SJC-12504

COMMONWEALTH vs. DENNIS ROSA-ROMAN.

Hampden. January 10, 2020. - September 8, 2020.

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

Homicide. Constitutional Law, Admissions and confessions, Waiver of constitutional rights, Voluntariness of statement, Jury, Fair trial. Due Process of Law, Police custody, Examination of jurors, Fair trial. Fair Trial. Evidence, Admissions and confessions, Voluntariness of statement, Third-party culprit, Relevancy and materiality. Jury and Jurors. Practice, Criminal, Admissions and confessions, Voluntariness of statement, Jury and jurors, Empanelment of jury, Challenge to jurors, Examination of jurors, Fair trial, Assistance of counsel, Instructions to jury, Capital case.

Indictment found and returned in the Superior Court Department on March 27, 2014.

A pretrial motion to suppress evidence was heard by Edward J. McDonough, Jr., J.; and the case was tried before Mark D. Mason, J.

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

CYPHER, J. The defendant, Dennis Rosa-Roman, was convicted by a jury of murder in the first degree, G. L. c. 265, § 1, for stabbing to death the victim, Amanda Plasse, in her apartment. He was convicted on theories of both deliberate premeditation and extreme atrocity or cruelty. The defendant appeals from his conviction on the grounds that his statements to police should have been suppressed after his Miranda rights were violated and that the trial judge erred by ruling against him on two juror challenges pursuant to Commonwealth v. Soares, 377 Mass. 461, 491, cert. denied, 444 U.S. 881 (1979); by excluding third-party culprit evidence; by denying the defendant's motion to strike the prosecutor's opening statement; by striking a portion of the defendant's opening statement; and by declining to instruct the jury in accordance with Commonwealth v. Reid, 29 Mass. App. Ct. 537 (1990), prejudicing the verdict. After careful consideration of the record and the defendant's arguments, we affirm the defendant's conviction, and we decline to grant extraordinary relief pursuant to G. L. c. 278, § 33E.

Background. We summarize the facts that the jury could have found at trial, leaving the recitation of other facts for discussion in connection with the issues raised on appeal.

On August 26, 2011, the victim was found stabbed to death in her apartment in Chicopee. The victim had sustained multiple blunt force injuries to her face, head, and shoulders. She had

scrapes and sharp force injuries to her face, neck, chest, and abdomen, including six stab wounds and two slashes to her neck from chin to collar bone.

During the two-year investigation that followed, police received information from the victim's friends, family, and acquaintances. In 2013, while reviewing the case file, State police Trooper Ronald Gibbons noticed a dry-erase board in a photograph of the victim's bedroom. Written on the board were the words, "Dennis was here," with a date of "8/11/11." Gibbons performed a search for people named Dennis who lived near the victim. He found the defendant, who lived in nearby Westfield, and whose telephone number appeared in the victim's telephone records.

On October 29, 2013, police approached the defendant and told him that they wanted to speak to him about a woman named Amanda from Chicopee. The defendant confirmed that he knew the victim because he had sold marijuana to her. At some point, the defendant told Gibbons that he had to leave and asked Gibbons for a telephone number so he could call Gibbons the following week. The defendant discarded the cigarette he had been smoking, and Gibbons retrieved it for deoxyribonucleic acid (DNA) testing.

That same day, the defendant and his girlfriend went to the home of Melissa Hoy. The defendant told Hoy about his encounter

with police. Hoy asked the defendant whether the investigation concerned the victim, and the defendant stated that he did not know. Hoy showed the defendant a picture of the victim on her telephone, and the defendant "got really quiet" and "put his head down." He admitted that he knew her and that he sold her marijuana occasionally. That night, the defendant returned to Hoy's home and apologized for lying to Hoy and his girlfriend. The defendant then told them that he had gone to the victim's home to deliver marijuana, and an unknown white male opened the victim's door, grabbed the bag of marijuana out of the defendant's hand, and told him to leave and not to return.

In addition to these statements and additional statements made by the defendant over the course of multiple police interviews, the Commonwealth introduced forensic evidence. DNA evidence recovered from underneath the victim's fingernails on both hands matched the Y-chromosome short tandem repeat DNA testing method profile of the defendant and his patrilineal male relatives. The defendant's right palm print was found on a broken window near the door of the victim's apartment. Bloody shoe prints were found on the right side of the victim's body that corresponded with a size seven of a certain brand of sneaker. During the defendant's first interview at the police station, he was wearing sneakers similar to those matching the prints found on the victim, and police later recovered two pairs

of the same size and brand of sneaker from a bedroom closet in the defendant's residence.

Discussion. 1. Motion to suppress statements. Police spoke with the defendant outside his home on October 29, 2013; at the Westfield police station on November 1 (first interview); in Westfield again on November 5 (second interview); and at the Chicopee police station on November 5 (third interview. Before trial, the defendant filed a motion to suppress all statements he made after he allegedly invoked his Miranda rights during the second interview. After a three-day evidentiary hearing, during which two officers testified, a Superior Court judge (motion judge) granted in part the defendant's motion with respect to certain statements that the defendant made during booking at Westfield. The motion judge denied the defendant's motion as to all other statements. We affirm the motion judge's order. Because the defendant alleges multiple constitutional violations throughout a series of interviews, we discuss each allegation chronologically.

a. Standard of review. "In reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error, 'but conduct an independent review of his ultimate findings and conclusions of law.'" Commonwealth v. White, 475 Mass. 583, 587 (2016), quoting Commonwealth v. Hernandez, 473 Mass. 379, 382-383 (2015). However, "an

appellate court may independently review documentary evidence, and [the] lower court findings drawn from such evidence are not entitled to deference." Commonwealth v. Tremblay, 480 Mass. 645, 654-655 (2018). "The case is to be decided upon the entire evidence, however, giving due weight to the judge's findings that are entitled to deference" (quotations and citation omitted). Id. at 655. Ultimately, this court will "make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found" (citation omitted). Hernandez, supra at 383.

