to disclose the defendant's intent to commit perjury, to inaccessible heights, would functionally tolerate the attorney's deliberate assistance of client perjury, compromising the integrity of jury verdicts and undermining public confidence in our system of justice.

While our system scrupulously safeguards an accused's individual rights, the Constitution does not relieve a defendant from compliance with "rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."[14] Chambers v. Mississippi, 410 U.S. 284,

---

[13] Although this oath was widely in use here by 1686, applicable law in what is now our Commonwealth continuously has required attorneys admitted to practice in the jurisdiction to swear the oath since 1701, with only minor linguistic variation. See Andrews, The Lawyer's Oath: Both Ancient and Modern, 22 Geo. J. Legal Ethics 3, 20 & n.77 (2009) (discussing history of oath).

[14] The United States Supreme Court also has expressly affirmed that "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410 (1988). Moreover, "adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case" are necessary for the adversary process to function effectively, and "[t]he State's interest in the orderly

302 (1973). To this we add that a defendant's exercise of the right to counsel's assistance does not secure representation outside the purview of our rules of professional conduct.[15] A defendant's right to testify (or present other evidence in his or her defense) is not a license to compel defense counsel to knowingly assist in eliciting false testimony or introducing other fabrications in evidence. See United States v. Grayson, 438 U.S. 41, 54 (1978) (describing attorney's ethical responsibility not to "assist his [or her] client in presenting what the attorney has reason to believe is false testimony" as "an important limitation on a defendant's right to the assistance of counsel").

It is well established that "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." United States v. Scheffer,

---

conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence. Id. at 411.

[15] Subsection (a) of Mass. R. Prof. C. 1.2, as appearing in 471 Mass. 1313 (2015), states that "[a] lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these Rules," and that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to . . . whether the client will testify." Subsection (d) of that rule states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."

523 U.S. 303, 308, 309 (1998) (upholding constitutionality of per se exclusion in Mil. R. Evid. 707 of any testimony or other evidence concerning polygraph test). See Taylor, 484 U.S. at 410 (holding preclusion of witness testimony appropriate sanction for discovery violation and not in violation of defendant's Sixth Amendment right to call witnesses in his defense); United States v. Nobles, 422 U.S. 225, 241 (1974) (noting "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system," in upholding exclusion of investigator's testimony where defense counsel refused to waive work product privilege respecting matters covered in testimony). Where rules excluding evidence from criminal trials altogether "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve,'" Scheffer, 523 U.S. at 308, quoting Rock, 483 U.S. at 56, surely rules restricting only the manner in which a party may present evidence, without restricting its content, must be governed by the same principle.

Neither the right to testify nor the right to counsel extends its protection to perjury. See Nix v. Whiteside, 475 U.S. 157, 173 (1986) ("the right to counsel includes no right to have a lawyer who will cooperate with planned perjury"); Harris v. New York, 401 U.S. 222, 225 (1971) ("Every criminal defendant

is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury"). The instant case presents the more difficult and important questions (i) whether the procedures we have established under rule 3.3 (e) and the Mitchell protocol are logically related to the important purposes we intend them to serve; and (ii) insofar as they may limit the defendant's opportunity to testify truthfully with direction from counsel, "whether the interests served by [our] rule justify the [possible] limitation imposed on the defendant's constitutional right[s]." Rock, 483 U.S. at 56. On reexamination, we are confident that rule 3.3 (e) and our procedures implementing it pass this test.

b. Role of narrative testimony. The dilemma of ethical response by a criminal defense attorney representing a client intent upon testifying falsely at trial has fueled decades of intense debate. The extensive discourse among academics and practitioners has generated more heat than light by returning to the same few suggested responses time and again. Each of these suggested responses comes with its own frailties.[16] We remain

[16] Both refusing to call the client to testify, and directing the testimony to prevent any opportunity for the defendant to communicate what counsel "knows" would be perjured testimony, risk preventing or substantially curtailing the content of the defendant's testimony. This is also true of specifically disclosing the intended perjury to the court, which

firm in our belief that the narrative approach permitted under rule 3.3 (e) is "the least worst" of these options.[17] The rule elects to follow the open narrative method, supported by procedural safeguards initiated by counsel's limited disclosure of an ethical concern to the court. The approach allows for the defendant to testify, albeit without counsel's direction or ability to use any "known" falsehood in closing argument. Where the defendant includes the known perjury in narrative testimony, "the lawyer shall call upon the client to rectify the false testimony" but, "if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal." Mass. R. Prof. C. 3.3 (e) (3). While not perfect, it is "the only method of effectuating both the right of the accused to testify and the duty of a defense lawyer not to assist in presenting known perjured testimony." 2 Restatement

---

carries yet a further drawback: revealing client confidences made to the attorney. Finally, conducting direct examination of the client in the normal course either requires or permits the attorney to pose a series of pointed questions deliberately guiding the defendant down the garden path of perjury.

