SJC-11279

COMMONWEALTH vs. JOAO TEIXEIRA.

Plymouth. September 14, 2020. - January 20, 2021.

Present: Lenk, Gaziano, Cypher, & Kafker, JJ.[1]

Homicide. Evidence, Self-defense, Prior misconduct. Self-Defense. Practice, Criminal, Request for jury instructions, Argument by prosecutor, Assistance of counsel, Capital case. Constitutional Law, Assistance of counsel.

Indictments found and returned in the Superior Court Department on April 3, 2009.

The cases were tried before Richard J. Chin, J., and a motion for a new trial, filed on August 13, 2014, was heard by him.

Andrew S. Crouch for the defendant.
Mary H. Nguyen, Assistant District Attorney, for the Commonwealth.

[1] Justice Lenk participated in the deliberation on this case and authored this opinion prior to her retirement.

LENK, J. The defendant was convicted of murder in the first degree by deliberate premeditation and of unlawful possession of a firearm in the shooting death of Keith Leverone. The victim was shot in the parking lot of a convenience store in Brockton on February 7, 2009. The defendant appeals from his convictions and from the denial of his motion for a new trial, which we consolidated with his direct appeal.

The defendant argues that a new trial is required in light of a number of errors at trial and in the denial of his motion for a new trial. In particular, he contends that the trial judge erred by declining to give a requested instruction on self-defense, and by allowing the prosecutor to introduce prior bad act evidence. The defendant asserts as well that certain of the prosecutor's remarks in her opening statement and closing argument were improper. The defendant also argues that he received ineffective assistance from his trial counsel, and that newly discovered evidence casts real doubt on the justice of the convictions. Finally, the defendant asks this court to exercise its authority under G. L. c. 278, § 33E, to reduce the verdict of murder in the first degree.

We conclude that there was no error, and accordingly affirm the convictions. We also discern no reason to use our extraordinary authority to reduce the murder verdict to a lesser degree of guilt or to order a new trial.

1. Background. a. Facts. We recite the facts as the jury could have found them, reserving some details for later discussion.

The shooting death of the nineteen year old victim occurred in the early morning of February 7, 2009, in a convenience store parking lot in Brockton. The fatal shot took place shortly after a fight between the defendant, the victim's brother, Olivio Leverone,[2] and several others. Olivio was the Commonwealth's key witness at trial, and the only witness who saw the defendant holding a gun.

Olivio testified that at about 9 P.M. on February 6, 2009, he was driving around Brockton in his black Acura, with the victim and Olivio's friend Steven Andrade. While at an intersection, the defendant and Curtis Busby, both of whom were former friends of Olivio, approached in a maroon vehicle. From the front passenger's seat, the defendant fired two shots at Olivio. Olivio "took off," and neither the vehicle nor its occupants were hit. No one reported the incident to police, and another witness denied that the incident took place.

Later that night or in the early morning hours of February 7, 2009, Olivio, Andrade, and the victim drove to a gasoline station that was a popular hangout spot at that hour,

[2] Because the victim and his brother Olivio Leverone share a last name, we refer to Olivio Leverone by his first name.

after the bars closed. The defendant and Busby also were present. Olivio's friend, Camilo Pina, pinned the defendant against a vehicle, and Olivio ran up and stabbed the defendant twice in the leg with a pocket knife. A police officer who had been inside the building heard an argument and came outside. The officer testified that several arguments were occurring, there were many vehicles and people, and the situation was "just getting out of hand." It is unclear whether the arguments were related to the stabbing; the officer did not see a stabbing, nor did anyone report one. When the officer told the crowd to disperse, Olivio and his group complied. The victim remained in Olivio's Acura throughout the time the group was at the gasoline station.

Olivio, Pina, Andrade, and the victim then drove to a nearby convenience store that was also a popular place to gather. The parking lot was "packed," and about thirty people were present. The victim again stayed in the Acura. Olivio chatted with two women in a parked vehicle and then noticed that the defendant and Busby had arrived. Both Busby and the defendant were wearing gloves.

The defendant walked towards an open parking spot near Olivio and announced that he was ready to fight "whoever." He lifted his T-shirt, which Olivio understood to indicate that the defendant was not carrying a gun.

Olivio and one to three others "swung on" the defendant.[3] They punched him, pulled his T-shirt over his head so he was unable to see, and kicked him. The "pummeling" lasted about five minutes, and ended when Olivio and the others had "pounded" the defendant to the ground.

Olivio walked away and headed towards his vehicle. Olivio noticed the victim seated in the rear seat, where he had remained "the whole time." While walking, Olivio turned around and saw the defendant getting up and approaching Busby, who was standing near a Dumpster. Olivio heard the defendant tell Busby, "Give me the gun," and saw Busby hand the defendant a gun; Olivio began to run past his Acura towards the street. When he was in the middle of the street, he heard a single gunshot, and turned around again to see the defendant driving away in the Acura.[4] Olivio ran back to the parking spot and found the victim lying on the ground near a silver vehicle, not breathing.

Officers were dispatched to the scene; the first arrived within a few minutes, checked the victim, and did not find a

---

[3] One witness testified that the victim, whom she did not know, participated in the fight, while other witnesses said that the victim was not a participant, and described the fight as being two to three on one.

[4] A witness at the grand jury testified that the shooter had been standing in the middle of the road, and left on foot. This witness was summonsed, but did not appear to testify at trial.

pulse. The medical examiner later determined that the victim suffered a single gunshot wound to the top of his head. Olivio approached the officer and said that the person on the ground was his brother. Police initially questioned Olivio inside the store, and then asked him to come to the police station for further questioning.

Sometime that afternoon, the defendant's friend Anthony Bass was driving on Belmont Street when he saw the defendant walking and stopped to offer him a ride. The defendant was carrying a white plastic bag. Bass "popped" the trunk, and the defendant got into the vehicle without the bag. A few hundred feet further along Belmont Street, police stopped the vehicle and arrested both occupants. The vehicle was towed to a police garage, where it was searched. Police seized a white plastic bag from the trunk that contained a pair of jeans and a T-shirt, both stained with blood later determined to be the defendant's, and a pair of black gloves that subsequently tested positive for gunshot residue and the defendant's deoxyribonucleic acid (DNA).[5]

b. Prior proceedings. Before trial, the defendant moved to suppress evidence seized from his person and the vehicle in which he had been a passenger when he was arrested. The motion

[5] One of the gloves contained a mixed DNA profile, with the defendant being one of multiple possible contributors. A match of the DNA in the second glove was inconclusive when compared with the defendant's DNA profile.

was denied. In a pretrial motion in limine, the Commonwealth sought to introduce evidence of prior bad acts, specifically, the shooting at Olivio's vehicle, and an alleged arson of Olivio's vehicle after the victim's death. The defendant opposed both motions. The judge excluded the arson evidence, but allowed the prosecutor to introduce evidence of the defendant's shooting at Olivio's vehicle, and the name of the city where the vehicle was found.

