SJC-11341

COMMONWEALTH vs. GARRET JACKSON.

Suffolk. September 14, 2020. - February 4, 2021.

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

Homicide. Firearms. Jury and Jurors. Constitutional Law, Jury. Practice, Criminal, Jury and jurors, Challenge to jurors, Voir dire, Capital case. Evidence, Photograph, Inflammatory evidence, Relevancy and materiality, Impeachment of credibility. Witness, Impeachment.

Indictments found and returned in the Superior Court Department on October 2, 2009.

The cases were tried before Patrick F. Brady, J.

Leslie W. O'Brien for the defendant.
Houston Armstrong, Assistant District Attorney, for the Commonwealth.

KAFKER, J. A jury convicted the defendant, Garrett Jackson, of murder in the first degree with deliberate premeditation in connection with the shooting death of Tommy

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

Speed on February 11, 2009.[2] The cause of death was a gunshot wound inflicted to the back of his skull at close range, and the identity of the shooter was the central issue at trial. In this direct appeal from his convictions, the defendant asserts reversible error on the part of the trial judge in (1) allowing the Commonwealth's peremptory challenges of two prospective jurors over the defendant's objections pursuant to Batson v. Kentucky, 476 U.S. 79, 95 (1986), and Commonwealth v. Soares, 377 Mass. 461, 486, cert. denied, 444 U.S. 881 (1979); (2) admitting a graphic autopsy photograph; (3) allowing rebuttal testimony about overheard telephone statements of a Commonwealth witness imparting that she altered her testimony upon receipt of death threats; and (4) denying the defendant's request to conduct consequent voir dire of that witness, to determine whether to recall her. For the reasons stated infra, we neither discern reversible error nor detect any other basis to exercise our G. L. c. 278, § 33E, authority to reduce or set

[2] The jury also convicted the defendant of numerous firearm offenses. These other charges included possession of a firearm without a license, carrying a loaded firearm, and unlicensed possession of ammunition. For the first charge, the judge imposed a sentence of eighteen months, deemed served, concurrent with the life sentence for murder. For the carrying charge, the defendant received another term of eighteen months, also to run concurrently with the life sentence, but from and after the sentence on the possession charge, and also deemed served. The Commonwealth dismissed the ammunition charge as duplicative.

aside the verdict of murder in the first degree. We affirm all his convictions.

Background. The jury could have found the following facts based upon the evidence at trial, with certain details reserved for subsequent discussion of the legal issues.

1. "Crack" cocaine sales in the Lenox housing development. At the time of his death, the victim was thirty-eight years old, and had been selling "crack" cocaine in the area around the Lenox public housing development (Lenox) in the South End section of Boston for many years. He ran a solo operation and had acquired master keys that opened several of the Lenox buildings, facilitating his access to resident clientele. The victim was the preferred local source for area addicts, both because of the dependable quality of his product and because he was personally well liked. When he was present in and around Lenox with crack cocaine, however, the victim expected customers would come to him for all of their needs before turning elsewhere, and he insisted other crack dealers relinquish all area sales to him.

The defendant, known as "G-Wiz," also sold crack cocaine in the Lenox area, operating with two associates called "Blaze" and "Nasty." The three young[3] men were together "all the time,"

[3] At the time of the shooting, the defendant was twenty-two years old.

typically loitering in the area outside a pizzeria and adjoining shops along the southeastern side of Lenox,[4] a public space the victim was also known to frequent and where a core group of at least twenty individuals from the area "hung out" and people came looking to buy crack cocaine.

G-Wiz, Blaze, and Nasty habitually operated out of certain Lenox apartments where they converged to "bag up" their product for sale while using building hallways to meet customers and transact business. At different times, the young men arranged to use the respective apartments of Renee Ruspus, known as "Kookie," and Gina Huffman[5] in this manner. In exchange for use of their respective apartments and consistent building access, G-Wiz and associates supplied Huffman and Kookie with crack cocaine. In late October 2008, the last time that Huffman recalled G-Wiz, Blaze, and Nasty coming to use her apartment,

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[4] The defendant was barred from Lenox, owing to a Boston housing authority (BHA) trespass notice issued in June 2007. His presence on any BHA property, including Lenox, was grounds for his immediate arrest. The area in front of the pizzeria and other shops across from the southeastern border of Lenox was not BHA property. Notably, BHA personnel continued to see him in and around Lenox frequently.

[5] Huffman lived in a building on the southeastern border of Lenox, and her kitchen window faced the pizzeria and other adjacent shops across the street. Her arrangement with G-Wiz began near the end of September 2008 and lasted for a period of roughly two months, when G-Wiz, Blaze, and Nasty came to her apartment weekly to "bag up." Kookie testified that she saw the victim daily over a period of five years; it was unclear for how long and exactly how often the men used her apartment.

she told the defendant that the crack cocaine he gave her was "bunk," meaning it was heavily cut with baking soda and contained very little stimulant, and that the victim sold better quality crack cocaine. The defendant reacted in anger, complaining to his associates that the victim had "screwed [them] over" by "selling [them] crap and keeping the good stuff for himself."