[17] Separate statement of Andrew L. Kaufman, Report to the Justices of the Supreme Judicial Court of Its Committee on Rules of Professional Conduct (May 1996) ("There is no easy resolution to the many conflicting policies that at stake in this situation, and it may well be that the task is to select the least worst, rather than the best, solution").

(Third) of the Law Governing Lawyers § 120 comment i, at 240 (2000).[18]

The narrative method preserves the defendant's ability to exercise the right to testify despite the "known" risk of perjury.[19] Along with the intended falsehood known to the attorney, there may also be useful truth, and the opportunity to testify carries inherent value for the defendant who elects it. Inviting a narrative serves these ends without compromising

---

[18] Rule 3.3 of the American Bar Association's (ABA's) Model Rules of Professional Conduct, and the accompanying official comments, each as adopted in a majority of United States jurisdictions, suggest that the attorney confronting anticipated client perjury either refuse to call the defendant, when the lawyer knows the only testimony the client intends to give would be false; or, where there is testimony other than false testimony, examine the defendant only on those matters and not on the subject matter that would elicit the false testimony. See E.J. Bennett & H.W. Gunnarsson, Annotated Model Rules of Professional Conduct 362-363 (9th ed. 2019) (official comments 6 and 9). Further, the ABA approach also requires defense counsel to pursue "reasonable remedial measures" when counsel "knows" the client has perjured him- or herself at trial, including disclosing the perjury to the judge. See id. at 363-364 (official comments 10 and 11). With the possible exception of Maryland, it appears that no jurisdiction has adopted the suggestion that defense counsel not be required to make any disclosure, and proceed with direct examination and closing in the normal manner.

[19] "[P]erjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system." United States v. Alvarez, 567 U.S. 709, 720-721 (2012). Our system, however, hedges against the risk that judgment will be rendered on false premises by providing for rigorous cross-examination and reserving the task of distinguishing truth from falsity to the jury, as informed by their common sense and life experience.

public confidence in our adversary system, which could not withstand a regime allowing for officers of the court knowingly to participate in client perjury. We conclude that any risk that the "narrative option" as permitted under rule 3.3 (e) and the Mitchell protocol poses to the defendant's constitutional rights is both logically related and proportional to the ends we intend it to serve, specifically upholding the integrity of our adversary system of justice.

c. Application of rule 3.3 (e) in the present case. The procedures used to implement rule 3.3 (e) at the defendant's trial were proper. Indeed, defense counsel's prudent advance consultation with bar counsel and his conscientious presentation of the issue at sidebar exemplified conduct befitting a member of our profession. The trial judge carefully reviewed the text of the rule and our decision in Mitchell, and his rulings relative to the form of the defendant's testimony and counsel's performance did not constitute error.[20] Counsel properly ensured the defendant's presence at sidebar during his invocation of rule 3.3 (e), and deliberately tailored his trial practice to choose procedures from among the array of possibilities approved

[20] As the Commonwealth concedes, it was error for the prosecutor to ask the defendant why he had decided to testify. However, where defense counsel properly objected, the judge properly sustained the objection, and the jury were properly instructed not to speculate about or consider things not in evidence, the prosecutor's error is not reversible.

in Mitchell to suit the circumstances of the defendant's case.[21] Counsel did not "abandon" the defendant, but rather preserved the defendant's opportunity to share his version of events with the jury, in his own words. Counsel appropriately asserted several proper objections throughout the prosecutor's cross-examination of the defendant,[22] and opted to reference certain of the defendant's testimony in support of his closing argument,

---

[21] The defendant's brief on appeal claims that counsel's invocation of rule 3.3 (e) under the Mitchell protocol "requires a defendant to testify without the assistance of counsel by way of a narrative" (emphasis added). This assertion is incorrect for at least two important reasons. First, although the defendant's expressed election to exercise the right to testify (despite counsel's prior contrary advice and remonstration concerning the defendant's intent to testify falsely) is a prerequisite to counsel's sidebar invocation of rule 3.3 (e), that invocation by no means "requires" the defendant to stand by the earlier decision. Until the moment a defendant takes the stand and swears or affirms to tell the truth, he or she still may change his or her mind. Second, the invocation of rule 3.3 (e) is to be followed by a request for the judge to instruct counsel how to proceed. Directing any testimony by the defendant to take open narrative form is "acceptable," Mitchell, 438 Mass. at 552, but it is discretionary rather than mandatory. "The judge possesses considerable discretion to vary any of the procedures discussed [in Mitchell], if the interests of justice, or effective management of the trial so requires." Id. A mistrial may be in order if the defendant demonstrates that appointment of new counsel is required to prevent a miscarriage of justice. Alternatively, the defendant may be permitted to represent himself, with the benefit of standby counsel.