At trial, the prosecutor proceeded on theories of deliberate premeditation and extreme atrocity or cruelty. Olivio, the Commonwealth's key witness, testified pursuant to a cooperation agreement. At the close of the prosecutor's case, the defendant moved for a required finding of not guilty, which was denied. At a sidebar before the final charge, the defendant requested that the judge provide an instruction on self-defense; the judge declined to do so. The judge instructed the jury on murder in the first degree based on the theories of deliberate premeditation and extreme atrocity or cruelty; murder in the second degree; voluntary manslaughter; and the mitigating circumstances of reasonable provocation or sudden combat.

The jury convicted the defendant of murder in the first degree on a theory of deliberate premeditation. The defendant then moved to set aside the verdict and to order the entry of a

finding of guilty of so much of the indictment as alleged manslaughter. The motion was denied.

The defendant's direct appeal subsequently was stayed pending resolution of his motion for a new trial, and his supplemental motion for a new trial. The motion judge, who was also the trial judge, denied the motion, and we consolidated the appeal from that denial with the defendant's direct appeal.

2. Discussion.[6] a. Instruction on self-defense. The defendant argues that the judge erred in denying his request for

---

[6] The defendant also filed a Moffett brief, in which he argues that the stop of the vehicle in which he was a passenger later on the day of the shooting was unlawful, and that the judge erred in denying his motion to suppress the evidence seized from the vehicle. See Commonwealth v. Moffett, 383 Mass. 201, 208-209 (1981).

The defendant argues that the officer who conducted the stop did not have the knowledge to which he testified at trial as his reason for the stop (i.e., that the officer recognized the defendant and also was aware that there was an outstanding warrant for his arrest). The defendant argues that the officer's testimony was not credible, in part, because the officer did not mention in his radio transmissions that he had seen the defendant, whom police were seeking in conjunction with the shooting. The defendant also suggests that police should have obtained a warrant before they searched the rented vehicle, and that it was improper for police to have obtained permission to search the vehicle from its lawful owner, a nationwide automobile rental company, rather than from one of the other occupants of the vehicle.

The claims that there was no reasonable suspicion or probable cause to stop the distinctive vehicle, or to order the defendant from the vehicle, are unavailing. Police had testimony from eyewitnesses reporting a man entering a vehicle the description of which matched that of the vehicle the

an instruction on self-defense, and maintains that the absence of such an instruction had a substantial effect on the jury's consideration of the case, resulting in prejudicial error.

An instruction on self-defense must be given if any view of the evidence, viewed in the light most favorable to the defendant, "is sufficient to raise the issue." See Commonwealth v. Harrington, 379 Mass. 446, 450 (1980). Here, according to the defendant, the evidence introduced at trial raised a reasonable doubt as to whether he shot the victim in self-defense, and, accordingly, the judge was required to instruct the jury on the use of deadly force in self-defense. The defendant also maintains that the judge's reliance on Commonwealth v. Barber, 18 Mass. App. Ct. 460, 463–464 (1984), S.C., 394 Mass. 1013 (1985), was misplaced, and the fact that the defendant instigated the confrontation did not make self-defense unavailable. See id. (while self-defense instruction generally is not warranted in case of mutual combat, where deceased escalated use of force, instruction on self-defense should be given).

Because the objection was preserved, we review for prejudicial error. Commonwealth v. Sosa, 79 Mass. App. Ct. 106,

---

witnesses had described as leaving the scene. The question whether the officer's testimony was not credible was for the jury to determine.

115 (2011), citing Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). When reviewing the denial of an instruction on the use of deadly force in self-defense, a reviewing court asks whether, in the light most favorable to the defendant, the evidence raised at least a reasonable doubt that the defendant (a) believed he or she was in imminent danger of death or serious bodily harm from which the defendant could save him- or herself only by using deadly force, and (b) used all reasonable means available to retreat from the conflict. See Commonwealth v. Pike, 428 Mass. 393, 396, 398 (1998); Barber, 394 Mass. at 1013.

i. Reasonable belief in danger of death or serious bodily harm. As the defendant notes, there was some evidence that, during the altercation prior to the shooting, he reasonably believed that he was in danger of death or serious bodily harm. The shooting occurred after the victim's brother joined with two or three others in "pummeling" the defendant for about five to ten minutes until he fell to the ground, bleeding. The defendant then stood up, obtained a weapon from his friend, a shot rang out, and the victim was seen lying on the ground. Whether it was reasonable for the defendant to fear death or serious bodily injury depends, in part, on the length of time that passed and the actions between the fight and the shooting.

The longer the time span between the events, the clearer the termination of any threat to the defendant, and thus the less likely it would be reasonable to fear imminent death or bodily injury. See, e.g., Commonwealth v. Epsom, 399 Mass. 254, 258 (1987) (defendant was not entitled to instruction on self-defense where, after fight, defendant followed victim outside bar, given that there was no evidence that assaults or threats continued, but defendant shot victim). Acting "out of a feeling of anger or revenge resulting from the first stage of [an] altercation" does not support a contention that a defendant "acted out of fear of imminent danger of death or serious bodily harm" (quotation and citation omitted). Pike, 428 Mass. at 397-398. See Commonwealth v. Britt, 465 Mass. 87, 95-96 (2013). Here, Olivio testified that roughly thirty seconds passed between the end of the fight and the gunshot. Another witness testified that it was "not even three minutes." Were the time span so short that it was unclear the fight was over at the moment the defendant pulled the trigger, it would be reasonable that he had a fear of imminent harm.

Beyond the timing, the actions of those involved may indicate whether it was reasonable for the defendant to fear imminent harm. Before the defendant obtained the gun and pulled the trigger, Olivio and his companions had ceased hitting and kicking the defendant, and had walked away. The group was

heading back toward their vehicle and were at least several feet away. See Pike, 428 Mass. at 398 (self-defense instruction was not warranted where there was no evidence that victim had means of injuring defendant from distance of several feet). The clearest testimony as to the victim's whereabouts immediately before the shooting was from Olivio, who said that the victim remained in the vehicle, which was about two parking spaces from the location of the fight. Given the history of violence between the defendant's group and the victim's group -- the earlier shooting by the defendant at Olivio and his group, and the subsequent stabbing of the defendant by Olivio -- and the intensity of the beating, the defendant might have feared that his assailants had knives or other weapons they were planning to obtain from their vehicle. It is clear, however, that Olivio and his group, let alone the victim, were no longer right beside or on top of the defendant when he headed to his companion to obtain a weapon. See, e.g., Commonwealth v. Grassie, 476 Mass. 202, 212 (2017), S.C., 482 Mass. 1017 (2019).

Fear of imminent harm is subjective, Commonwealth v. Iacoviello, 90 Mass. App. Ct. 231, 240 (2016), and certainly there was some reason here for the defendant to have been concerned for his safety in the moments before the shooting. The accounting of the events during that brief period was vague and incomplete. There is agreement, however, that the beating

was serious. One witness testified that she stopped watching because she "didn't think it was fair at all." The Commonwealth's counterintuitive assertion at argument before us that this severe attack was desired by the defendant in order to set the stage for a planned shooting was unsupported in the record, and downplays the severity of the attack and the fear the defendant may have felt. Nonetheless, even if the defendant reasonably had believed that he was at risk of death or serious bodily harm, in order to be entitled to an instruction on self-defense, he was required to have retreated from the situation if he could have done do so safely.

ii. Use of all reasonable means to retreat. The requirement that a defendant have availed him- or herself of all reasonable means of retreating from the conflict before resorting to the use of deadly force does not impose the duty to place oneself in danger. Pike, 428 Mass. at 398. "[An individual] must, however, use every reasonable avenue of escape available to him [or her]" (citation omitted). Commonwealth v. Lopez, 474 Mass. 690, 697 (2016).