Throughout the remainder of 2008, and in early 2009, the victim continued to monopolize crack cocaine sales in the Lenox area. During a conversation with the younger men outside the pizzeria, he told them, "Y'all wait until I get my money and then y'all can have the rest." Another time, the defendant was heard complaining to the others that "when [the victim] was out there they couldn't eat," meaning no one else could make any money on which to live.

In the weeks before the shooting, the victim and other crack cocaine dealers, including G-Wiz and Blaze, were all outside the pizzeria when a man approached them looking to buy crack cocaine. The victim quickly claimed the customer for himself, leaving the others to grumble about the "effed up" situation and how "somebody has got to be out of here." Inside the pizzeria, the defendant and others continued complaining that it was "time for somebody to take a walk . . . so somebody else can get some money."

2. The shooting. At around 7:30 P.M. on the evening of February 11, Judy Brown, another client of the victim, went to Lenox to buy some crack cocaine from him, which they had discussed by telephone about one-half hour earlier. Kookie also testified that she had been looking to buy crack cocaine from the victim at about that same time; she found him just inside the front door of the building behind the one where Huffman's apartment was, arguing with the defendant. She saw Brown inside, waiting. Brown also had seen the defendant and the victim as she approached the front of the building. Both were standing on the raised entry platform just outside the front door, the victim in the doorway, holding the door partway open to his right while facing out, and the defendant about one or two feet to the victim's left, leaning against the outside wall and directly in front of Brown as she climbed the steps to reach the platform. Brown asked the defendant if he was waiting to see the victim. When he shook his head "no," she asked the victim to speak privately. The victim invited her inside, pushing the door open wider while standing with his body up against it to let her pass.[6] No more than two seconds after

[6] At trial, another client of the victim's, Patricia Ross, also testified that at around 8 P.M. on the night of the shooting she had walked through the first floor hallway of that same building, on her way home. She was very drunk and high on marijuana, but recalled seeing the victim there and teasing him. She saw Brown and Kookie there, too.

Brown passed through the door and into the hallway, the blast of a single gunshot deafened her. Moments later, the defendant ran out the building's back door and into a waiting black truck, which sped off.

3. The police investigation. At about 8:11 P.M., Boston police dispatch reported that a person had been shot inside one of the Lenox buildings. Upon arrival at the dispatched address minutes later, police found the front door to the building closed but unlocked. When they pulled open the door, the victim was already dead, lying face down in a pool of blood on the floor. His feet were just inside the door, and his body extended diagonally to the left across the entryway and into the first-floor hallway, his right shoulder near the bottom left corner of an internal stairway that faced the front door and led straight up to the second floor. On the second step of that stairway, crime scene investigators located a spent nine millimeter shell casing.

The victim, who was about six feet, two inches tall, had suffered no injuries apart from the fatal gunshot wound. The bullet had entered the back of his skull, leaving a rim of soot around the entrance wound, indicating that the shooter had held the gun no more than two feet away when fired; the bullet had

torn through several critical areas of the brain[7] on its trajectory through the victim's skull. Police found a spent nine millimeter projectile, bent on one side, lying on the floor at the opposite end of the hallway, near the building's back exit. The projectile was on the floor below a small dent in the wall tile in the upper corner of the hallway (about two feet below the ceiling, on the wall immediately to the left of the back doorway). The murder weapon was never found.

On May 27, three months after the shooting, Patricia Ross walked past a police cruiser parked in the area, and casually threw a crumpled up lottery ticket with her telephone number written on it through the window as she passed; officers promptly telephoned the number they found scrawled on the back of the ticket and arranged to interview Ross. Ross had known the victim for twenty-five years and considered him a good friend. She told police about a conversation that took place about three weeks earlier, at a friend's apartment on the second floor of the Lenox building where the victim was shot -- right at the top of the stairs inside the building's front door. When she arrived, several people were inside, including G-Wiz and

[7] At trial, the medical examiner testified that the resulting brain damage would have caused the victim's heart and lungs to cease function almost instantaneously.

Blaze, who were sitting at a table with others, bagging up crack cocaine to sell. There was a gun on the table.

Ross commented that whoever had shot the victim was "effed up." The defendant had a smile on his face and said "what you thought." She was crying, and again he said, "Tricia, what you thought." Ross told police that the defendant had also stated that the victim was making too much money, and that the victim took a shot to the back of the head. The defendant and another man sitting at the table had looked at each other and smiled.