[22] Counsel's effective pretrial advocacy secured the prosecutor's stipulation to waiving use of the defendant's prior convictions, removing what may otherwise have presented a significant impediment to the defendant's credibility.

suggesting that the Commonwealth had not adequately met its burden to prove that the defendant was the shooter.

d. Mitchell protocol. i. Prerequisite standard of attorney knowledge. In Mitchell, 438 Mass. at 547, we held that before invoking rule 3.3 (e), counsel must have "a firm basis in objective fact for his [or her] good faith determination that the defendant intend[s] to commit perjury." We reaffirm that standard today. As we emphasized in Mitchell, this standard never was intended to set a low bar,[23] id. at 552, and what a defense lawyer "knows" for purposes of rule 3.3 (e) denotes "actual knowledge," in accord with the definition of "knowledge" now set forth in Mass. R. Prof. C. 1.0 (g), 471 Mass. 1305 (2015).[24] Id. at 544.

---

[23] "Conjecture or speculation that the defendant intends to testify falsely are not enough. Inconsistencies in the evidence or in the defendant's version of events are also not enough to trigger the rule, even though the inconsistencies, considered in light of the Commonwealth's proof, raise concerns in counsel's mind that the defendant is equivocating and is not an honest person. Similarly, the existence of strong physical and forensic evidence implicating the defendant would not be sufficient. Counsel can rely on facts made known to him [or her] and is under no duty to conduct an independent investigation." Mitchell, 438 Mass. at 552. See Mass. R. Prof. C. 3.3 comment 11B (adopting Mitchell's explanation of standard).

[24] In Mitchell, 438 Mass. at 544, we tacitly adopted the uncontroverted rationale of the Superior Court judge "that the rule does not define the term 'knows,' but the terminology section of the [ABA] Model Rules of Professional Conduct, on which rule 3.3 is based, states that the term 'knows' 'denotes

By way of clarification, the necessary knowledge is "actual" not in terms of the level of certainty with which it is held, but rather in the sense that it "does not include unknown information, even if a reasonable lawyer would have discovered [such information] through inquiry." Restatement of the Law Governing Lawyers § 120 comment c. In other words, a lawyer "knows" a client's intent based upon the "information [the attorney] possesses" already, without ignoring the obvious, but equally without further investigation. Mitchell, 438 Mass. at 546-547 ("The lawyer may act on the information he or she possesses, and we decline to impose an independent duty on the part of counsel to investigate because such a duty would be 'incompatible with the fiduciary nature of the attorney-client relationship'" [citation omitted]).

"Knowledge," as used in rule 3.3 (e), must be derived from "objective circumstances firmly rooted in fact," Mitchell, 438 Mass. at 546, as opposed to mere belief. Defense counsel who find themselves struggling to decide whether they have a "firm basis in objective fact" very likely do not. In making this decision, "a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client . . . [but] cannot ignore an obvious falsehood." Mass. R. Prof. C. 3.3

---

actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.'"

comment 8. It is only appropriate that the standard should be high. See Nix, 475 U.S. at 189 (Blackmun, J., concurring) ("Except in the rarest of cases, attorneys who adopt 'the role of the judge or jury to determine the facts,' pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment" [citations omitted]).

We decline to adopt the more rigid standard of "knowledge beyond a reasonable doubt," which we continue to believe "essentially would eviscerate rule 3.3 (e)" by setting a standard "virtually impossible to satisfy," Mitchell, 438 Mass. at 546, namely, "an abiding conviction, to . . . the highest degree of certainty possible in matters relating to human affairs." Commonwealth v. Russell, 470 Mass. 464, 477 (2015) (imposing revised mandatory jury instruction defining "beyond a reasonable doubt" standard). See, e.g., Doe v. Federal Grievance Comm'n, 847 F.2d 57, 63 (2d Cir. 1988) (interpreting "actual knowledge" standard to mean not that attorney must "wait until he has proof beyond a moral certainty," but rather that "he must clearly know, rather than suspect").