The following facts are derived from the motion judge's findings, and these facts are supplemented, as relevant, with statements drawn from the video exhibits in evidence.

b. November 1 Westfield interview. On November 1, 2013, three days after police first spoke with the defendant at his home, the defendant telephoned Gibbons and told him that he had to speak with him immediately. The defendant agreed to meet with Gibbons that day in Westfield. Gibbons, Trooper Gary Fitzgerald, and Sergeant Eric Watson of the Chicopee police department met with the defendant in an interview room. The defendant was advised of and waived his Miranda rights. The defendant does not contest the validity of this particular waiver.

During this interview, the defendant told officers that he had met the victim one or two weeks before her murder. On the day of the murder, according to the defendant, the victim called him to ask for marijuana. When the defendant approached the victim's back door, he could hear a male voice arguing with the victim. The defendant knocked on the door, and an unknown male answered the door and took the marijuana from him. The defendant told police that he feared for his life because of this unknown male and that the male had been following him in different cars. He asked for police protection.

The defendant claimed that he had never been inside the victim's apartment, and he identified a friend who was with him on the day he had gone to the apartment. According to the defendant, he had been hanging out with this friend, the friend waited in front of the home while the defendant went around the back, and the two left together on foot after the defendant's encounter with the man at the victim's door.

Gibbons asked the defendant if they could collect a DNA sample, and the defendant readily agreed, stating, "Didn't you guys take a cigarette off me, anyways? . . . I know you're investigating me, no matter what."[1] At the end of the interview,

[1] The quoted portions of the defendant's interviews are as reflected in the transcripts. Reviewing the video recordings revealed minor discrepancies that are not material.

Gibbons read the defendant his statement, which the defendant signed.

The defendant does not allege that his constitutional rights were violated in any way during the course of this first interview, and we conclude that there was no violation.

c. November 5 at Westfield police station. On November 5, 2013, Gibbons and other officers approached the defendant at his home and requested another interview. Officers wanted to follow up on statements that the defendant had made during his first interview. The defendant stated that he was willing to speak with officers, but that he was currently babysitting his girlfriend's child. Gibbons offered to have another officer watch the child at the station, and the defendant agreed to the arrangement.

Once in the interview room, Gibbons read the Miranda warnings to the defendant, which the defendant waived.[2] At the start of the interview, the defendant was friendly with the officers, laughing with them before expressing concern that his girlfriend may be angry if she found out that he had brought her child to the police station.

[2] The motion judge found that the defendant freely and willingly waived those rights and was eager to participate in the interview. After viewing the recorded interview, we agree.

Throughout the interview, as the motion judge noted, the defendant repeatedly expressed a desire to assist the detectives with their investigation. The defendant said, "This is terrible. You guys need help"; "I gotta help you guys out. You know what I'm saying"; "You need people to help. . . . I can understand that, and I'm one of those people"; and "You got questions for me man." The defendant made several statements indicating his desire to get home before his girlfriend returned from work, first saying, "I just have to hurry up. My girl is gonna be out soon" and later saying, "I need to go soon. Like, we need to wrap this up"; "My girl is about to be home soon"; and "Guys, my girl is getting out soon. I have the house keys and her phone, you know? . . . I'm trying to wrap this up and help you guys as much as I can."[3]

The defendant acknowledged that he brought the victim marijuana on multiple occasions and that on one occasion, the defendant, his girlfriend, and the victim spoke on the victim's back porch.

Gibbons showed the defendant a picture of a dry-erase board located in the victim's bedroom with the phrase, "Dennis was here" written on it. Although the defendant previously had denied being inside the victim's apartment, he admitted that he

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[3] The defendant does not allege that any of these statements were attempts to invoke his Miranda rights.

had stepped inside to sign the dry-erase board, but explained that the board was located by the back door and that her bedroom did not look the way it was pictured in the photograph at the time. In response, Watson asked, "How do you know this room didn't look like this?" and the defendant answered, "All I seen was a bed in her room. That's about it."

Gibbons asked the defendant if he had ever smoked marijuana with the victim inside the apartment, and the defendant admitted that he "lit" a "bowl" in the kitchen, "placed the lighter on the counter," and "sat on the couch." Finally, the defendant stated, "Well, I have been inside her house. But, like, I just don't want people to look at me like I'm a fucking murderer." He then said, "I seen that shit go down. I heard that shit. And . . . I'm scared."

When Gibbons informed the defendant that they did "a lot of processing" on the scene, the defendant stated that his fingerprints might be on a glass cup, the table, and a doorknob. The defendant then asked, "What did you guys find? I wanna know." Gibbons informed the defendant that they found "some things" underneath the victim's fingernails, and asked the defendant if he ever had a fight with the victim or a "scuffle," to which the defendant replied, "No."

Watson informed the defendant that they tried to locate the friend that the defendant had identified as being with him on

the day of the murder but that this friend was in jail on that day. The defendant emphatically stated that this was impossible.

Gibbons again showed the defendant a picture of the dry-erase board in the victim's bedroom and asked if the defendant had written anything besides his name on that board. In response, the defendant said, "No. I want to know what's going on. You guys trying to pin this on me? You guys trying to what? What's up? 'Cuz I don't have no time here. I gotta go." Gibbons explained, "We're still investigating," to which the defendant stated, "But like, I wanna know, like this shit ain't cool. Like, you guys are asking me a bunch of shit. . . . You need people to help."

i. First alleged invocation -- Miranda rights. The defendant argues that he invoked his right to silence during the second interview when he said, "I want to know what's going on. You guys trying to pin this on me? You guys trying to what? What's up? 'Cuz I don't have no time here. I gotta go." The motion judge, however, disagreed.

First, the motion judge found that the defendant was not in custody at the time of this statement. He credited Gibbons's testimony that it was only when officers learned that the defendant's DNA was found underneath the victim's fingernails, which happened much later in the interview, that the defendant

was no longer free to leave.[4] Second, the motion judge stated that even if the defendant had been in custody for the entire interview, the defendant properly was advised of his rights at the start of the interview, and he freely and willingly waived those rights. Finally, the motion judge concluded that this statement did not "express[] clear, unequivocal unwillingness to continue with the interview." We agree.