Discussion. 1. Peremptory challenges. A challenge to the peremptory strike of a potential juror is subject to a three-step burden-shifting analysis. See Batson, 476 U.S. at 94-95; Soares, 377 Mass. at 489-491. First, to rebut the presumption that the strike was proper, the challenger "must make out a prima facie case" that it was impermissibly based on race or other protected status "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."[8] Johnson v. California, 545 U.S. 162, 168 (2005), quoting Batson, supra at 93-94. Second, "[i]f a party makes such a showing, 'the burden shifts to the party exercising the challenge to provide a "group-neutral" explanation for it.'" Commonwealth v. Sanchez, 485 Mass. 491, 493 (2020), quoting

[8] We clarified the first step in the burden-shifting analysis in Commonwealth v. Sanchez, 485 Mass. 491, 493 (2020).

Commonwealth v. Oberle, 476 Mass. 539, 545 (2017). Third and finally, "the 'judge must then determine whether the explanation is both "adequate" and "genuine."'" Sanchez, supra, quoting Oberle, supra. At each step of this analysis, we review a judge's decision allowing the peremptory strike of a potential juror for abuse of discretion. Commonwealth v. Lopes, 478 Mass. 593, 599 (2018), citing Commonwealth v. Jones, 477 Mass. 307, 320 (2017). We find abuse of discretion when we determine that a decision resulted from "a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Here, the defendant contends that the trial judge erred by failing to conclude that the Commonwealth's peremptory challenges of two prospective jurors were improper. Relative to defense counsel's challenge to the strike against juror no. 115, a Hispanic female member of the first venire panel, the defendant claims that the judge abused his discretion in performing the "step one" analysis, when he ruled that defense counsel had failed to make a showing of any "pattern" and declined to require the prosecutor to provide a race-neutral reason for the challenge. Relative to defense counsel's later challenge to the strike against juror no. 13, a black female

member of the second venire panel, the defendant argues that accepting the prosecutor's proffered reasons for the strike as "adequate" and "genuine" race-neutral explanations pursuant to "step three" of the legal analysis amounted to abuse of judicial discretion. To assess these claims of error, we first examine in some detail how jury empanelment unfolded.

a. Empanelment process generally. Jury empanelment in the defendant's case spanned two days in May 2011. Ultimately, the trial judge determined to sit a jury of sixteen, entitling each side to sixteen peremptory strikes pursuant to Mass. R. Crim. P. 20 (c), 378 Mass. 889 (1979). During the process, the judge conducted group questioning of two venire panels, and individual voir dire of eighty-nine jurors: sixty-nine from the first panel, and twenty from the second. Before commencing individual voir dire, the judge identified both the defendant and the victim as African-American men and told the venire that he would inquire about any "feelings or attitudes about African-American people, or more generally people of color"[9] that might interfere

[9] During review of counsels' motions in limine, the judge agreed to ask this question during individual voir dire at defense counsel's request. Specifically, defense counsel requested that the judge use the language "people of color," explaining: "I like the phrase of color, because of color includes not only African American, but it includes Asian and Hispanics. In other words, anybody who is not white is of color . . . ." Recognizing that in the instant case the defendant and victim were both African-American, he added "for the record, when I use of color, it's a more expansive term."

with jurors' ability to judge the case impartially, based only on the evidence.

On the first day of empanelment, the judge conducted individual voir dire[10] of more than fifty members of the first venire panel, and ten jurors were seated. These included six white females, two white males, one Asian-American female, and one nineteen year old Asian-American male. The judge excused about twenty other prospective jurors for cause, three of these over defense counsel's express objection.[11] The remaining twenty-three jurors subject to individual voir dire on the first day were dismissed following peremptory strikes by trial counsel. The Commonwealth exercised strikes against twelve

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[10] The judge questioned each prospective juror consistently, first about any responses they had to questions he had posed to the venire as a group, next about the answers supplied to or information missing from the written questionnaire, and then about any feelings about black people or people of color generally that might interfere with the duty to judge the case impartially. After instructing a potential juror to step down, the judge conferred with the attorneys, rarely granting requests for specific follow-up questioning, and then either excused the juror or declared him or her "indifferent." The prosecutor and defense counsel were then afforded the opportunity to raise challenges. If neither attorney raised a challenge, the juror would be seated.

[11] Of these three, one was a black woman from Honduras, another was an Indian-American pharmacy student, and the third was a white man who had been in prison for seventeen years, including after an escape. Defense counsel apparently grew heated while arguing the objection to dismissing the woman from Honduras, protesting "She's black. We don't have any blacks," and telling the judge "you were slanted."

prospective jurors; defense counsel struck eleven more prospective jurors, with whom the prosecutor had been content. On this first day of empanelment, neither counsel objected to any of the other's strikes. The record reveals little about the demographics of the struck jurors apart from that the Commonwealth's strikes included one against a black male community college student and two more against Hispanic men.

b. Juror no. 115. The defendant did not raise his first Batson-Soares challenge to a Commonwealth peremptory strike until the second day of empanelment, after the judge already had conducted individual voir dire of eleven prospective jurors. Of these eleven, the judge excused six for hardship or cause, dismissed two who were subject to peremptory strikes, and seated three, bringing the total number empanelled to thirteen. All three of these newly seated jurors were women, and all parties agreed that two of them were Hispanic and that one of those two had "very dark skin." The record also reveals the prosecutor's impression that the third female juror seated on the second morning was "non-white."