The events in this case speak to two separate incidents of violence, first the fight, and then reengagement by the defendant in firing the shot. See Commonwealth v. Espada, 450 Mass. 687, 693 (2008) (self-defense instruction was not warranted where defendant shot victim in separate incident one

and one-half hours after victim beat him). Where events are separate, as here, a self-defense instruction often is not merited because in the intervening moments a defendant has the opportunity to retreat. See, e.g., Pike, 428 Mass. at 398-399 (defendant was not entitled to instruction on use of deadly force in self-defense where defendant used deadly force against victim after victim had retreated by reapproaching victim, who thereafter came towards defendant, and throwing radio at victim's head); Epsom, 399 Mass. at 258 (defendant was not entitled to instruction on use of deadly force in self-defense where, after fight, defendant followed victim outside bar, and then shot him).

In the case at hand, the jury heard evidence that the defendant had reasonable avenues of retreat after the fight, that he was aware of at least one avenue, and that he chose not to use it. Prior to the shooting, the defendant had retreated back toward his friend, Busby, who was standing near a Dumpster watching the fight. Rather than leave the parking lot, the defendant obtained a firearm from Busby and turned and began pursing Olivio and his companions, who were in the process of walking back to their vehicle. See Commonwealth v. Mercado, 456 Mass. 198, 209-210 (2010) (no instruction on self-defense was warranted where defendant was free to leave but returned with firearm). Similarly, we have held that an instruction on the

use of deadly force in self-defense was not warranted where a defendant who had access to a vehicle in which he could have fled chose instead to reach inside that vehicle, retrieve a firearm, and shoot the victim. See, e.g., Commonwealth v. Diaz, 453 Mass. 266, 280 (2009), overruled on other grounds by Commonwealth v. Womack, 457 Mass. 268 (2010). See also Espada, 450 Mass. at 694 (no self-defense instruction was warranted where defendant, "instead of remaining safely behind the [D]umpster," ran up to departing victim, saw "flash," then shot at victim's vehicle four times, "firing even as they tried to leave"); Commonwealth v. Leoner-Aguirre, 94 Mass. App. Ct. 581, 585 (2018) (defendant "got more than he was entitled to receive" when judge instructed jury on self-defense, where defendant did not avail himself of all reasonable means to retreat before using deadly force on public street).

Here, nothing stopped the defendant from fleeing the scene after the individuals who had been beating him moved away. The encounter took place in the open parking lot of a lighted convenience store. See, e.g., Commonwealth v. Avila, 454 Mass. 744, 769 (2009) (defendant reasonably could have retreated from altercation on public street); Espada, 450 Mass. at 692-693 (location in small alley did not eliminate means to avoid combat where sidewalk was nearby and thus defendant had available reasonable avenues that would have allowed retreat). There was

also no threat of force from a weapon preventing the defendant from fleeing. While Olivio had been carrying and using a knife the previous day, there was no direct evidence that, at the time of the shooting, Olivio or his companions were armed. Moreover, the defendant does not point to any particular threat, let alone from the victim, at the time of the shooting. Cf. Espada, supra at 693-694 (defendant who shot at victim's vehicle as it was driven away down alley was not entitled to instruction on self-defense, even where defendant thought he saw "flash" from victim's vehicle); Pike, 428 Mass. at 398 (defendant who threw radio at victim as victim came towards him was not entitled to self-defense instruction). Contrast Commonwealth v. Ortega, 480 Mass. 603, 611–612 (2018) (victim's possession and use of firearm may make retreat unreasonable).

Because the defendant in this case did not meet the requirement that he use all reasonable means to retreat before resorting to deadly force, the judge did not abuse his discretion in declining to provide an instruction on the use of force or excessive force in self-defense.

b. Prior bad acts. The defendant argues that the judge's decision to allow the introduction of prior bad act evidence concerning a purported shooting the day before the victim's death in the early morning hours of the following day was an abuse of discretion.

"It is well settled that the prosecution may not introduce evidence that a defendant previously has misbehaved, indictably or not, for the purposes of showing his [or her] bad character or propensity to commit the crime charged . . . ." Commonwealth v. Helfant, 398 Mass. 214, 224 (1986). See Mass. G. Evid. § 404(b)(1) (2020). Such evidence may be admissible, however, if relevant for another purpose, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." See Mass. G. Evid. § 404(b)(2). Even where relevant, prior bad act evidence "will not be admitted if its probative value is outweighed by the risk of unfair prejudice to the defendant." See Commonwealth v. Crayton, 470 Mass. 228, 249 (2014). "To be sufficiently probative the evidence must be connected with the facts of the case [and] not be too remote in time" (citation omitted). Commonwealth v. Butler, 445 Mass. 568, 574 (2005).

Before evidence of a prior bad act may be introduced against a defendant, "the Commonwealth must satisfy the judge that the 'jury . . . reasonably [could] conclude that the act occurred and that the defendant was the actor'" (citation omitted). See Commonwealth v. Leonard, 428 Mass. 782, 785 (1999); Mass. G. Evid. § 104(b). "The Commonwealth need only show these facts by a preponderance of the evidence." See Leonard, supra. "If the judge finds this standard has been met,

it is thereafter for the jury to evaluate the evidence for 'its weight and credit.'" See id. at 786, quoting Commonwealth v. Robinson, 146 Mass. 571, 582 (1888).

Where the error is properly preserved, as here, we review a judge's decision to allow the introduction of prior bad act evidence for abuse of discretion. See Commonwealth v. Facella, 478 Mass. 393, 407 (2017). On appeal, the decision will stand absent "a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives." See id., citing L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Prior to trial, the prosecutor moved to admit evidence that the defendant shot at Olivio's vehicle four or five hours before the victim was shot. Olivio had been driving with the victim and Andrade when the defendant and Busby drove past in a maroon vehicle, and, as they passed, the defendant, from the passenger's seat, fired two shots towards Olivio's vehicle. The prosecutor argued that this evidence was admissible to establish a possible motive, to show the defendant's state of mind, and to help establish a pattern of conduct towards the victim, thereby providing a complete picture of the events surrounding the victim's death. In opposition, the defendant argued that Olivio's assertions were "demonstrably false," because Andrade, a passenger in Olivio's black Acura, later told police that the

shooting did not happen. The defendant also maintained that the evidence was more prejudicial than probative and requested that, at a minimum, a voir dire of the purported witnesses be conducted.

On the first day of trial, the parties revisited the issue at a sidebar conference, and counsel reiterated his request that the judge conduct a voir dire of Olivio and Andrade. Counsel again pointed out that Andrade's statement to police contradicted Olivio's, and argued that Olivio's assertion was part of a larger pattern of false statements. The judge queried what purpose a voir dire would serve:

> "I mean the voir dire would be for me to make a determination as to credibility. I don't think that's my function. I think, you know, I think what we're ignoring here is the fact that there's been a lot of bad blood between these two groups and that . . . there are reasons why they're not candid with the police, there's reason why when confronted they recant. So I don't think this is a situation where I should be making determinations of credibility. He made this statement. It goes to motive. It's an alleged incident that took place prior to the alleged shooting, and I'm going to allow it."