When a suspect is not in custody, and therefore not subject to custodial interrogation, he has "no right of silence to invoke." Commonwealth v. Durand, 475 Mass. 657, 665 (2016), cert. denied, 138 S. Ct. 259 (2017). The defendant bears the burden of proving that he was in custody. Commonwealth v. Almonte, 444 Mass. 511, 517, cert. denied, 546 U.S. 1040 (2005), abrogated on other grounds by Commonwealth v. Carlino, 449 Mass. 71, 79-80 (2007). "An interview is custodial where a reasonable person in the suspect's shoes would experience the environment in which the interrogation took place as coercive" (quotation and citation omitted). Commonwealth v. Cawthron, 479 Mass. 612, 617 (2018). "Four factors are considered in determining whether a person is in custody: (1) the place of the interrogation; (2) whether the officers have conveyed to the person being

[4] The defendant himself did not think he was in custody, as approximately ten minutes later, he asked, "You got questions for me, man? Are you gonna drop me off?"

questioned any belief or opinion that that person is a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and (4) whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest." Commonwealth v. Amaral, 482 Mass. 496, 501 (2019), quoting Commonwealth v. Groome, 435 Mass. 201, 211-212 (2001). A judge must "consider[] the above factors in total." Amaral, supra at 502. See Commonwealth v. Medina, 485 Mass. 296, 301 (2020) (Groome factors "provide a framework for assessing what kinds of circumstances may be relevant when a court considers whether a defendant was in custody; they do not limit the obligation of a court to consider all of the circumstances that shed light on the custody analysis").

No one factor is dispositive, and questioning that occurs at a police station is not necessarily custodial interrogation. See Commonwealth v. Libby, 472 Mass. 37, 46 (2015); Almonte, 444 Mass. at 518; Commonwealth v. Sparks, 433 Mass. 654, 657 (2001). For example, a defendant arriving voluntarily at a police station would suggest that an interrogation there is noncustodial. See Amaral, 482 Mass. at 501; Almonte, supra;

Sparks, supra at 656; Commonwealth v. Smith, 426 Mass. 76, 80-81 (1997), S.C., 460 Mass. 318 (2011). This may be true even where a suspect agrees to a police request to go to a police station for questioning. Commonwealth v. Morse, 427 Mass. 117, 118-119 (1998). Where interrogating officers are focusing their investigation on a suspect, that suspect may not be subject to custodial interrogation if the general demeanor of the exchange is "explanatory rather than accusatory" (citation omitted). Libby, supra at 46. The subjective suspicion of interrogating officers is relevant to the custody analysis "only to the extent that an officer's suspicions influence the objective conditions of an interrogation, such that a reasonable person in the position of [the suspect] would not feel free to leave the place of questioning" (citation omitted). Id. See Medina, 485 Mass. at 302-306 (defendant not in custody based on assessment of over-all nature of interaction with police).

In Amaral, 482 Mass. at 501-502, we agreed with the motion judge that the defendant was not in custody during an interrogation at a police station that ultimately ended in his arrest because (1) he had gone to the station voluntarily; (2) the interrogating officers had not conveyed to the defendant that he was a suspect or revealed that they had incriminating evidence against him; (3) the exchange was "calm and cordial . . . and the defendant heavily influenced [the interview's]

direction"; and (4) until the point of his arrest, the defendant had never been told he was in custody and indicated that he felt free to leave by calling his mother to make dinner plans.

Here, the motion judge's finding that the defendant was not in custody at this point during the second interview was not clearly erroneous. There is ample evidence in the record to support such a conclusion. Specifically, the motion judge credited Gibbons's testimony that (1) the defendant voluntarily agreed to speak with police at the station after Gibbons requested a second interview; (2) Gibbons testified that he and other officers would have honored the defendant's refusal in the event that he declined their request; (3) the defendant told Gibbons that he wanted to help with the case; (4) the defendant was not under arrest; (5) the room in which the interview was held was the same room used during the November 1 interview, for which the defendant does not claim he was in custody; (6) the tone of the interview was cordial and respectful, punctuated with several statements by the defendant expressing his willingness to assist the detectives; and (7) the defendant was eager to gather information related to the officers' investigation.

As in Amaral, the defendant went to the station voluntarily, and until the point of his arrest, interrogating officers had not conveyed to the defendant that he was a suspect

or revealed that they had incriminating evidence against him. The exchange was cordial and respectful, and the defendant indicated that he felt free to leave by his numerous requests to hasten the interview so he could return home before his girlfriend arrived. These factors, viewed together, support the motion judge's conclusion that the defendant was not in custody during the Westfield interrogation on November 5.

Assuming arguendo, however, that the defendant was in custody, we also conclude that the motion judge did not err in finding that the defendant did not express a clear, unequivocal unwillingness to continue with the interview when he stated, "You guys trying to what? What's up? 'Cuz I don't have no time here. I gotta go." The responsibility for invoking the rights to silence and counsel after having waived them "rests squarely in the hands of criminal defendants" (citation omitted). Durand, 475 Mass. at 665. "Whether invocation of the right is clear and unequivocal is to be determined by the totality of the circumstances." Commonwealth v. Leahy, 445 Mass. 481, 488 (2005).