Juror no. 115 was a forty-four year old female born in Puerto Rico, and a single mother to three children, ages twenty-six, twenty-four, and twenty-two. During her voir dire, she told the judge that she had not responded to any of the group questions the day before, and had no "feelings about black

people or in general people of color that might affect [her] ability to fairly judge the case." Her formal education ended upon receiving her high school diploma, and she was then employed by the city of Boston as a student lunch monitor at a public elementary school. A little more than one year before, juror no. 115 had pleaded guilty to a charge of disturbing the peace. Her sentence was one year of probation, which she had recently completed. The judge found her indifferent.[12] The Commonwealth exercised a peremptory challenge, whereupon defense counsel stated, "I make a Soares challenge. Person of color."

In asserting this challenge, defense counsel did not specify what protected group he was claiming as the target of the strike's improper discriminatory purpose. At different points throughout his "step one" Batson-Soares argument, he referred to black people, Hispanics, Asians, and minorities in general. When the judge said he could not determine whether juror no. 115 is "Hispanic or black," defense counsel responded, "She's Puerto Rican." The judge then recognized that juror no. 115 was "Hispanic," but stated that Hispanics can also be black or white, and he was uncertain here if juror no. 115 was black

[12] On her juror questionnaire, in response to the question about "anything else in [her] background, experience, employment, training, education, knowledge, or beliefs that might affect [her] ability to be an impartial juror," she had checked "yes," and wrote in the space below, "employed, had probation a year ago."

or white. The defendant then returned to his vaguely defined objection that persons "of color" were being improperly struck. The judge then stated, "I don't know that that's a proper Soares basis, but it doesn't matter." He then asked defense counsel where he saw a pattern.

In his response, defense counsel referred variously to blacks, Hispanics, and minorities in general. He referred to prior Commonwealth peremptory strikes of one African-American and two Hispanic prospective jurors and then stated, "[W]e didn't start off with very many [people of color]," adding that the small number did not "reflect their percentage in the community." He then referenced four members of the first venire panel who were "of color" and had been excused because of illness, inability to speak English, and inability to remain impartial in a case involving drug dealing. Counsel then moved on to more general commentary that in some parts of the country "close to probably [twenty-five] percent plus are minority," but that in the defendant's lifetime the minority would become the majority. He concluded: "So I suggest to you that challenging the first young black,[13] challenging two Hispanics, challenging a third Hispanic, so four out of six that they ultimately could

[13] At the outset of his "step one" argument, defense counsel also stated that "all young people, whether they be black or white," were also being struck.

challenge, I call that a pattern." After being presented with this diffuse objection, and a back-and-forth discussion with counsel that seemed to indicate that the juror's protected category was Hispanic, but not black, the judge concluded that he "[did] not find a pattern," and then declined to inquire as to the basis for the Commonwealth's challenge.[14]

On appeal, the defendant's claim challenging the strike against juror no. 115 is more focused, as he expressly designates her Hispanic ethnicity as the relevant protected group for purposes of the Batson-Soares "step one" analysis. He contends that the relevant facts and circumstances, including the Commonwealth's proportionally greater number of peremptory strikes against Hispanic members of the venire, raise an inference that the Commonwealth's peremptory strike against juror no. 115 was unlawfully premised on her Hispanic heritage. Based on the totality of the circumstances here, we cannot conclude that the judge abused his discretion in determining that the defendant had not carried the Batson-Soares "step one"

[14] The prosecutor nevertheless volunteered his opinion that one of the female jurors who had been seated was Asian, and that the two Hispanic males against whom he had exercised peremptory challenges were white. The judge characterized the latter assessment as "a judgment call" he was "[in]capable of making," and then stated that one of the seated female jurors who was "certainly Hispanic" was also "perhaps" black, judging from her dark skin color, and that juror no. 115 was a "much more neutral color." He repeated his finding that, in any event, no pattern had been shown and permitted the peremptory challenge.

burden of production to raise an inference of discriminatory intent based on juror no. 115's Hispanic heritage.