Olivio subsequently testified that the defendant fired approximately two shots at his vehicle while hanging out of the front passenger's side window. Olivio explained that neither the vehicle nor its passengers were struck, and that he did not report the incident to police because nobody was shot and he was not a snitch.

The judge did not abuse his discretion in concluding that the evidence was relevant to a possible motive, including prior animus between the defendant and the victim and his brother, and therefore in allowing it to be introduced. The incident shed light on the hostile relationship between the defendant and Olivio, as well as the victim, which is relevant to establishing a possible motive for the subsequent fatal shooting. See, e.g., Commonwealth v. Watt, 484 Mass. 742, 748 (2020) (evidence of prior shooting was "relevant to show a motive for a shooting that otherwise appeared senseless"); Commonwealth v. Gil, 393 Mass. 204, 215-216 (1984) (evidence of hostile relationship was relevant to motive). In addition, the fact that the defendant's shooting at Olivio's vehicle was alleged to have occurred approximately five hours before the fatal shooting means that the prior bad act evidence is both connected with the facts of the case and temporally linked. See Butler, 445 Mass. at 574. Compare Watt, supra (evidence of shooting eleven days prior to fatal shooting of victim was relevant to motive).

The defendant argued during trial, as he does before us, that any probative value of the evidence was outweighed by unfair prejudice because the evidence was "demonstrably untrue." The basis for this assertion is Andrade's statement to police that the defendant had not fired at Olivio's vehicle earlier in the evening, as well as the lack of any evidence beyond Olivio's

statement to support his allegations. A lack of other support, however, does not make the evidence demonstrably untrue. While the defendant can dispute the allegation, he has not proved it to be untrue. Moreover, that prior bad act evidence may be disputed does not render it inadmissible; rather, the question is whether the jury reasonably could conclude that the defendant did, in fact, commit the act. See Leonard, 428 Mass. at 785. Here, the jury reasonably could have concluded, on the basis of Olivio's testimony, that the act of the defendant shooting at his vehicle did occur.[7] As such, there was no abuse of discretion in the judge's decision to leave the credibility determination to the jury.

The defendant also asserts error in the judge's decision not to conduct a voir dire hearing prior to allowing the introduction of Olivio's testimony, for the same reasons that he

---

[7] The defendant also argues that the error was not mitigated because the judge did not instruct on the proper uses of prior bad act evidence. While such an instruction is often preferable, see, e.g., Commonwealth v. Bryant, 482 Mass. 731, 737 (2019) (noting that best practice would be to give limiting instruction at time evidence of defendant's drug dealing history was admitted), a trial judge, is not required, sua sponte, to provide one, see Commonwealth v. Peno, 485 Mass. 378, 395 (2020), citing Commonwealth v. Leonardi, 413 Mass. 757, 764 (1992) ("To be sure, we have not said that a judge is required to give contemporaneous limiting instructions if a defendant does not request them"); Commonwealth v. Bradshaw, 385 Mass. 244, 270 (1982), citing Commonwealth v. Monsen, 377 Mass. 245, 252 (1979). It was not necessary for the judge, without any request from either party, specifically to instruct on the limited permissible uses of the prior bad act evidence.

objected to the evidence writ large, i.e., that the only evidence of the incident was from Olivio's testimony, and that another witness testified that the incident did not happen. "The decision to conduct a voir dire examination of a witness rests in the sound discretion of the trial judge . . . ." Commonwealth v. Pina, 481 Mass. 413, 431 (2019). In this case, the judge did not abuse his discretion in concluding that a voir dire was unnecessary because it was for the jury, and not the judge, to decide whether Olivio's testimony was credible, or whether they found Andrade's testimony credible. So long as the prosecutor put forward sufficient evidence such that the jury reasonably could conclude that the defendant committed the prior bad act, questions of weight and credibility are for the jury. See Leonard, 428 Mass. at 786.

c. Prosecutor's opening statement and closing argument. The defendant contends that numerous statements in the prosecutor's opening and closing were improper. He asserts that, in the context of the statements as a whole, and in the absence of any specific curative instructions, these statements were so egregious that he was deprived of a fair trial and that a new trial is required on that basis alone. In particular, the defendant argues that the prosecutor misstated the evidence concerning the defendant's intent to kill the victim, argued inferences with no basis in the record, suggested that the

prosecutor had knowledge of facts not in evidence, and attempted to excite the jury's passion and sympathy with testimony as to the manner in which the victim was killed. The defendant contends also that the prosecutor deliberately and in bad faith made arguments as to motive without evidentiary support.

"While prosecutors are entitled to argue 'forcefully for the defendant's conviction,' closing arguments must be limited to facts in evidence and the fair inferences that may be drawn from those facts." Commonwealth v. Rutherford, 476 Mass. 639, 643 (2017), quoting Commonwealth v. Wilson, 427 Mass. 336, 350 (1998). "[A] prosecutor should not refer to the defendant's failure to testify, misstate the evidence or refer to facts not in evidence, interject personal belief in the defendant's guilt, play on racial, ethnic, or religious prejudice or on the jury's sympathy or emotions, or comment on the consequences of a verdict" (footnotes omitted). Commonwealth v. Kozec, 399 Mass. 514, 516-517 (1987), and cases cited. "A prosecutor may not use closing argument to argue or suggest facts not previously introduced in evidence" (quotation and citation omitted). Commonwealth v. Beaudry, 445 Mass. 577, 580 (2005).

Because the defendant did not object to the prosecutor's remarks at trial, we review for a substantial likelihood of a miscarriage of justice. See Commonwealth v. Niemic, 472 Mass. 665, 673 (2015) (Niemic I).

i. Motive for shooting the victim. The defendant maintains that there was no evidence to support the prosecutor's repeated statements concerning the reason why the victim was shot: either in mistake for Olivio, or intentionally because the victim was Olivio's brother and Olivio had fled.

During her opening statement, the prosecutor remarked,

> "And although the evidence may show that the defendant mistook [the victim] for his brother, Olivio, the evidence will show this killing was the product of deliberate premeditation and that it was done with extreme atrocity and cruelty."

In her closing, the prosecutor stated,

> "Now, one question you may be asking is if [the victim] had absolutely nothing to do with this fight, nothing to do with this defendant, then why is it that he is the one that ends up dead? I suggest to you, ladies and gentlemen, the defendant chased after Olivio Leverone that night in the parking lot and he couldn't get to him. So he figured he'd get to him another way. He'd get to him vicariously by killing his brother in cold blood."

The prosecutor continued this line of argument by ending her closing with, "This coward who gunned down [the victim] and killed him for absolutely no reason except for the fact that he was Olivio Leverone's brother."

The evidence showed that the defendant had a long-standing dispute with Olivio, his former friend, and that the groups had been engaged in ongoing hostilities towards each other. Olivio's brother, the victim, remained in a vehicle near the scene of the recent assaults against the defendant, able to

observe and by some accounts not participating. At the time of the fatal shooting, the defendant was chasing after Olivio and his two friends, who had just beaten the defendant so severely that he fell down, bleeding, while Olivio ran past the Acura in which his brother was seated.