In this case, considering the defendant's statement, "You guys trying to what? What's up? I don't have no time here. I gotta go," in the context of the entire exchange, such statement reasonably could easily have been perceived as a desire to speed the interview along because he was babysitting his girlfriend's

young child, and not as an expression of unwillingness to continue. He indeed had made numerous statements during the interview, as outlined supra, about needing to "hurry up" or leave "soon" to return home to his girlfriend. Further, the defendant made several statements both before and after the alleged invocation indicating a desire to help the officers with their investigation and seeking to obtain information for himself. In fact, after the first alleged invocation of the right to remain silent, the defendant continued to speak with police for nearly an hour, repeatedly telling them that he wanted to help them catch the murderer.[5] In the context of the entire interview, this statement does not even rise to the level of an ambiguous invocation.

ii. Second alleged invocation -- right to counsel. After the defendant stated, "I gotta go," the interview continued. Gibbons asked the defendant why he thought the victim might have been killed, and the defendant speculated that the victim owed someone money or stole drugs from someone and "maybe a fucking dealer . . . got mad at her or something." Because the defendant previously had told police that the victim had called him on that day to get marijuana, Watson told the defendant that

[5] At one point he told police, "I wish I could give you more." Later, he stated that he wanted to "help you guys as much as I can."

they had searched the victim's telephone records and there was no record of a telephone call to him on that day. The defendant told officers that he "smoked so much" marijuana that he did not "remember a lot of things" and was not sure if he had his days mixed up.

Nearly two hours into the interview, Gibbons stepped out of the room for approximately nine minutes, during which time he learned for the first time that police had DNA implicating the defendant. When Gibbons returned, he told the defendant that they had physical evidence implicating him, and Watson informed the defendant that they had found DNA connecting him to the victim underneath her fingernails. In response, the defendant stated, "I know the fucking murderer and I tried to save her life." Gibbons asked, "What did you do?" The defendant explained, "I tried to grab her and the guy tossed me down the stairs. I can't give you no more. I'm sorry. That's it." Then the defendant said, "I want a lawyer. I want a lawyer. . . . That is it." The officers immediately ceased questioning, ended the interview, and arrested the defendant.

iii. Defendant makes spontaneous statement to police during booking in Westfield. Moments later, as Gibbons and the defendant proceeded to the booking area at the Westfield police station, but before they entered the booking room and turned on the video equipment, the defendant stated, unprompted, that his

DNA was underneath the victim's fingernails because the defendant was pulled into the victim's apartment during the attack and the victim grabbed him.[6]

iv. Questioning defendant during Westfield booking. The defendant repeatedly interrupted the booking process to tell police that they had arrested the wrong person and that his family was now in danger. Detective Todd Edwards, who overheard the defendant's unprompted statements and was unaware that the defendant had invoked his right to counsel,[7] asked the defendant if the victim had grabbed him. In response, the defendant answered that he tried to grab the victim, but the victim had grabbed him, and he apologized for not trying to save her.

The motion judge found that in this instance police did not scrupulously observe the defendant's invocation of the right to counsel, and he correctly suppressed the defendant's statements that were made in response to the officer's questioning. The defendant alleges no error here, and we agree that the defendant's responses to Edwards were found properly to be inadmissible at trial. See Edwards v. Arizona, 451 U.S. 477,

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[6] Gibbons testified about this encounter at the motion to suppress hearing.

[7] The motion judge notes that there was no indication that Edwards was present during the Westfield interview. Gibbons testified that Edwards was not present during the interview nor was he watching the interview from the detective bureau.

481-482 (1981) (once defendant invokes right to counsel, all questioning must cease); Commonwealth v. Sarourt Nom, 426 Mass. 152, 157 (1997) ("before police may recommence interrogation in these circumstances, they must first obtain from the suspect a voluntary, knowing, intelligent waiver").

d. Chicopee interview. Shortly after being booked in Westfield, the defendant was transported to the Chicopee police station. The transporting officer, David Gagnon, testified that there was no conversation during the transport except when the defendant asked if he could stop at his girlfriend's house to tell her that he loved her. In Chicopee, the defendant was again advised of his Miranda rights. The defendant was booked and taken to a holding cell until another trooper was ready to take the defendant's "major case" prints.[8] When the print setup was complete, Gibbons walked the defendant to the interview room to take his prints. At this point, the defendant reinitiated conversation with Gibbons, stating that he wanted to clear his name.

The defendant was then informed of his Miranda rights for a second time at the Chicopee police station. He waived those rights and provided police with a third version of events. He

[8] "Major case" prints comprise the entire hand, including the palm, and require a more extensive equipment setup than what is required for the collection of just fingerprints.

said that he had gone to the victim's apartment that day to hang out with her, they smoked marijuana, and he was at her apartment for about two hours. She told him to come back later to smoke more. He admitted that he was not with his friend and that he had lied about his friend's presence at the apartment because he hated the friend and wanted to get him in trouble.

As he approached the apartment, he could hear the victim screaming, "Stop, stop, stop, stop. This isn't right. Stop, stop, stop." When he heard something slam and the sound of glass breaking, he pushed inside the door and entered the house, where he found the assailant and the victim in the kitchen. The assailant was on top of the victim. The defendant tried to separate them when the assailant pushed him back and brandished a knife. The defendant said that the victim grabbed him when he tried to help her off the floor. The defendant fought with the assailant and eventually was punched in the jaw repeatedly before fleeing out the door.

The defendant told police that he had lied to them about what had happened because he feared for his safety and the safety of his family. Gibbons tried to get the defendant to identify the third man, and the defendant responded, "I can't say nothing. I really can't. I hold to my word, I can't say nothing." Gibbons asked, "Hold your word to who?" and said, "You're going to jail, though." The defendant then said, "I

know I'm going to jail, so I'm not saying no more. So, I'm sorry, you have to charge me with this shit. I'm done. You can try this shit, but I'm done." The defendant continued to speak with police, revealing that the victim owed him money for drugs, the killer was the defendant's drug dealer, and the defendant went to the victim's apartment with his dealer to get paid. He also stated that after the violent attack, he looked down at the victim's body and thought to himself, "Wow, how do I get myself out of this?"