As a preliminary matter, we note that defense counsel at trial was unfocused in his objection, which confused matters. "The test in Soares and Batson does not apply to challenges to members of all minority ethnic or racial groups lumped together, but instead applies to challenges to 'particular, defined groupings in the community.'" Lopes, 478 Mass. at 600 n.5, quoting Commonwealth v. Prunty, 462 Mass. 295, 307 n.17 (2012). See Gray v. Brady, 592 F.3d 296, 305-306 (1st Cir.), cert. denied, 561 U.S. 1015 (2010) (declining to assume that "minorities," African-American jurors, and Hispanic jurors are part of same "cognizable group" for Batson purposes where defendant provided no factual support for that claim). See also People v. Smith, 81 N.Y.2d 875, 876 (1993) (rejecting defendant's contention that Batson challenge may be based on exclusion of "minorities" in general, regardless of race). Such diffuse objections, presented without specific factual bases for each protected category, make the already difficult Batson-Soares analysis many times more complicated to sort out. On appeal, the defendant directs us to the juror's Hispanic heritage, and thus we focus our inquiry there.

> "In the course of determining whether an inference of discriminatory purpose is warranted with respect to a challenged juror, judges should consider, among any other

> relevant factors, (1) the number and percentage of group members who have been excluded from jury service due to the exercise of a peremptory challenge; (2) any evidence of disparate questioning or investigation of prospective jurors; (3) any similarities and differences between excluded jurors and those, not members of the protected group, who have not been challenged (for example, age, educational level, occupation, or previous interactions with the criminal justice system); (4) whether the defendant or the victim are members of the same protected group; and (5) the composition of the seated jury" (footnotes omitted).

Sanchez, 485 Mass. at 512. See also Lopes, 478 Mass. at 598-599. Of course, "[t]his list of factors is neither mandatory nor exhaustive; a trial judge and a reviewing court must consider 'all relevant circumstances' for each challenged strike" (footnotes omitted). Sanchez, supra at 513, quoting Jones, 477 Mass. at 322 n.24.

We begin by recognizing that neither the victim nor the defendant is Hispanic. Although not dispositive, as peremptory challenges based on protected status are prohibited in any case, "[w]e have . . . turned a keen eye toward the use of peremptory challenges on jurors who are members of the same protected class as the defendant." Commonwealth v. Robertson, 480 Mass. 383, 393 (2018). See Commonwealth v. Harris, 409 Mass. 461, 465-466 (1991) (single Commonwealth peremptory challenge can rebut presumption of propriety where target is sole member of protected group of which both defendant and prospective juror are members). In contrast, the specific basis for inferring

bias in jury selection that arises in an interracial killing is not present when the defendant and victim share membership in the same protected group. See Commonwealth v. Issa, 466 Mass. 1, 11 (2013). See also Commonwealth v. Roche, 377-378 & n.3 (1998) (where both defendant and victim were white, judge erred by denying defendant's peremptory challenge of only black prospective juror because there was no additional evidence of racial motive for challenge).

We next turn to the numbers-based considerations, although mindful that "the numbers considered in isolation are [commonly] inconclusive." Sanchez, 753 F.3d at 303, quoting United States v. Mensah, 737 F.3d 789, 802 (1st Cir. 2013), cert. denied, 572 U.S. 1075 (2014). Out of the thirty-nine jurors declared indifferent at the time of the Batson-Soares challenge, five were Hispanic. Hispanics thus represented twelve percent of the jurors declared indifferent. At the time of juror no. 115's individual voir dire, two Hispanic jurors (whom the judge also thought "could be" black) had been seated out of the total of thirteen jurors then empanelled; thus, Hispanics made up about fifteen percent of the jury seated at that point.[15] More significant is the percentage of strikes. Out of the five

[15] Two additional Hispanic jurors were later seated, such that Hispanics constituted one-quarter of the sixteen empanelled jurors. Because none of them was selected as an alternate, they constituted one-third of the deliberating jurors.

potential "indifferent" Hispanic jurors, three had been struck by the Commonwealth, representing a strike rate of sixty percent. In contrast, the Commonwealth had struck eleven out of the thirty-four non-Hispanic jurors, representing a strike rate of approximately thirty-two percent. This difference, while noteworthy, is not as dramatic or glaring as that in other cases where the raw numbers and percentages have been dispositive in raising a "step one" inference. See Soares, 377 Mass. at 473 & n.7 (prosecutor used forty-four total strikes against twelve out of thirteen prospective black jurors [ninety-two percent] and thirty-two out of ninety-four white prospective jurors [thirty-four percent]). See also Commonwealth v. Hamilton, 411 Mass. 313, 316-317 (1991) ("In this case, because the prosecution disproportionately excluded sixty-seven per cent of the prospective black jurors and only fourteen per cent of the available whites, the defendant established a prima facie rebuttal of the presumption"). Compare Commonwealth v. Green, 420 Mass. 771, 777 (1995) (no "step one" inference found where defense counsel challenged two of four [fifty percent] black prospective jurors and eight out of nineteen [forty-two percent] non-black prospective jurors). We are also dealing with only three strikes of Hispanic jurors, thereby requiring careful, individualized consideration of those strikes to place them in proper context.