The prosecutor's suggestions that the victim was shot because the defendant could not get to his brother, Olivio, mistook the victim for Olivio, or wanted to cause Olivio severe distress were all reasonable inferences that the jury could have drawn from the evidence. Moreover, the prosecutor was not required to prove beyond a reasonable doubt the motive for the shooting. See Commonwealth v. Moseley, 483 Mass. 295, 302 n.9 (2019), citing Commonwealth v. Borodine, 371 Mass. 1, 8 (1976), cert. denied, 429 U.S. 1049 (1977). Therefore, the challenged remarks about the victim being shot because he was Olivio's brother were not improper.

ii. Statements that the victim was "cowering." The defendant also argues that the prosecutor engaged in impermissible speculation when she described the victim as "cowering," and stated that he "knew what was coming," at the time he was shot. The prosecutor argued:

> "[The medical examiner] described for you the bullet wound to his head in the top of his head and went straight down his spine about seventeen inches, which would indicate, I suggest to you, that [the victim] was in a ninety degree angle at the time he was executed, which is consistent, I

> suggest to you, with him either getting out of the car or being dragged out of the car at the time he was executed."

The prosecutor later expanded upon this argument:

> "Again, consider the position that the victim would have to have been in at the time he was killed. I suggest to you he was in a cowering position, which would suggest that he knew what was coming."

The medical examiner testified as to the placement of the bullet at the top rear of the victim's head, and the seventeen and one-half inches it traveled directly down through the victim's body, lodging in the central portion of the back ("straight down through the body without deviating significantly at all)." In response to the prosecutor's repeated inquiries, the medical examiner stated that she could not tell from the injuries how close the weapon had been to the victim, the angle of the weapon when the shot was fired, how the shot had occurred, or the victim's position at the time of the shooting. The judge sustained the defendant's objections to the prosecutor's insistent questioning. At a sidebar hearing, the judge explained that asking the expert to form an opinion on the position of the victim was "going to rise to speculation as to what happened."

While the prosecutor presented her arguments as "suggest[ions]" rather than as established facts, and her two suggestions of what had occurred actually differed substantially, neither of them were based on evidence before the

jury. The medical examiner explicitly described the path of the bullet as "down" the victim's body. A reasonable inference might have been that the victim was kneeling or sitting, whereas "dragged" implies that the defendant was horizontal. The medical examiner also testified to finding a bruise on the victim's head, but did not note any injuries from having been "dragged." Although the evidence did not preclude an inference that the victim was out of the vehicle at the time of his death, it also did not support the prosecutor's suggestions of the victim's position at death. The expert clearly stated that she could not opine as to the distance between the gun and the victim when the shot was fired, or the victim's position or location when shot, and in sustaining the defendant's objection, the judge explained that any further efforts to have her do so would have required her to speculate.[8]

---

[8] Prosecutor: "With your training and experience, would you be able to form an opinion as to the proximity of the weapon that was fired to the gunshot to the head?"

Witness: "No. This type of injury pattern is best described as an indeterminate range injury pattern. . . ."

. . .

Prosecutor: "Would you be able to form an opinion in your training and experience as to the position of [the victim] in regards to the downward trajectory that you observed in the bullet that you found?"

Defense counsel: "Objection, Your Honor."

The suggestion that the victim was "cowering" also was merely speculative, and prone to inflame the jury. Prosecutorial "appeals to sympathy . . . obscure the clarity with which the jury would look at the evidence and encourage the jury to find guilt even if the evidence does not reach the level of proof beyond a reasonable doubt." Commonwealth v. Niemic, 483 Mass. 571, 591 (2019) (Niemic II), citing Commonwealth v. Bois, 476 Mass. 15, 34 (2016). "Cowering," unlike a term such as "kneeling" or "crouching," encompasses an emotional element of fear or apprehension. Beyond describing a physical position, see, e.g., Rutherford, 476 Mass. at 647 (evidence of bloodstains supported prosecutor's statement that victim was "crawling" as opposed to "standing"), the use of the word "cowering" communicates a mental state, and one for which the jury could

---

After the defendant objected, the judge limited the expert to testifying to where the bullet lodged as sufficient evidence of the trajectory. On cross-examination, defense counsel followed up on this line of questioning:

> Defense counsel: "[Y]ou cannot give any opinion as to distance from which the shot was fired?"
>
> Witness: "No."
>
> . . .
>
> Defense counsel: "So you can't give an idea where someone was when the gunshot was discharged?"
>
> Witness: "[I]n terms of distance I cannot."

have great sympathy. In asserting that such a position meant the victim "knew what was coming," the prosecutor also improperly invited juror sympathy by emphasizing the purported emotions of the victim immediately prior to his death, where there was no evidence as to what the victim was feeling.

Indeed, given the victim's position inside the vehicle, as described by witnesses, there was no evidence the victim knew what was coming, or even saw the gun pointed at him in the very brief period between the fight ending, the victim's friends starting to return to their vehicle, and the shooting. See Commonwealth v. Smith, 387 Mass. 900, 909-910 (1983) (prosecutor's "speculative argument" was improper, as "[a] verdict must be based only on facts established by evidence beyond a reasonable doubt. It is the evidence, not the sympathy, that must be the foundation of the jury's decision"). Compare Rutherford, 476 Mass. at 645 ("argument that the victim was 'crawling away to die,' leaving bloody hand and knee prints on the floor, after giving up any hope of survival" was impermissible and speculative play to juror sympathy, inviting them to speculate as to victim's final thoughts [emphasis added]). "The jury should not be asked to put themselves 'in the shoes' of the victim, or otherwise be asked to identify with the victim." Rutherford, supra at 646, quoting Commonwealth v. Bizanowicz, 459 Mass. 400, 420 (2011). Whether or not, as the

prosecutor "suggested," the victim "knew what was coming," the prosecutor's statements not only played to the emotions of the jury in inviting them to imagine the victim's last moments, but also were unsupported by the evidence.

While a prosecutor may urge the jury to draw reasonable inferences from the facts, see, e.g., Commonwealth v. Burgess, 450 Mass. 422, 437 (2008), here there simply was no evidence as to the victim's emotional state or thoughts, be it "cowering" or an awareness that his death was imminent, see Niemic II, 483 Mass. at 593 (prosecutor's statement that victim was at crime scene to seek refuge from defendant was improper where there was "absolutely no evidence" to support that assertion); Beaudry, 445 Mass. at 580-584 (prosecutor's suggestion that complainant's testimony was true because it reflected knowledge of type of acts alleged was improper, where no facts at trial demonstrated child had knowledge beyond that ordinary for children her age). Compare Commonwealth v. Matos, 95 Mass. App. Ct. 343, 354 (2019) (where victim identified perpetrator as "red-hatted man," and defendant's mother identified red-hatted man as defendant, prosecutor's connection of evidentiary dots to argue defendant attacked victim was not improper). In sum, the prosecutor crossed the line, and her remarks as to the victim's position and state of mind shortly before his death were improper. See Smith, 387 Mass. at 909-910.