The concurrence would require defense counsel to initiate our rule 3.3 (e) protocol only when counsel knows "beyond a reasonable doubt" that the defendant intends to testify falsely. Noting that juries apply the "proof beyond a reasonable doubt" standard every day, the concurrence then asks, "[W]hy cannot

defense counsel do the same?" Post at . The question is an important one, to which the court in Mitchell provided an answer: defining defense counsel's duty of candor to the tribunal to require action only if counsel knows "beyond a reasonable doubt" that counsel's own client intends to lie under oath "essentially would eviscerate" rule 3.3 (e), leaving a hollow pretense. Mitchell, 438 Mass. at 546. The jury's role as impartial judges of the facts, who decide the case without fear or favor,[25] is a far cry from the role of defense counsel, who alone contests the State's ability to carry its weighty burden of proof, the defendant's sole shield against the

[25] A juror, in good faith, may see reasonable doubt where his or her fellow juror is convinced that no reasonable doubt exists. Indeed, when we charge a jury after they have declared themselves deadlocked, we instruct:

> "In conferring together, you ought to give proper respect to each other's opinions, and listen with an open mind to each other's arguments. Where there is disagreement, those jurors who are for acquittal should consider whether a doubt in their own minds is a reasonable one, if it makes no impression on the minds of other jurors who are equally honest, equally intelligent, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and who have taken the same oath as jurors. On the other hand, those jurors who are for conviction ought seriously to ask themselves whether they may not reasonably doubt the correctness of their judgment, if it is not shared by other members of the jury. They should ask themselves whether they should distrust the weight or adequacy of the evidence if it has failed to convince the minds of their fellow jurors."

Instruction 2.460 of the Criminal Model Jury Instructions for Use in the District Court (2020) ("When Jurors Cannot Agree").

potential "conviction and sentence depriving him of his life or his liberty." Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

No criminal defense attorney wants to disclose impending client perjury to the court. Defense counsel is the accused's partisan armor: a professional advocate charged with a duty to zealously represent the client. During trial, a criminal defense attorney is saddled with enormous responsibility and under enormous stress. With neither the support of eleven fellow jurors, nor the opportunity to deliberate collaboratively, and at length, about the conflicting testimony, a defense attorney facing midtrial anticipation of client perjury is "on the spot" -- alone. To protect the attorney-client relationship and minimize the risk of impinging upon a defendant's constitutional rights, the knowledge threshold embedded in rule 3.3 (e) must be high, but to protect the integrity of the trial, that standard must be viable. The standard this court reaffirms today is both. To instead require knowledge beyond a reasonable doubt would erect an impenetrable fortress to which even the most conscientious attorney safely may repair, rather than invoke rule 3.3 (e) and its accompanying potential to prejudice the client. And why not do so, if the rules of our profession permit? In the context of expected client perjury, imposing a standard of knowledge beyond a

reasonable doubt would, in practice, constitute no standard at all.

ii. Mitigating potential prejudice. Today, although we reaffirm our holding that the knowledge standard we established in Mitchell is in keeping with a defendant's constitutional rights, we remain concerned that when counsel invokes rule 3.3 (e), the judge and defense counsel deploy the narrative approach in such a way as to limit its necessary effect ensuring that counsel is neither compelled nor permitted to elicit known perjury, to protect the integrity of the verdict.[26] In service of that end, we emphasize the range of available options that counsel and the judge may deploy in the sound exercise of their discretion, and in taking into account the circumstances of a particular case, to mitigate any unfair prejudice to the defendant. See, e.g., Allen, 397 U.S. at 351 (Brennan, J., concurring) (upholding constitutionality of removing contumacious defendant from court room after warning, and observing: "it is not weakness to mitigate the disadvantages of his expulsion as far as . . . possible in the circumstances" by making efforts to keep him apprised of trial progress and providing means for communicating with attorney).

[26] We ask this court's standing advisory committee on the rules of professional conduct to amend the official comments to rule 3.3 to conform to our decision in Mitchell as reaffirmed in this opinion.

To the extent that counsel believes that such prejudice may be limited by presenting only what counsel "knows" to be the perjured portion of the direct testimony by way of a narrative, or by utilizing the "nonperjurious" parts of the defendant's intended testimony in argument, the discretion to deploy those options is available to counsel in conformity with attorney obligations of candor under rule 3.3 (e). Counsel should remain standing during the defendant's open narrative testimony, may object during cross-examination as appropriate and to the extent that such objection would not promote a known falsehood, and may conduct redirect examination as appropriate and to the extent that it does not elicit testimony the attorney knows to be false.