The defendant asserts two bases on which statements made during the Chicopee interview should be suppressed. He argues, first, that the entirety of the interview was tainted by the Edwards violation during the Westfield booking. Edwards, 451 U.S. at 481-482. In the alternative, the defendant argues that, if the taint of the prior Edwards violation was removed, he invoked his right to silence during the interview when he stated, "I know I'm going to jail, so I'm not saying no more. So, I'm sorry, you have to charge me with this shit. I'm done. You can try this shit, but I'm done."

i. Taint of the Edwards violation. "In this Commonwealth, there is a presumption that a statement made following the violation of a suspect's Miranda rights is tainted. . . . [The] presumption may be overcome by showing that either: (1) after the illegally obtained statement, there was a break in the

stream of events that sufficiently insulated the post-Miranda statement from the tainted one; or (2) the illegally obtained statement did not incriminate the defendant, or, as it is more colloquially put, the cat was not out of the bag" (quotation and citation omitted). Tremblay, 480 Mass. at 658 n.9. The second prong of the analysis asks whether, in giving the statements in Chicopee, "the defendant was motivated by the belief that, after a prior coerced statement, his effort to withhold further information would be futile and he had nothing to lose by repetition or amplification of the earlier statements" (emphasis added). Commonwealth v. Thomas, 469 Mass. 531, 552 (2014).

The motion judge held, and the Commonwealth agrees, that the presumption of taint created by the prior Edwards violation was overcome both by a sufficient break in the stream of events and because the proverbial cat was not yet out of the bag. We agree with the motion judge's analysis under both prongs.

We recognize that where police illegally have obtained a statement from a suspect, "a subsequent statement may be the product of the initial coercion even where the suspect knowingly and voluntarily waives [his] right to silence and to counsel, if the custodial interrogation was essentially continuous or if the suspect believes that it would be futile to invoke [his] rights because [he] incriminated [himself] in the first statement." Thomas, 469 Mass. at 551. However, "'[i]f the defendant's

subsequent statements were not a product of coercion, either by coercive external forces or primarily by a sense of futility that he has already incriminated himself with the first statement,' then suppression of the subsequent statement is not required." Id., quoting Commonwealth v. Prater, 420 Mass. 569, 581 (1995).

The defendant reinitiated conversation with Gibbons by making a spontaneous statement after he was booked in Chicopee. See United States v. Henry, 447 U.S. 264, 276 (1980) (Powell, J., concurring) ("Massiah [v. United States, 430 U.S. 201, 206 (1964),] does not prohibit the introduction of spontaneous statements that are not elicited by governmental action"); Commonwealth v. Howard, 469 Mass. 721, 727 (2014), S.C., 479 Mass. 52 (2018) (defendant's statements made at time of arrest, transport, and booking "were spontaneous and not obtained through police questioning, and . . . therefore Miranda protections did not apply"); United States v. Conley, 156 F.3d 78, 83 (1st Cir. 1998) ("Edwards does not bar the introduction into evidence of spontaneous utterances merely because the utterances occur subsequent to the accused's invocation of his right to counsel"). When analyzing whether there was a sufficient "break in the stream of events," the court focuses "on external constraints, continuing or new, which may have overborne the defendant's will," the "temporal proximity" of the

two statements, and the "presence of intervening circumstances" between the two statements (citations omitted). Prater, 420 Mass. at 582. In Prater, this court concluded that there was a sufficient break in the stream of events where (1) ninety minutes elapsed between the defendant's first, coerced confession and his second, voluntary one; and (2) the defendant appeared calm and relaxed during the second confession. Id.

Here, there was a two-hour break between the Edwards violation in Westfield and the interrogation in Chicopee. Further, the two occurred at different locations, and the defendant was transported from Westfield to Chicopee without any improper questioning by police. After arriving in Chicopee and again receiving Miranda warnings during booking there, the defendant reinitiated conversation with Gibbons, stating that he wanted to assert his innocence.[9] Gibbons recited Miranda warnings to the defendant again, meaning the defendant received such warnings twice between the Edwards violation and the subsequent interrogation in Chicopee. These circumstances, taken together, indicate a sufficient break in the stream of events to overcome the presumption of coercion arising from the prior Edwards violation. Therefore, the initiation of the

[9] The motion judge credited Gibbons's testimony that the defendant reinitiated conversation without any prompting or solicitation from Gibbons.

Chicopee interrogation did not violate the defendant's Miranda rights.

It also is clear from the record that the defendant did not feel, at the time of initiating conversation in Chicopee, that the "cat was out of the bag" due to any responses he gave to the improper questioning in Westfield. As previously noted, the cat is not out of the bag "[i]f the defendant's subsequent statements were not a product of coercion . . . by a sense of futility that he has already incriminated himself with the first statement" (emphasis added). Prater, 420 Mass. at 581.

First, the improper questioning during the Westfield booking did not lead to the revelation of any new material information. Therefore, to the extent that any incriminating statement was made before such improper questioning and was not the result of coercion, the "cat out of the bag" analysis is irrelevant because the Edwards violation occurred after the defendant made the incriminating statements. It also is clear that the defendant did not feel he had made incriminating statements that would render further efforts to withhold information futile. On the contrary, he appeared eager to assert his innocence. The motion judge found that "the video of the interview in Chicopee reflected a man motivated to tell his side of the story, and not one who has buckled under the

pressure of a coercive environment." After reviewing the video footage, we agree.

ii. Alleged invocation during interview. Finally, the defendant argues that he unequivocally invoked his right to silence when he stated, "I know I'm going to jail, so I'm not saying no more. So, I'm sorry, you have to charge me with this shit. I'm done. You can try this shit, but I'm done." When the statement is analyzed in the context of the interview, it is apparent that the statement was made when the defendant was explaining to police that he would not identify the man who he claimed killed the victim to avoid being labeled as a "snitch." The motion judge found that, in the totality of the circumstances, the defendant's statement fell short of a clear and unequivocal invocation, and police had no obligation to cease questioning. We agree. The defendant's statement was not a clear, unequivocal invocation of his right to cease questioning. See Durand, 475 Mass. at 665-666 (no invocation of right where defendant stated, "I want to go home and I want to go to bed" and "I can't take any more of this," followed by defendant continuing to talk without prompting from officers). There was no error.[10]