"If a defendant establishes that the prosecutor's closing argument was improper, we are guided by the following factors when deciding whether a new trial is required: 'whether 'defense counsel seasonably objected to the arguments at trial . . . whether the judge's instructions mitigated the error . . . whether the errors in the arguments went to the heart of the issues at trial or concerned collateral matters . . . whether the jury would be able to sort out the excessive claims made by the prosecutor . . . and whether the Commonwealth's case was so overwhelming that the errors did not prejudice the defendant.'" Niemic I, 472 Mass. at 673-674, citing Commonwealth v. Maynard, 436 Mass. 558, 570 (2002).

Here, defense counsel did not object to any of the prosecutor's statements at trial. While the statements "went to the heart" of the matter with respect to the theory of extreme atrocity or cruelty, the jury reached their verdict on the theory of deliberate premeditation, making these comments collateral. See Commonwealth v. Cruz, 424 Mass. 207, 212-213 (1997) ("The prosecutor's effort to explicate the theory of extreme atrocity or cruelty for the jury was partly incorrect, but could have had no effect on the jury's conviction of the defendant of murder in the first degree on the theory of deliberate premeditation").

Additionally, the jury were able to sort out the excessive claims. The jury heard testimony by the medical examiner that the gunshot wound entered the top of the victim's skull and traveled into his neck and upper back. They heard the medical examiner say that she could not answer how proximate the weapon was to the victim when fired. When the prosecutor questioned whether the medical examiner could opine as to the trajectory of the bullet, the judge sustained an objection, stating, "I don't think she -- it's going to rise to speculation as to what happened." The jury observed this exchange, and were able to note the lack of a determination as to the position of the victim. Thus, they were able to distinguish these excessive claims. Finally, apart from these brief remarks, the majority of the prosecutor's arguments were without error. Contrast Niemic II, 483 Mass. at 598-599 (new trial was required due to improper prosecutorial statements in opening and closing); Niemic I, 472 Mass. at 675, 679 (prosecutor's "highly improper, emotionally charged discussion covering three pages of transcript" combined with additional error of failure to request instruction on reasonable provocation necessitated new trial).

In making a determination as to the effect of improper remarks, "the cumulative effect of all the errors must be 'considered in the context of the arguments and the case as a whole.'" Niemic I, 472 Mass. at 673, quoting Maynard, 436 Mass.

at 570. The single shot to the top of the victim's head suggested, if anything, a premeditated killing. The victim had been sitting in his vehicle, not participating in any of the earlier altercations. The evidence of a cold and calculated killing would have outweighed any prejudice from the brief improper remarks. In the context of the trial and the arguments as a whole, the improper suggestions would have had little impact on the jury's thinking, let alone have created a substantial risk of a miscarriage of justice.

iii. Bad faith. The defendant challenges one of the remarks in the prosecutor's opening statement as misstating the evidence, unsupported by any evidence, and being so egregious that this represents the "rare case" where a prosecutor's opening was made in bad faith. The defendant points to the statement that, "although the evidence may show that the defendant mistook [the victim] for his brother, Olivio, the evidence will show this killing was the product of deliberate premeditation and that it was done with extreme atrocity and cruelty" (emphasis added). This, the defendant argues, constituted bad faith and prejudiced the defendant in implying motive that otherwise would be absent. As stated, the defendant did not challenge any portion of these remarks at trial.

"The proper function of an opening is to outline in a general way the nature of the case which the counsel expects to

be able to prove or support by evidence." Commonwealth v. Croken, 432 Mass. 266, 268 (2000), quoting Commonwealth v. Fazio, 375 Mass. 451, 454 (1978). "This expectation must, of course, have been reasonable and grounded in good faith." Croken, supra, quoting Fazio, supra at 456.

For similar reasons as with the prosecutor's statements about the defendant's motives, the defendant has not shown that the challenged statement was not something the prosecutor expected to be able to prove. The defendant was chasing Olivio, who had just beaten him, as Olivio headed for the vehicle in which the victim was sitting, at 3 A.M. The prosecutor may have expected to put forth sufficient evidence for the jury to conclude that the defendant mistook the victim for his brother. Thus, the defendant has not established that the prosecutor's suggestion about what the evidence "may" show about the reason for the killing was made in bad faith.

d. Ineffective assistance of counsel. The defendant argues that the judge erred in denying his motion for a new trial on grounds of constitutionally ineffective assistance by trial counsel, and newly discovered evidence that "cast[s] real doubt on the justice of his convictions."

"In evaluating a claim of ineffective assistance of counsel in a case of murder in the first degree, we begin by determining whether there was a serious failure by trial counsel. If so,

then we determine whether the failure resulted in a substantial likelihood of a miscarriage of justice." Commonwealth v. LaCava, 438 Mass. 708, 712-713 (2003), quoting Commonwealth v. Harbin, 435 Mass. 654, 656 (2002), and citing Commonwealth v. Wright, 411 Mass. 678, 681-682 (1992), S.C., 469 Mass. 447 (2014).

i. Failure to call alibi witness. The defendant contends that his counsel was infective for failing to call an alibi witness. The defendant argues that his counsel should have sought a capias or a delay in the trial in order to locate and bring before the court this witness, whose grand jury testimony contradicted Olivio's account of the shooting.

The determination whether to call a witness is a strategic decision. Commonwealth v. Montez, 450 Mass. 736, 754 (2008), citing Commonwealth v. Adams, 374 Mass. 722, 728-729 (1978). "A strategic decision amounts to ineffective assistance 'only if it was manifestly unreasonable when made.'" Montez, supra, quoting Commonwealth v. Martin, 427 Mass. 816, 822 (1998).

The witness testified before the grand jury that he was driving past the parking lot where the shooting and preceding fight took place. He saw some type of altercation and then saw Olivio leaving the scene in a black vehicle before another individual fired a shot towards the victim's vehicle. The witness also testified that he was shown a photographic array by

police and selected two photographs from it as appearing like the shooter, one of which was of the defendant.

This witness had been summonsed to appear at the defendant's trial on the day before his anticipated testimony, and, according to the defendant's investigator, declined to be served in hand, so the investigator had left the summons at the witness's address. When the witness did not appear, counsel did not seek a continuance or to have him arrested and brought to court, but, rather, carried on with the trial. In an affidavit filed with the defendant's motion for a new trial, trial counsel averred that he had decided not to take these steps because, while he initially had believed that the witness's testimony would be helpful for the defense, he by then no longer was sure what the testimony would be. While some of the witness's testimony before the grand jury was highly exculpatory, the witness also had identified a photograph of the defendant as looking like the shooter. Since the witness's testimony at best would have been a double-edged sword, defense counsel decided it would be better to forgo the testimony.

Such a decision by counsel not to call a witness whose testimony counsel felt might not be credible, and which might in counsel's view harm his client's case, is not manifestly unreasonable. See, e.g., Commonwealth v. Morales, 453 Mass. 40, 45 (2009). Contrast Commonwealth v. Hill, 432 Mass. 704, 718

(2000) (failure to call disinterested witness who would have contradicted entirely Commonwealth's theory of case was manifestly unreasonable, given absence of any explanation or reasoning by defense counsel). Here, the witness deliberately did not appear in court when he knew he was being asked to testify. His versions of events differed from those of the other witnesses, calling into question the witness's credibility, or at least how it would be perceived by the jury. As such, it was not manifestly unreasonable for trial counsel to make a determination not to undertake to locate the witness and have him returned to the court to testify.

ii. Failure to cross-examine witness. The defendant also maintains that he received constitutionally ineffective assistance because counsel failed to cross-examine the defendant's friend Bass about his purported ownership of the black gloves found in a plastic bag in the trunk of Bass's vehicle.