Further, unless the defendant requests its omission, the judge should provide a general jury instruction stating that the judge has the discretion to control the mode, order, and manner of the presentation of witness testimony throughout the trial, and that the jury may not derive any inference from the form of a witness's testimony or consider it in their deliberations.[27]

---

[27] We do not agree that it is a foregone conclusion that the narrative approach telegraphs a message to the jury that defense counsel does not believe the defendant. "Because the defendant in a criminal trial is not situated the same as other witnesses, it would not be illogical for a jury to assume that special rules apply to [a defendant's] testimony, including a right to testify in a narrative fashion." People v. Johnson, 62 Cal. App. 4th 608, 629, cert. denied, 525 U.S. 914 (1998).

Mass. G. Evid. § 611(a) (2020). The effect of any or all of these tactical choices depends upon the circumstances in a particular case. The decision regarding the jury instruction is a strategic one to be made by counsel, in consultation with the client. The matter should be addressed with the judge at the charge conference.

Counsel is put in a most difficult position during trial or on the eve of trial when presented with information providing a good faith basis in objective fact revealing the defendant's intent to commit perjury. The first and foremost ethical obligation of counsel, in service both to the court and to the client, is to advise strongly against it and exercise a genuine best effort to persuade the client to testify truthfully or otherwise reconsider the decision to testify at all. Mass. R. Prof. C. 3.3 (e) & comment 11C.[28] Counsel should also explain to

[28] This includes a full explanation to ensure the defendant understands the implications of perjured testimony on counsel's ethical duties under the rules of professional conduct, and the potential for certain associated consequences, specifically, the obligation of counsel to invoke rule 3.3 (e) at sidebar, effectively disclosing the attorney's knowledge of the intended perjury to the court and the prosecution; the court's possible direction of narrative testimony, meaning that counsel could neither conduct a full direct examination to assist and guide the defendant's testimony, to the extent it would elicit known perjury, nor argue the known perjured testimony in closing; and the possibility that the jury could draw a negative inference in the event that jurors notice the different form of the defendant's testimony and the absences in defense counsel's closing argument.

the defendant that perjury does not fall within the parameters of a defendant's rights to testify or to counsel's assistance. Finally, counsel should once again confirm the defendant's understanding that by exercising his right to testify (without first consenting to do so truthfully), he would lose both his right to have counsel elicit his testimony through directed questioning and the otherwise available opportunity for defense counsel to have all of the defendant's testimony available for use in presenting a closing argument to the jury due to rule 3.3 (e)'s constraints on counsel's conduct.

Where defense counsel invokes rule 3.3 (e) at sidebar during trial, the judge, before ruling that the defendant may only testify in narrative form, should conduct a colloquy with defense counsel, in the presence of the defendant, to ensure that defense counsel has fully explained the implications of the defendant's choice to exercise the right to testify in light of counsel's invocation of rule 3.3 (e).[29]

---

[29] The judge should pose the following questions to defense counsel:

> (1) Have you explained to the defendant your ethical obligation not to assist in the presentation of testimony or other evidence you know to be false?
>
> (2) Have you explained to the defendant that if he chooses to testify, you will not assist in examining him with respect to any of his testimony you know to be false?

2. Testimony of substitute medical examiner. By the time of trial, the medical examiner who had performed and prepared a written report of the victim's autopsy (original examiner) no longer worked for the Commonwealth and lived in North Carolina. Over the defendant's objections, the judge allowed a different medical examiner, who was not present for the victim's autopsy (substitute examiner), to provide an expert opinion on cause of death. On direct examination, the substitute examiner testified to the types, locations, and directionality of the wounds on the victim's body, based upon his independent review of the autopsy photographs.[30] The autopsy photographs showed eleven wounds from where bullets entered or exited from the victim's body,

---

(3) Have you explained to the defendant that if he chooses to testify, you may not argue to the jury any of his testimony that you know to be false?

(4) Have you explained to the defendant the default jury instruction that will be included in my charge in an attempt to mitigate any resulting prejudice, and that he has the option to have that instruction omitted?

After counsel's affirmative answer to each question, the judge should turn to the defendant for confirmation that counsel did in fact make such explanation, and that the defendant understood it.

[30] These photographs previously had been authenticated and admitted attendant to the earlier testimony of the photographer, who took them to document the autopsy in his then-assigned official capacity with the Springfield police department's photographic division. The judge admitted these photographs subject to the defense attorney's pending motion to strike most of them as unduly prejudicial, which the judge later allowed. Only four of them went to the jury.

supporting the substitute examiner's conclusion that the victim was shot at least seven times. Finally, results of a toxicology report from the autopsy ruled out alternative causes of death. Over defense counsel's objection, the substitute examiner then opined, to a reasonable degree of medical certainty, that "multiple gunshot wounds [to] the torso" caused the victim's death.