[10] The prosecutor's opening statement began: "Wow, how am I going to get myself out of this. Those, ladies and gentlemen are the words of this defendant when he talked about how he felt right after he watched Amanda Plasse take her last breath in her

e. Voluntariness. The defendant argues that the Chicopee statement was involuntary because he was young and immature and did not understand the process. He further argues that his statement was involuntary because giving him a cigarette before the interview was the "equivalent of giving him drugs to obtain a Miranda waiver." The video recording shows that at the time he waived his rights and gave a statement, "[h]e was sober, alert, oriented, and lucid." Commonwealth v. Durand, 457 Mass. 574, 597 (2010). The recording reveals that as Gibbons began to advise the defendant of his Miranda rights, the defendant interrupted to ask if they had to go through all of the warnings again. Gibbons confirmed that they did, and then asked the defendant if he understood each individual warning. The recording also shows that the defendant was not subjected to any psychological coercion or improper tactics. Cf. id. at 596. He was calm and deliberative throughout the interview process.

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kitchen . . . ." The defendant did not object to this statement at trial, but he now argues that the statement was so grossly misleading that it created a substantial likelihood of a miscarriage of justice. See G. L. c. 278, § 33E. When the Commonwealth charges a defendant with murder in the first degree on a theory of extreme atrocity or cruelty, the prosecutor is permitted to attempt to illustrate the magnitude of the crime during his or her opening statement. Commonwealth v. Siny Van Tran, 460 Mass. 535, 554 (2011). Moreover, the judge appropriately instructed the jurors that opening statements are not evidence. Commonwealth v. Gordon, 422 Mass. 816, 831 (1996).

The defendant also claims that he was told during the Westfield booking that he would die in jail and that this tainted the voluntariness of his later statement. Our review of the video recording of the interview in Chicopee reveals that when the defendant said a second time that he was going to die in jail Gibbons appeared to say, "You will, you would hope so," in response to another officer, not the defendant.[11] Where our review of the record reveals no improper police tactics, this argument is without merit.[12] Commonwealth v. LeBlanc, 433 Mass. 549, 555 (2001) (confession voluntary where no evidence of police pressure and defendant, although emotionally upset, spoke calmly and acted rationally).

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[11] Throughout the booking procedure, Gibbons avoided speaking to the defendant, despite the defendant's repeated attempts to engage him and the other officers. When Gibbons stated, "You will, you would hope so," he was turned toward another officer. Additionally, there is no evidence that the defendant heard the statement by Gibbons as he did not appear to react to it in any way.

[12] The defendant also argues that the officers attempted to coerce a confession by offering to find the defendant's biological father. This argument is without merit, and it completely mischaracterizes what happened during the interview. Gibbons asked the defendant for his parents' names, and the defendant stated that he did not know his father. After the defendant pleaded with officers to locate his father, Gibbons only responded, "I don't know. We could try." Commonwealth v. Leahy, 445 Mass. 481, 484 (2005) (waiver of Miranda rights voluntary where defendant had "purported hope at the time that he would receive medical help for his pain after talking with the police").

2. The Soares challenges. During jury selection, the defendant objected, under Soares, 377 Mass. at 486, to the Commonwealth's use of peremptory strikes on two minority jurors: juror no. 29, a Hispanic female, and juror no. 2, an African-American female. With regard to both jurors, the trial judge determined that a prima facie showing of impropriety had been made; however, the judge denied both challenges, finding that the Commonwealth's proffered reasons for each juror were adequate and genuine. Because the defendant argues that the Commonwealth's justifications for exercising a peremptory strike on each juror were neither adequate nor genuine, we analyze each peremptory challenge in turn.

a. Juror no. 29. During venire, juror no. 29 raised her juror card in response to the question, "Do you have any interest whatsoever in this case or its outcome?" At sidebar, the juror did not mention that she had raised her hand in response to this question, which prompted the Commonwealth to ask the court to inquire further on this issue. In response, the juror stated, "I've always been like -- I've always liked the criminal justice system. It's always interesting." To further clarify, the judge asked, "Do you have any, as we would say, vested interest? . . . By that, meaning, do you have any stake in this case?" The juror responded, "No. No." Defense counsel asked similar follow-up questions and received responses

indicating that the juror had initially misinterpreted the meaning of the word "interest" in the judge's question.[13]

When defense counsel challenged the Commonwealth's peremptory strike of juror no. 29, the judge found that there was a prima facie showing of an improper challenge because the defendant was Hispanic and none of the four jurors who previously had been seated appeared to be Hispanic. When asked to provide a group-neutral basis for the challenge, the prosecutor explained,

> "[I]t solely has to do with the unsettled feeling that the Commonwealth has in regards to the fact that [juror no. 29] raised her hand in regard to having a stake in this case and has . . . an interest in the case and an interest in the outcome of the case. [Juror no. 29] raised her hand to that question, but when she came to sidebar she . . . didn't freely volunteer that she had raised her hand to that question. We had to ask her about that. She indicated that she did for a reason that she's just interested in criminal law. But it gave the Commonwealth an unsettled feeling that it had to be brought to her attention. In addition, in looking at her juror questionnaire, she is very overeager to be on this jury. I would note that she appears to be a single mother of three young children without any spousal support. And all of that taken together, the Commonwealth has an unsettled feeling as to her eagerness and overeagerness to want to be on this jury."

The judge found that the explanation given was both "adequate and genuine," and that the Commonwealth's basis for exercising a

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[13] Defense counsel asked if the juror's interest was because she was "interested generally" in the case, and counsel confirmed that the juror was not "looking forward to acquitting or convicting any particular defendant."

peremptory strike of juror no. 29 was "clear and reasonably specific and personal to Juror Number 29." The judge agreed with the Commonwealth, in that he "maintain[ed] some concerns initially" when the juror stated that the case would present no hardship despite the fact that she had three young children and was a part-time worker at a fast food restaurant.[14] The judge concluded that juror no. 29 "was more eager to participate in the trial than we generally see" and that the challenge fell "within the parameters of a peremptory challenge when combined with the other factor that [the judge] raised." He noted the defendant's objection for the record, but allowed the peremptory strike to stand.