The trial judge is the "final arbitrator on matters of credibility" (citation omitted). Commonwealth v. Scott, 467 Mass. 336, 344 (2014), and cases cited. Our review is limited to whether the judge committed "a significant error of law or other abuse of discretion." See id., citing Commonwealth v. Sherman, 451 Mass. 332, 334 (2008). See, e.g., Martin, 427 Mass. at 817.

The evidence showed that the gloves were found inside a plastic bag containing a T-shirt and a pair of jeans, both stained with blood that matched the defendant's DNA. The gloves themselves tested positive for gunshot residue, and one of them contained a mixed DNA profile, part of which was consistent with the defendant's DNA. At trial, defense counsel elicited testimony from Bass to the effect that the trunk contained many items of clothing belonging to Bass, and his mother and sister, as well as to Busby. Counsel did not specifically ask Bass if the gloves belonged to him.[9] There was testimony that Bass, as well as the defendant, had been seen wearing gloves on the night of the shooting.

In support of the defendant's motion for a new trial, Bass submitted a postconviction affidavit stating that the gloves were his, that he had worn them earlier on the day of the shooting, and that he had placed them in the trunk at some point before the defendant got into the vehicle. The defendant argues that, "[w]ithout this testimony, counsel deprived [the defendant] of a substantial ground of defense by failing to fully undermine the connection between him and the gloves." The decision not to examine Bass about his ownership of the gloves,

---

[9] Counsel averred in an affidavit, "At the time of trial, I was unaware that Mr. Bass would testify that the black gloves found in his car trunk belonged to him. I, therefore, did not question him about the gloves."

in the defendant's view, was not a strategic decision because it was based on a lack of knowledge.

The motion judge, who was also the trial judge, rejected Bass's affidavit as implausible or outright not credible for several reasons. See Scott, 467 Mass. at 344, citing Commonwealth v. Leavitt, 21 Mass. App. Ct. 84, 85 (1985) ("Particular deference is to be paid to the rulings of a motion judge who served as the trial judge in the same case"). First, the judge noted that trial counsel was unaware of any claim that the gloves belonged to Bass. Such information, the judge stated, was something that the defendant would have mentioned to his attorney before, and therefore the assertion of ownership was implausible and the claim of evidence was "newly contrived." Second, the judge also commented that Bass's claim that he owned the gloves was "suspect given that the gloves were found inside a plastic bag containing pants stained with [the defendant's] blood." A motion judge has discretion to credit evidence or to make a determination concerning its reliability. Commonwealth v. Bonnet, 482 Mass. 838, 848 (2019), citing Commonwealth v. Sullivan, 469 Mass. 340, 351 (2014). Here, the judge found the claims not to be credible, and thus concluded that there could be no error in trial counsel having failed to cross-examine a witness on evidence that was "implausible" and seemingly "newly contrived" in support of the motion for a new trial.

e. Newly discovered evidence. The defendant also asserts that "newly discovered" evidence involving jailhouse calls by Olivio, and Olivio's criminal convictions after the defendant's trial, require a new trial.

Where a defendant moves for a new trial on the ground of newly discovered evidence, the defendant must show that the evidence "is in fact newly discovered"; the newly discovered evidence is "credible and material"; and the newly discovered evidence "casts real doubt on the justice of the conviction." See Pina, 481 Mass. at 435, and cases cited. "Evidence is newly discovered if it 'was unknown to the defendant or trial counsel at the time of trial' or at an earlier motion for a new trial." Commonwealth v. Ellis, 475 Mass. 459, 472 (2016), citing Commonwealth v. Cowels, 470 Mass. 607, 616 (2015).

The defendant argues that recordings of jailhouse calls between Olivio and several individuals are "newly discovered," and would have "substantially weaken[ed] the Commonwealth's case," casting doubt on the justice of the convictions. Three of the calls were made while Olivio was being held on $250,000 bail before the defendant's trial, and the others were made after the defendant had been convicted. The calls, which do not use individuals' names, could tend to suggest that Olivio was seeking another plea arrangement in connection with his pending charges, notwithstanding his assertions to the contrary at the

defendant's trial. Similarly, the defendant claims that evidence of Olivio's later convictions would have been material and relevant to impeach Olivio.

The defendant's trial counsel was aware of Olivio's pending charges and that he was being held on bail. There is no showing that reasonable due diligence would not have uncovered calls from Olivio that took place before trial. Pina, 481 Mass. at 435 (defendant must show that reasonable diligence on part of defendant or defense counsel would not have uncovered evidence by time of trial or first motion for new trial). The defendant argues that if trial counsel had tried to obtain the call records, he would have failed because of either the short time span or the refusal of jail staff to provide them, and that such an inability to obtain the evidence renders it "newly discovered." We can only speculate as to what would have happened if counsel had sought to obtain the records of the calls, but he did not, and thus the calls made pretrial are not "newly discovered," because with due diligence they could have been discovered at that time.

Even if the evidence indeed had been newly discovered, however, it merely would have been cumulative of significant other evidence challenging Olivio's credibility. Counsel cast doubt on Olivio's credibility repeatedly, from counsel's opening statement through the end of his closing argument. For

instance, Olivio admitted that he did not cooperate before the grand jury because he "didn't want to snitch" and he "wanted to take things in [his] hands." Olivio denied lying, but when asked, "Well, you didn't tell the truth, correct?" he replied, "Correct." Olivio admitted to lying before the grand jury, the jury heard evidence of a very beneficial cooperation agreement, and he was impeached by multiple other convictions. Additional evidence that Olivio had lied with respect to a plea agreement concerning the pending charges would have had little impact on the jury's evaluation of Olivio's credibility.

Because the purported newly discovered evidence is merely cumulative, this is not one of those "rare cases" where a new trial is warranted because "the Commonwealth's case depends . . . heavily on the testimony of a witness and where the newly discovered evidence seriously undermines the credibility of that witness" (quotations and citation omitted). See Cowels, 470 Mass. at 621. Moreover, much of this asserted newly discovered evidence, such as the bulk of the jailhouse calls, concerns events that took place after the defendant's convictions, and that would not have been admissible to show any person's state of mind at the time of the defendant's trial.

f. Review under G. L. c. 278, § 33E. The defendant urges this court to use its authority under G. L. c. 278, § 33E, to reduce the verdict of murder in the first degree to manslaughter

or to murder in the second degree. He argues that we should consider the spontaneity of the fight and whether the killing was the product of reasonable provocation or sudden combat, rather than malice.

Under G. L. c. 278, § 33E, "[t]his court may overturn a conviction and remand the case to the Superior Court for a new trial or reduce a conviction of murder in the first degree to a conviction on a lesser charge, for any reason that justice may require." Commonwealth v. Billingslea, 484 Mass. 606, 618 (2020). A reduction in guilt may be appropriate even where the evidence is sufficient to support the verdict. See Commonwealth v. Rolon, 438 Mass. 808, 821 (2003). This court, however, "grants relief under § 33E extremely rarely and only in the most extraordinary circumstances." Billingslea, supra.