On appeal, the defendant challenges the substitute examiner's testimony under the Sixth Amendment and art. 12. Specifically, the defendant asserts violations of his witness confrontation rights arising from the judge's (1) failure to require proof that the original examiner was legally unavailable to testify before permitting the substitute examiner's testimony, and (2) evidentiary admission of the substitute examiner's expert opinion, informed by his review of the original examiner's autopsy report. Both of the defendant's arguments are unavailing, since we conclude that the substitute examiner did not testify to any statements from the original examiner's autopsy report that qualify as testimonial hearsay (with one potential, immaterial exception). Even if there were any testimonial hearsay included in the substitute expert's testimony, it would satisfy the "harmless beyond a reasonable doubt" standard applicable to preserved constitutional errors.

A judge's decision to allow a substitute examiner to testify at trial need not require a prior showing that the author of a victim's autopsy report is legally "unavailable" to testify in order to protect a defendant's witness confrontation rights. See Commonwealth v. Williams, 475 Mass. 705, 719 (2016); Commonwealth v. Reavis, 465 Mass. 875, 881 (2013). We decline the defendant's invitation to reconsider established precedent: allowing the Commonwealth to call the substitute examiner as a witness was not error.[31]

Nor did the judge run afoul of the defendant's witness confrontation rights upon the admission of the substitute examiner's expert opinion as to cause of death. A medical examiner who did not personally attend or supervise a victim's autopsy may nonetheless form a proper independent opinion on the victim's cause of death by reviewing another medical examiner's autopsy report and autopsy photographs. See Commonwealth v. Seino, 479 Mass. 463, 466-467 (2018), citing Reavis, 465 Mass. at 883. Although he need not have specified the opinion's basis, see Mass. G. Evid. § 705 (2020), the substitute examiner testified to personal review not only of the autopsy report, but

[31] The analysis applicable when a judge decides whether to allow an expert witness to testify does not differ where the expert is a substitute medical examiner. See Commonwealth v. Lanigan, 419 Mass. 15, 26 (1994) (detailing "gatekeeper" factors relevant to decision); Mass. G. Evid. § 702 (2020).

also of the autopsy photographs, certain apparel the victim was wearing when he was shot,[32] and certain of the victim's medical records. These were permissible foundations for his independent opinion on cause of death, see Commonwealth v. Markvart, 437 Mass. 331, 337 (2002), and the defendant had a meaningful opportunity to cross-examine the substitute expert about them.

Finally, with the possible exception of the toxicology report, none of the substitute medical examiner's direct testimony violated the confrontation clause because he did not implicate or rely upon statements made with a primary purpose of "creating an out-of-court substitute for trial testimony."[33] Commonwealth v. Wadsworth, 482 Mass. 454, 464 (2019), quoting Michigan v. Bryant, 562 U.S. 344, 358 (2011). Even if any of the substitute examiner's testimony were in violation of the confrontation clause, the error would have been harmless beyond a reasonable doubt where it was merely cumulative of other

---

[32] The substitute medical examiner testified that the locations of holes in clothing he examined matched up with the locations of the wounds on the victim's body. The victim's boots and photographs of the boots and other apparel were admitted in evidence.

[33] Whether a "toxicology report [of the victim] . . . constitutes testimonial hearsay" implicating the confrontation clause remains an open question. Commonwealth v. Montrond, 477 Mass. 127, 140 (2017) (Lowy, J., concurring), citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 n.1 (2009). Here, the results of the toxicology test demonstrated nothing unusual apart from a metabolite of marijuana (a byproduct of the body breaking down the drug, once ingested).

witness testimony proving that the victim died from multiple gunshot wounds, including from the trauma surgeon who operated on the victim at the time of his death; the testimony provided no detail as to the killer's identity or directly implicated the defendant in any way, and our review of the entire record supports the conclusion that it could not have affected the jury's verdicts. See Commonwealth v. Montrond, 477 Mass. 127, 138 (2017); Commonwealth v. Tyree, 455 Mass. 676, 701 (2010).

3. Ammunition seized from the codefendant's residence. Prior to trial, the defendant moved to exclude all evidence relating to firearms and ammunition seized from the basement of the codefendant's residence.[34] After hearing,[35] the judge allowed

[34] None of the firearms found at the codefendant's residence was consistent with the girlfriend's description of the murder weapon, which police never located.