Each of the two strikes the Commonwealth had exercised against Hispanic venire members prior to juror no. 115 also appeared to be made for obvious reasons that did not raise any inference of bias. During his individual voir dire, juror no. 51 stated that he knew defense counsel's paralegal, who was present in court throughout the trial, because he "[went] way back" with the paralegal's brother -- a convicted murderer well known for his community outreach work during the forty years he had been in prison. The Commonwealth had asked that juror no. 51 be released for cause since he had expressed a "fairly close relationship" with a convicted murderer; he only exercised the peremptory strike after the judge declined to excuse juror no. 51 for cause.[16] The other Hispanic venire member subject to prior Commonwealth strike, juror no. 19, told the judge she could not "be honest," and was clearly nervous about sitting on a case of murder in the first degree, explaining, "I just can't go like hearing the fingerprints and the gun . . . ."

[16] The judge had found that juror no. 51 only knew the paralegal in passing and that this would not affect his ability to judge the case fairly. The Commonwealth nonetheless questioned his ability to judge impartially. Juror no. 51's individual voir dire also revealed that during the 1980s, he had been employed as a juvenile diversion officer in the neighborhood where the murder occurred, and that he had been arrested seven years before, in connection with an alleged altercation with his son, although domestic violence charges were promptly dismissed.

Another factor for consideration is any apparent disparate questioning or investigation of prospective jurors. There was none. As indicated, see note 9, supra, the judge was extremely consistent in his individual voir dire procedure. The number and length of the inquiries depended upon whether the particular prospective juror had replied to any of the group questions, left portions of the written questionnaire incomplete, or completed the questionnaire in a manner calling for follow-up inquiry.[17] The prosecutor very rarely sought to supplement questioning unless the judge had missed an incomplete questionnaire response, and no correlation with prospective juror race or ethnicity is apparent from the record. This factor does not support a step one inference.

We also consider any notable similarities between juror no. 115 and other non-Hispanic jurors challenged by the Commonwealth. As the Commonwealth emphasizes, juror no. 115's relatively recent conviction of disturbing the peace, a race-neutral explanation for the Commonwealth's strike, was readily apparent from the record. This race-neutral reason for striking juror no. 115 was strengthened by the fact that the Commonwealth

[17] The only notable factor involving the questioning of seated jurors is that several had not answered any group questions and had fully completed the questionnaire in such a manner that the judge apparently discerned no basis for further questioning, so the exchange was minimal. There is no record evidence of any other factor contributing to that brevity.

had previously struck four other potential jurors because of their recent experience with the criminal justice system.[18] Her questionnaire also indicated that she had three children, ages twenty-six, twenty-four, and twenty-one: at the time of trial, the defendant was twenty-four years old, and he had been twenty-two years old at the time of the shooting.

In sum, this case did not involve Hispanic victims or defendants; the composition of the jury, two Hispanic jurors out of the total of thirteen jurors empanelled at the time of the strike (thirteen percent), was consistent with the percentage of Hispanic and non-Hispanic prospective jurors declared indifferent (five Hispanic prospective jurors out of thirty-nine total, or fifteen percent); there were obvious neutral grounds for the challenge -- particularly juror no. 115's recent probationary status -- that the record suggests had resulted in similar challenges to non-Hispanic jurors; and the questioning of all jurors was standardized. Although the Commonwealth's strike rate for Hispanic jurors was higher than for non-Hispanic

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[18] The Commonwealth did not strike three other indifferent venire members who had prior records of relatively minor offenses or had household or family members with such records, but in each case the offenses were older, and there is no record indication that any of them had checked "yes" to the catch-all question on the juror questionnaire about whether there was "anything else . . . that might affect . . . [their] ability to be a fair and impartial juror," as juror no. 115 had (and in the space provided below, wrote "had probation a year ago").

jurors, the statistics must be analyzed in context. The two other Hispanic jurors struck by the Commonwealth were challenged for seemingly obvious reasons not based on their membership in a protected group, one of them following an unsuccessful Commonwealth challenge for cause. Based upon the totality of the facts and circumstances here, we therefore conclude that the judge did not abuse his discretion in declining to find that the defendant had made a prima facie showing of impropriety in the prosecutor's peremptory challenge of prospective juror no. 115. See Issa, 466 Mass. at 11. We reach this conclusion, but also emphasize, as we have on numerous recent occasions, that a "trial judge is strongly encouraged to ask for an explanation as questions are raised regarding the appropriateness of the challenges." Lopes, 478 Mass. at 598, citing Issa, supra at 11 n.14.

c. Juror no. 13. Following the ruling with respect to juror no. 115, the judge conducted voir dire of the last four members of the first venire panel. The judge introduced the case to a second venire panel, posed the same series of group questions asked of the first panel, and then commenced individual voir dire. Six of the first seven prospective jurors were excused,[19] and one, a Hispanic man, was seated.