Considering the particulars of the fight that led to the victim's death, we do not discern the spontaneity or reasonable provocation that sometimes may persuade us to reduce a verdict. The record does show that Olivio injured the defendant twice, in the period immediately preceding the fatal shooting, and in both instances the injuries were far from minor. None of the incidents before the fatal shooting, however, appeared to surprise the individuals involved, and, indeed, they appeared to have sought each other out at public locations that were known to them as places to gather and socialize. In particular,

during what was described as an "unfair" beating of three individuals on one, which the defendant invited, his friend stood by, carrying a gun, and not coming to his defense.

Importantly, as discussed, the defendant took the opportunity after the blows had ended, and while his assailants were walking away, to obtain a weapon from his friend, rather than to escape or otherwise to avoid further combat. This suggests a deliberateness and choice of escalation that could have been avoided. The intent to kill was not formed in the "heat of sudden affray or combat," Commonwealth v. Baker, 346 Mass. 107, 119 (1963), but, rather, after the conflict had ended, even if mere moments before the shot was fired. Compare Niemic I, 472 Mass. at 679 (ordering new trial or reduction in verdict where there was no self-defense instruction and there was evidence that supported self-defense, in conjunction with erroneous statements by prosecutor in closing).

Here, the jury were instructed on the defenses of reasonable provocation or sudden combat, but did not find that the defendant merited the resultant reduction in the degree of guilt to manslaughter or to murder in the second degree. Absent evidence in our plenary review to indicate that the result should be contrary, we will not replace the jury in their assessment of a record that depended heavily on credibility assessments of the witnesses.

Having conducted the plenary review required by G. L. c. 278, § 33E, we conclude that a reduction in the verdict would not be more consonant with the interest of justice in this case.

Judgments affirmed.

Order denying motion for a new trial affirmed.

CYPHER, J. (concurring, with whom Kafker, J., joins). Although I agree with the outcome, I write separately to the address the prosecutor's closing argument. Specifically, the defendant contends, and the court agrees, that the prosecutor engaged in impermissible speculation when she described the victim as "cowering" and stated that the victim "knew what was coming" at the time he was shot. A prosecutor may "argu[e] forcefully for a conviction based on the evidence and on inferences that may reasonably be drawn from the evidence." Commonwealth v. Walters, 485 Mass. 271, 289 (2020), quoting Commonwealth v. Kozec, 399 Mass. 514, 516 (1987). I disagree with the court that the prosecutor went beyond the bounds of a reasonable inference in making this argument.

The medical examiner testified that the bullet entered the top rear of the victim's head and traveled seventeen and one-half inches directly down through the victim's body. Based on this evidence, the jury could have inferred that the victim was not in the car at the time he was shot, as it would have been difficult for the defendant to shoot him in the top of the head if he had been sitting in the car. The prosecutor's suggestion that the evidence was consistent with the victim "either getting out of the car or being dragged out of the car" was a reasonable inference. The medical examiner's testimony that she could not tell how close the gun was to the victim when it was fired, or

the angle of the weapon when it was fired, does not negate the inference that the victim was no longer in the car when he was shot.

I also disagree with the court's conclusion that the prosecutor's use of the word "cowering" was mere speculation rather than reasonable inference based on the evidence. "Expert testimony is required where an inference is 'beyond [the] common knowledge and experience of the ordinary lay[person]'" (quotation omitted). Walters, 485 Mass. at 291, quoting Commonwealth v. Scott, 464 Mass. 355, 363 (2013). Although the medical examiner testified that she could not say what the victim's position was at the time of the shooting, her testimony that the bullet entered the top of the victim's head and traveled directly down permits the inference that the defendant was standing above the victim. The court states that a "reasonable inference might have been that the victim was kneeling or sitting." See ante at . To "cower" is defined as (1) "to crouch down: squat" or (2) "to shrink away or cringe [usually] in abject fear of something menacing or domineering and sometimes from cold." Webster's Third New International Dictionary 526 (1993). There is little difference between kneeling or sitting on the ground and crouching down. Further, it is a reasonable inference that when a gun was pointed at the victim, he shrunk away. See Commonwealth v. Parker, 481 Mass.

69, 74 (2018) ("In closing argument, prosecutors are entitled to marshal the evidence and suggest inferences that the jury may draw from it" [quotation, citation, and alteration omitted]).

Finally, I disagree that the prosecutor's statement that the victim "knew what was coming" improperly invited juror sympathy by emphasizing purported emotions of the victim before his death that were unsupported in evidence. Rather, I conclude that the statement was a reasonable inference that an ordinary layperson could make based on the evidence presented that the defendant pointed a gun at the victim and then shot him in the top of the head. See Scott, 464 Mass. at 362-363. See also Commonwealth v. Reyes, 483 Mass. 65, 75-76 (2019) (prosecutor's statement that defendant obtaining knife on night before killing evidenced premeditation based on reasonable inference even where defendant testified that he obtained knife for self-defense and did not use it during killing); Commonwealth v. Diaz, 478 Mass. 481, 490 (2017) (prosecutor's statement that victim "didn't die from the first blow" was reasonable inference where medical examiner's testimony supported theory but left open possibility that victim could have suffered immediate death); Commonwealth v. Burgess, 450 Mass. 422, 437 (2008) (prosecutor's statement that defendant pursued victim into bathroom was reasonable inference from evidence that knife with defendant's fingerprints on it was found in bathroom sink); Commonwealth v. Colon, 449

Mass. 207, 223-224, cert. denied, 552 U.S. 1079 (2007), S.C., 479 Mass. 1032 (2018) (prosecutor's statement that defendant was "ruthless drug dealer who would kill to obtain his own 'corner'" was fair inference where defendant testified to financial dispute with victim over drug-dealing operation); Commonwealth v. Corriveau, 396 Mass. 319, 337 (1985) (prosecutor's statement that sexual activity played part in killing was reasonable inference given evidence that defendant and victim were observed dancing, kissing, and holding hands earlier that night).

By contrast, in Commonwealth v. Rutherford, 476 Mass. 639, 646 (2017), we concluded that the prosecutor's statement that the victim was "crawling away to die" unfairly asked jurors to imagine the victim's final thoughts and invited jurors to decide the case based on sympathy for the victim. There, although the evidence supported the inference that the victim was crawling on his hands and knees, there was no evidence to warrant the inference that he was crawling away to die. See id. at 646-647. The prosecutor's contention that the victim was crawling away from a telephone that could be used to call 911 did not permit the inference that the victim was instead crawling to his death. See id. at 646. See also Commonwealth v. Valentin, 474 Mass. 301, 307 (2016) ("piling of inference upon inference is improper" [quotation and citation omitted]).

Unlike in Rutherford, the prosecutor's statements here did not require the jurors to imagine the defendant's final thoughts, nor did the statements invite the jurors to decide the case on sympathy for the victim. Instead, the prosecutor's statements were commonsense inferences to be drawn from the testimony of the medical examiner and the evidence presented that the defendant pointed a gun at the victim's head and shot him.

I am not suggesting that we lighten the duty of prosecutors to confine their arguments to those supported by the evidence or to avoid unfair emotional appeals. I suggest only that we recognize a reasonable inference.