[35] At the hearing, defendant's counsel argued that the challenged evidence would cause unfair prejudice against the defendant at a joint trial, because, unlike the codefendant, the defendant did not live at the codefendant's residence. Although defense counsel had also moved in limine for relief from prejudicial joinder under Mass. R. Crim. P. 9 (d), 378 Mass. 859 (1979), the grounds for that request concerned prior bad acts evidence unrelated to the evidence police seized from the codefendant's residence. To the extent the defendant now argues that undue prejudice arising from the ammunition evidence approached that level of compelling prejudice requiring severance, we disagree. That type of prejudice arises only in a case of "mutually antagonistic and irreconcilable" defenses, Commonwealth v. Moran, 387 Mass. 644, 659 (1982), as where each codefendant advances the other's guilt as a sole defense, see Commonwealth v. Siny Van Tran, 460 Mass. 535, 543 (2011), citing Moran, supra at 657-659. Although a trial judge retains discretion to order severance where it appears that joint trial

the motion in part, restricting the Commonwealth's admissible evidence solely to certain live rounds of ammunition (admissible ammunition) bearing the same manufacturer's markings as the cartridge casings recovered from the crime scene and the caliber of each of four projectiles removed from the victim's body and the single projectile and cartridge casings recovered at the crime scene. The judge later allowed the admissible ammunition to be marked as an exhibit at trial, over renewed objection.

On appeal, the defendant argues that the judge abused his discretion by failing to exclude the admissible ammunition from evidence at trial, because (i) forensic science could not conclusively verify that the ammunition used to shoot the victim came from the same stockpile of admissible ammunition later seized from the codefendant's basement, and (ii) its unfairly prejudicial effect outweighed any possible probative evidentiary value. We disagree. The judge properly characterized the admissible ammunition as relevant evidence, and any resultant prejudice did not rise to a level warranting its exclusion.

From among the numerous firearms and liberal assortment of ammunition seized from the codefendant's residence, the judge found only the admissible ammunition relevant, and excluded the

---

is "not in the best interests of justice," Mass. R. Crim. P. 9 (d) (1), the record is devoid of any basis for such a finding here, where the defendant and codefendant advanced entirely consistent trial defenses.

rest as irrelevant. That ruling did not require the support of conclusive forensic science. To qualify as "relevant," a piece of proffered evidence need not be sufficient to prove the entire case (or even an issue within the case).[36] See Commonwealth v. Tucker, 189 Mass. 457, 467 (1905) ("evidence having a tendency to prove a proposition is not inadmissible because it does not wholly prove the proposition").

The admissible ammunition, seized from the codefendant's basement, carried substantial probative value as to the defendant's participation in the shooting. Not only did its caliber match that of the bullets recovered from the victim's body and the bullet recovered from the crime scene, but its casings also bore the same manufacturer's markings as those recovered outside the residence where the defendant admitted he had eaten dinner on the evening of the shooting, and where the girlfriend testified that she recognized both the defendant and the codefendant as the individuals perpetrating the shooting, and the murder weapon as a sawed-off shotgun she had seen once before at the codefendant's residence. On cross-examination, the defendant also admitted to sending a text message directing the driver to pick him up at the codefendant's residence on the

[36] The sufficiency of evidence (required to satisfy a burden of production) is not the same as the admissibility of evidence. "A brick is not a wall." 1 McCormick on Evidence § 185, at 1114 (R.P. Mosteller ed., 8th ed. 2020).

night of the shooting. When the admissible ammunition is taken into account, the defendant's participation in the shooting is more probable than it otherwise would be without considering the admissible ammunition, because it connected him both to the codefendant, who the girlfriend also identified as a participant in the shooting at the crime scene, and to the codefendant's residence, where the girlfriend previously had seen the murder weapon and where the defendant asked to be picked up on the night of the shooting. Mass. G. Evid. § 401 (2020). See, e.g., Commonwealth v. Rosa, 468 Mass. 231, 237-238 (2014) (ammunition recovered from coventurer's bedroom not admitted in error where offered to prove defendant's participation in crime by linking him to coventurer, also identified at scene of crime). The jury are unlikely to have drawn any additional, impermissible inferences.

4. Double jeopardy. The defendant contends that his conviction of armed assault with the intent to rob is duplicative of his conviction of felony-murder with attempted armed robbery as the predicate felony. A conviction of a predicate felony may stand, however, where the jury find sufficient additional grounds for their verdict of murder in the first degree other than felony-murder. See Commonwealth v. Pennellatore, 392 Mass. 382, 390 (1984). Although a jury's finding of either (i) deliberate premeditation or (ii) extreme

atrocity or cruelty ensures the guilty verdict on a predicate felony is not duplicative, the jury here found both.

For the reasons stated, the defendant's convictions are affirmed. The record reveals no basis to support relief under G. L. c. 278, § 33E.