[19] Two of these six were Asian-American. Of the six, two were not qualified due to either residency or extremely limited

The defendant's second Batson-Soares challenge to the prosecutor's use of a peremptory strike followed the attempted strike of the next prospective juror, a forty-four year old black female resident of the Dorchester section of Boston who had not continued formal education past high school and was employed as a preschool teacher (juror no. 13). During her voir dire, she told the judge that she recognized one of the named police witnesses as her mother's first cousin; she did not know him well, had not seen him in a long time, and they had no interaction apart from acknowledging one another on the street in the event of a chance encounter. She was confident that she could judge his testimony fairly and impartially.[20]

Juror no. 13 also had two sons, then ages twenty-four and twenty-one. In response to further inquiries based on her questionnaire, she explained that the younger son had been arrested seven years before, at age fourteen, when he was

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English comprehension, and three were excused for health-related hardship. The last of the six, a male prospective juror, who evidently was not black himself, was excused for cause when he explained that his wife and father had both been the victims of violent crime, and he expected some difficulty judging the case impartially after that experience, because the perpetrators were black.

[20] The prosecutor later explained that juror no. 13's maternal relative had played a relatively minor role in the investigation. It was not certain that he would be called, but his name would be raised in connection with another key Commonwealth witness (Brown).

"caught in a stolen car." The charge was "thrown out" almost immediately, and he was not prosecuted. The older son had been in trouble for marijuana possession about two years earlier, but paid a fine and "got [it] thrown out." Finally, juror no. 13 elaborated upon her own experience as an eyewitness at a murder trial involving a shooting in the Roxbury section of Boston about eight to ten years prior. Given that the people involved "ran around the corner," she had not seen the actual shooting occur. Two years passed between the shooting and her trial testimony; "by [that] time . . . [she] didn't remember."

The judge found juror no. 13 indifferent, whereupon the prosecutor exercised his fifteenth peremptory strike. Defense counsel immediately challenged the strike, stating, "Tell me she's not black. . . . He's excusing her because of her color. . . . I'm challenging [the strike] because I believe it is based on race." While also noting the Commonwealth's prior strikes against other prospective jurors "of color," defense counsel expressed his "opinion [that juror no. 13] is the second person who appears as African-American." The judge proceeded by "count[ing] up the challenges of [black prospective jurors] or Hispanic [prospective jurors who] could be black,"[21] whereupon he

[21] The judge counted "one person who I thought clearly was black"; "three that I characterized as Hispanic male or female," noting, "I don't know if they were black"; and juror no. 13, "who I would think is black."

found "a pattern of excusing people who are African-American or perhaps have African blood" and asked the prosecutor to explain the reason for the challenge.

The prosecutor responded that "a combination of . . . factors" had led him to exercise the strike against juror no. 13. To begin, she had two sons around the same age as the defendant, both of whom had been arrested, and he thought at least one of them would have been prosecuted by the office of the district attorney for the Suffolk district. Further, he "sensed some sort of hostility" in the "tone of her voice" when speaking about her mother's first cousin, the police witness. The judge then asked defense counsel for argument concerning the adequacy and genuineness of the stated reasons.

Defense counsel dismissed the perceived "hostility" toward the police witness as pretext. The relationship was so distant that the potential witness was basically "a stranger," and juror no. 13 had answered that she would evaluate his testimony "like anything else." As for having two sons who were in their early twenties and had experience with the criminal justice system, defense counsel denounced that explanation as "subterfuge," explaining, "in this country young African-American males, it's like one out of two is either on probation or in jail or on parole." He then opined that juror no. 13's sons were "fine" -- the incidents were isolated and minor, and the charges were

quickly dismissed. Emphatically noting that juror no. 13 had not indicated any bias against the police, he added, "Candidly if I was in her shoes I would have animosity." The judge then permitted the challenge, for several stated reasons, discussed in detail infra. Defense counsel stated that he rejected the judge's findings as "disingenuous," since involvement with the criminal justice system, on account of systemic racism, was essentially a proxy for race.

On appeal, the defendant characterizes this Batson-Soares "step three" ruling as an abuse of judicial discretion. Upon examining the judge's findings, we discern no abuse of discretion.

> "An explanation is adequate if it is 'clear and reasonably specific,' 'personal to the juror and not based on the juror's group affiliation' (in this case race) . . . and related to the particular case being tried. . . . An explanation is genuine if it is in fact the reason for the exercise of the challenge. The mere denial of an improper motive is inadequate to establish the genuineness of the explanation."

Commonwealth v. Maldonado, 439 Mass. 460, 464-465 (2003). The trial judge must "make an independent evaluation of the prosecutor's reasons and . . . determine specifically whether the explanation was bona fide or a pretext." Commonwealth v. Calderon, 431 Mass. 21, 26 (2000). "A trial judge has considerable discretion in ruling on whether a permissible ground for [a] peremptory challenge has been shown, and [this

court] will not disturb that ruling so long as it is supported by the record." Oberle, 476 Mass. at 545, citing Commonwealth v. Rodriguez, 431 Mass. 804, 811 (2000).