"The Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights prohibit a party from exercising a peremptory challenge on the basis of race" or any other protected class. Commonwealth v. Jones, 477 Mass. 307, 319 (2017), citing Batson v. Kentucky, 476 U.S. 79, 95 (1986), and Soares, 377 Mass. at 486. While the Federal inquiry "turns on the right of the prospective juror to be free

[14] Although it is true that potential jurors sometimes express a reluctance to serve because of inconvenience, there are those who are eager to serve either because of an interest in our criminal justice system or to fulfill their duty as a citizen. Being a twenty-nine year old single mother of three with a part-time job in a fast food restaurant is not incompatible with an interest in serving as a juror, one of the more meaningful ways to participate in our democracy.

from discrimination in the exercise of his or her right to participate in the administration of the law," the art. 12 inquiry "focuses on the defendant's right to be tried by a fairly drawn jury of his or her peers" (quotation and citation omitted). Jones, supra. "Regardless of the perspective from which the problem is viewed, the result appears to be the same." Commonwealth v. Benoit, 452 Mass. 212, 218 n.6 (2008).

The procedure that follows a Batson-Soares challenge is well established:

> "First, the burden is on the objecting party to make a prima facie showing of impropriety that overcomes the presumption of regularity afforded to peremptory challenges. Next, if the judge finds that the objecting party has established a prima facie case, the party attempting to exercise a peremptory challenge bears the burden of providing a group-neutral reason for the challenge. Finally, the judge then evaluates whether the proffered reason is adequate and genuine. Only if it is both may the peremptory challenge be allowed." (Quotations and citations omitted.)

Commonwealth v. Robertson, 480 Mass. 383, 390-391 (2018). Because the trial judge found that the defendant had established a prima facie showing of impropriety with respect to this juror,[15] our analysis turns on whether the judge appropriately

[15] This court has adopted the Federal language to clarify the first step of a Batson-Soares inquiry. "[T]he presumption of propriety is rebutted when the totality of the relevant facts gives rise to an inference of discriminatory purpose" (citation omitted). Commonwealth v. Sanchez, 485 Mass. 491, 511 (2020).

concluded that the Commonwealth's reasoning was both "adequate" and "genuine."

"We grant deference to a judge's ruling on whether a permissible ground for the peremptory challenge has been shown and will not disturb it so long as it is supported by the record." Commonwealth v. Rodriguez, 431 Mass. 804, 811 (2000).

An explanation is adequate if "it is clear and reasonably specific, personal to the juror and not based on the juror's group affiliation . . . , and related to the particular case being tried" (quotations and citation omitted). Commonwealth v. Maldonado, 439 Mass. 460, 464-465 (2003). We repeatedly have held that "[c]hallenges based on subjective data such as a juror's looks or gestures, or a party's 'gut' feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination." Id. at 465.

Here, the Commonwealth suggested five possible grounds for exercising a peremptory strike on juror no. 29: (1) the juror raised her hand to indicate that she had an interest in the outcome of the case; (2) the juror did not "freely volunteer" at sidebar that she had raised her hand; (3) the juror was "very overeager to be on this jury"; (4) the juror was a single mother of three young children without any spousal support; and finally (5) all of those factors taken together left the Commonwealth with an "unsettled feeling." The judge found that the

explanation given was both adequate and genuine and noted that overeagerness to participate would not survive a challenge for cause, but when combined with the juror's status as the "sole supporter for [her] children," it fell "within the parameters of peremptory challenge."

This court reviews a trial judge's decision to allow a juror to be struck through the use of a peremptory challenge for an abuse of discretion. See Commonwealth v. Lopes, 478 Mass. 593, 602 (2018). While we may not have allowed this strike, we do not conclude that the judge, who was able to observe the jurors and the attorneys, erred in determining that this challenge was within the permissible range of peremptory challenges. L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) (defining abuse of discretion as decision that "falls outside the range of reasonable alternatives"). Although we conclude that the judge did not abuse his discretion in finding that the prosecutor's "unsettled feeling" about this juror was not based on the juror's race or sex, we pause to comment.

The first two reasons were interconnected. The Commonwealth expressed concern that the juror had a "stake in this case," and this was compounded by the fact that the juror did not bring her response to this question to the court's attention at sidebar. But, the juror's responses to further questioning made it abundantly clear that the juror was confused

by the meaning of the word "interest" in this context. A "lack of working knowledge of the vocabulary of criminal law . . . simply does not qualify as a valid, race-neutral basis on which to exercise a peremptory challenge here." Benoit, 452 Mass. at 224.

The third and fourth reasons also are interconnected. Both the Commonwealth and the judge take issue with the juror's apparent eagerness to participate as a juror, especially in light of her perceived status as a single mother of three children working at a fast food restaurant. We caution that reasoning of this nature should be scrutinized carefully. Compare id. at 224-225 ("occupation as legitimate disqualifier should be carefully scrutinized"). Here, although we do not conclude that the judge erred in concluding that the prosecutor's reasons were proper, we remind attorneys that they should search their conscience for implicit bias and stereotypes.

b. Juror no. 2. During a different panel voir dire, the Commonwealth asked the panel if they would have trouble convicting the defendant if they felt that he was guilty beyond a reasonable doubt, but still had lingering questions. This prompted responses from multiple jurors. One juror volunteered that it would "really depend on some of our questions that didn't get answered." When juror no. 2 was asked to respond,

she stated that she agreed with the juror who had explained that it would depend on the unanswered question. As the Commonwealth continued to ask juror no. 2 clarifying questions, the juror maintained that she would not "be able to put the thoughts aside because [she] would still be thinking about the question that wasn't answered," and that although she would "try [her] hardest not to [speculate]," it "might" affect her deliberations.