Judgments affirmed.

GANTS, C.J. (concurring, with whom Lenk and Budd, JJ., join). I agree with the court's revision of the protocol that defense counsel should apply under Mass. R. Prof. C. 3.3 (e), as appearing in 471 Mass. 1416 (2015), when he or she "knows" that his or her client intends to testify falsely. Ante at . I write separately, however, because I disagree with the court that a defense attorney should be required in a criminal case to reveal to the judge that the client will testify falsely, and trigger all the consequences arising from that revelation, when the attorney has "a firm basis in objective fact for his [or her] good faith determination that the defendant intend[s] to commit perjury" (second alteration original). Id. at , quoting Commonwealth v. Mitchell, 438 Mass. 535, 547, cert. denied, 539 U.S. 907 (2003). I would not require an attorney to make this disclosure unless the attorney knows beyond a reasonable doubt that the client intends to commit perjury.

As the court recognizes, ante at note 16, it is a devastating blow to a criminal defendant when the attorney who is retained or appointed to represent the defendant discloses to the judge presiding at the trial that his or her client intends to testify falsely; it effectively tells the judge not only that the attorney knows that the client is guilty of the crimes charged but that the attorney knows the client also intends to lie about it and commit the crime of perjury. It deprives the

defendant of the attorney's assistance in preparing to testify regarding the subject matter the attorney believes to be false, deprives the defendant of questioning by the attorney on direct examination designed to elicit that testimony, and deprives the defendant of the opportunity for defense counsel to present that testimony in closing argument.

I do not believe that an attorney should be required to do the functional equivalent of throwing his or her client under the bus unless the attorney knows that the client's testimony will be false beyond a reasonable doubt. Why should the legal standard requiring a defense attorney to "turn in" his or her client as a perjured witness be less than the legal standard a jury will use in determining the client's guilt?[1]

I am perplexed by the court's declaration that the standard of knowledge beyond a reasonable doubt "'essentially would eviscerate rule 3.3 (e)' by setting a standard 'virtually impossible to satisfy.'" Ante at , quoting Mitchell, 438 Mass. at 546. Juries apply that standard every day to find

[1] The court seeks to distinguish the role of the jury from the role of the defense attorney, describing defense counsel as "the defendant's sole shield against the potential 'conviction and sentence depriving him of his life or his liberty.'" Ante at , quoting Johnson v. Zerbst, 304 U.S. 458, 468 (1938). But it is precisely because of defense counsel's role as the defendant's "sole shield" that the standard for disclosing a client's anticipated perjury should be as high as the jury's standard for finding guilt.

defendants guilty; the reasonable doubt standard is high, but it is certainly not impossible to satisfy. And presumably any defense counsel adequately prepared for trial who decides to make this disclosure knows what evidence will be presented at trial, and is likely to have even more information than the jury because he or she will have the benefit of privileged communications with the client and the defense investigator's findings. If a jury can find proof beyond a reasonable doubt based on the evidence at trial, why cannot defense counsel do the same?

Moreover, knowledge beyond a reasonable doubt is a standard of certainty that any criminal defense counsel should understand. The same cannot be said for the court's standard of "a firm basis in objective fact." Ante at . In fact, the court struggles to define that standard and, when one looks closely at the court's explanation of the standard, it approximates the knowledge beyond a reasonable doubt standard. The court recognizes that "[i]t is only appropriate that the standard should be high." Id. at . "Inconsistencies in the evidence or in the defendant's version of events are . . . not enough to trigger the rule," and even "the existence of strong physical and forensic evidence implicating the defendant would not be sufficient." Id. at note 23. The court adds:

> "Defense counsel who find themselves struggling to decide whether they have a 'firm basis in objective fact' very likely do not. In making this decision, 'a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client . . . [but] cannot ignore an obvious falsehood."

Id. at , quoting Mass. R. Prof. C. 3.3 comment 8. If, under the "firm basis in objective fact" standard, an attorney is required to resolve any doubt as to whether the client intends to testify falsely in favor of the client, this certainly seems to require an attorney to have no reasonable doubt before he or she tells a judge that the client intends to commit perjury.

The court appears to contend, in essence, that if we established a reasonable doubt standard, no attorney would disclose a client's perjury but would instead shirk his or her duty under rule 3.3 (e) by conjuring a reasonable doubt in order to avoid the consequences to the client of disclosure. See ante at . This assumption, that defense attorneys will not abide by their ethical obligations to the court when hard decisions have to be made, is unfair to the defense bar. It is also a poor reason to reject a reasonable doubt standard, especially where the standard as articulated by the court is effectively a reasonable doubt standard by another name.