The Commonwealth moved to strike juror no. 2 for cause, and the defendant objected. The judge sustained the objection because he was "satisfied that she would be willing to follow [his] instructions." The Commonwealth then exercised a peremptory challenge to excuse juror no. 2, and the defendant again objected. The Commonwealth argued that the juror was being challenged because of her answers to the reasonable doubt questions, which made the prosecutor feel "unsettled." The judge again found that there was a prima facie showing of an improper challenge, but stated,

> "I understand the Commonwealth's concerns relative to Juror Number 2's responses that were posed of her during the panel portion of the voir dire. Certainly there was a degree of equivocation in Juror Number 2's responses which might righteously be the basis for a peremptory challenge. And I've conducted a meaningful independent evaluation and find that the Commonwealth's basis for their challenge is both adequate and genuine. So, therefore, the Soares challenge is denied."

Because the juror indicated that she might not be able to return a guilty verdict, even if the Commonwealth proved its

case beyond a reasonable doubt, we determine that this was an adequate reason to use a peremptory strike. With regard to genuineness, again, here the judge was in a position to evaluate both the prosecutor and the juror's demeanor. Maldonado, 439 Mass. at 465-466 ("For example, while a proffered explanation based solely on the innocuous demeanor of a juror might generally be considered inadequate, the judge's specific observations of the juror might well provide the basis for exclusion where odd or inappropriate deportment is noted"). Although the judge rendered sparse findings, the record does "explicitly contain the judge's separate findings as to both adequacy and genuineness" as required by Maldonado. Id. There is nothing in the record that requires a conclusion that the prosecutor's challenge was not genuine. The reasons given were personal to juror no. 2 and not based on the juror's group affiliations. Therefore, there was no structural error.

3. Third-party culprit evidence. Before trial, the defendant moved to admit certain statements based on a third-party culprit theory. See Commonwealth v. Silva-Santiago, 453 Mass. 782, 800 (2009) ("A defendant may introduce evidence that tends to show that another person committed the crime or had the motive, intent, and opportunity to commit it" [citation omitted]). The defendant sought to admit three key pieces of evidence: the testimony of two witnesses who would have

testified that a third party confessed to the murder, and a recorded police interview where the same third party recanted an accusation that someone else had committed the murder.

The judge did not allow the defendant to admit the statements under a third-party culprit theory because the statements were hearsay. The judge did, however, allow the two statements in evidence as part of the defendant's argument that the police failed adequately to investigate alternate suspects pursuant to Commonwealth v. Bowden, 379 Mass. 472, 486 (1980). Silva-Santiago, 453 Mass. at 801-802. Further, although the recorded interview itself was not allowed, defense counsel was allowed, under Bowden, to elicit testimony from the police that this alleged third party had recanted his initial accusation.

The defendant argues that the judge's decision to exclude his third-party culprit defense denied him his right to a fair trial. The defendant further argues that trial counsel's "failure to press the issue" manifestly was unreasonable.[16]

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[16] The defendant also argues that the judge's order striking a crucial portion of trial counsel's opening statement was prejudicial error. The judge struck one portion of one sentence from the defendant's four-page opening argument. The sentence was, "They were not interested in investigating Ryan Coggins and it was he who killed, not Dennis." Additionally, the entire opening statement focused on the failure of police to investigate (i.e., his Bowden defense). The judge already had ruled that third-party culprit evidence was inadmissible, and defense counsel knew that he would be prevented from directly stating that Coggins was the perpetrator.

The judge did not allow the defendant to admit the statements pursuant to a third-party culprit defense because they were hearsay. Although we have concluded that hearsay may be admitted if "there are other substantial connecting links to the crime," Commonwealth v. O'Brien, 432 Mass. 578, 588 (2000), here there was no other evidence implicating the third party. "Absent an abuse of discretion, the judge's decision in determining relevance and prejudice will not be reversed unless justice requires a different result." Commonwealth v. Rosa, 422 Mass. 18, 23 (1996). Moreover, the statements were still submitted to the jury as part of the defendant's Bowden defense, but with a limiting instruction that they could not be considered for the truth of the matter asserted.

Therefore, we also disagree with the defendant's contention that his trial counsel did not press the issue. He did so, repeatedly, and was allowed other concessions by the judge.[17] Ineffective assistance of counsel, when based on an attorney's

[17] For example, during cross-examination of Gibbons, defense counsel sought to introduce a written statement taken from the third party when he first accused someone else of committing the murder. The Commonwealth argued that the statement could not be admitted under Bowden because the police had investigated that statement, and that this was an attempt by the defendant to introduce third-party culprit evidence. Although the judge noted that he was "not convinced that this statement comes in for Bowden purposes because . . . there was an investigation and within [twenty-four] hours [the third-party had] recanted," the judge allowed the statement in evidence because he wanted to "err on the side of extreme caution in this case."

strategic or tactical decision, constitutes error "only if it was manifestly unreasonable when made." Commonwealth v. Coonan, 428 Mass. 823, 827 (1999), quoting Commonwealth v. Martin, 427 Mass. 816, 822 (1998). That was not the case here.

4. The Bowden instruction. The defendant argues that the judge's failure to instruct the jury in accordance with Reid, 29 Mass. App. Ct. 537, created unfair prejudice and demands reversal. This argument is without merit. Reid states only that "it might [be] preferable for the judge to inform the jurors that evidence of police omissions could create a reasonable doubt," and reiterates that Bowden "only holds . . . that a judge in his instructions should not remove from the jury's consideration evidence of failure to follow normal police procedures" and "[a] judge has discretion whether to give an instruction." Reid, supra at 540, 541. Here, the judge used the District Court's model jury instructions for omissions in police investigations, and we see no error.

5. Review under G. L. c. 278, § 33E. We have reviewed the record in its entirety in accordance with our obligation under G. L. c. 278, § 33E, and we see no basis to set aside or reduce the verdict of murder in the first degree or to order a new trial.

Judgment affirmed.