Here, the judge specifically concluded that the reasons given were "reasonably specific" and "personal to [this] juror," and not based on her race. He later placed even more elaborate findings on the record to explain his reasoning. In his estimation, "the fact that the witness's two children had been involved with the criminal justice system" was a "legitimate reason for exercising a peremptory challenge," because someone "who has experienced her children being arrested and prosecuted[22] . . . may harbor a bias, conscious or unconscious against the Commonwealth." Anecdotally, he also added that it was common for prosecutors to be concerned that people with a family member who had experienced the criminal justice system as a defendant possibly may continue to feel some animosity towards the government.[23] Here, in addition to juror no. 13, the record

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[22] The defendant correctly points out that neither of juror no. 13's sons was fully "prosecuted" where she specifically stated that the charge had quickly been dropped in each instance. We think that the fact that charges issued is enough to substantiate the point here.

[23] Although the judge did not address it specifically, the prosecutor's claim to have sensed "hostility" in juror no. 13's "tone of . . . voice" when talking about the police witness who happened to be her mother's first cousin, standing alone, would not have been an adequate rationale. The defendant is correct that this is the type of "[c]hallenge[] based on subjective data

reflects that four other "indifferent" venire members had a family member or partner who was arrested and experienced the criminal justice system as a defendant. The prosecutor exercised peremptory challenges against two of them,[24] but was content to have the other two empanelled.[25] Juror no. 13 was the only "indifferent" venire person whose arrested family members were her children, however, and at the time of the peremptory strike, both were young men of the same approximate age as the defendant.[26] Given the deference owed trial judges, particularly

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such as a juror's looks or gestures, or a party's 'gut' feeling [that] should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination." Maldonado, 439 Mass. at 465.

[24] Juror no. 42 indicated that her domestic partner had been involved in some prior criminal incidents, including an arrest for operating a motor vehicle while under the influence in 1993 and a 1995 domestic violence arrest. Juror no. 21 of the second venire panel explained that her brother had pleaded guilty to felony robbery and assault as a juvenile in New York.

[25] Juror no. 36 had a brother who had been convicted of operating a motor vehicle while under the influence, and juror no. 58 indicated that her husband had an "old" arrest for operating a motor vehicle while under the influence and had also been arrested for assault as a college student, for fighting.

[26] There is no record evidence to suggest that the Commonwealth declared itself "content" with any other venire member who was parent or guardian to a child of that approximate age. To the contrary, the only other identifiable "indifferent" venire member with children in that age range was juror no. 115, who was also subject to a strike by the Commonwealth. The prosecutor also claimed to recall striking a white female juror on that basis on the first day of empanelment, but there is no independent record evidence to support or disprove that claim.

involving credibility determinations, we cannot conclude that the trial judge abused his discretion here in evaluating juror no. 13.[27]

2. Evidentiary issues. The defendant challenges the admission in evidence of a graphic autopsy photograph and certain police witness testimony expressly admitted for the limited purpose of impeaching the credibility of Ross. He also contends that the judge improperly denied his request to conduct a voir dire of Ross in connection with that testimony. There were no errors.

a. Admission of autopsy photograph. Based upon foundational testimony from the medical examiner who performed the victim's autopsy, and defense counsel's earlier questioning concerning the bullet's flight path, the judge permitted the Commonwealth to introduce an autopsy photograph of the victim's head with a metal probe inserted through the gunshot wound. The image shows one end of a metal probe protruding from the entry

[27] We nevertheless acknowledge the need for careful consideration of strikes based on minor offenses, particularly those involving young black men who have been subject to disparate treatment in the criminal justice system. See Report by the Criminal Justice Policy Program, Harvard Law School, Racial Disparities in the Massachusetts Criminal System (Sept. 2020). See also State v. Holmes, 334 Conn. 202, 205-206 (2019) (affirming negative views of police and fairness of criminal justice system as race-neutral reason for peremptory strike, but referring "systemic concerns" to jury selection task force, appointed by chief justice, to consider measures intended to promote selection of diverse jury panels).

wound in the back of the victim's skull, about four inches from the top, slightly right of center, and the other end protruding out from his right eye socket.

Defense counsel did not object;[28] he requested that the judge issue a jury instruction regarding the photograph, and the judge granted that request by forewarning the jury about the gruesome nature of the autopsy photographs, and explaining the need to consider them dispassionately for their evidentiary value. On appeal, the defendant claims that he is entitled to a new trial based upon the unfairly prejudicial effect of the image, which he characterizes as irrelevant to the jury's determination of any contested fact in the case. We reject the argument and conclude that the trial judge properly assessed the probative value of the image and mitigated any risk of unfair prejudice with an appropriate limiting instruction.

It lies within the sound discretion of a trial judge to "determine whether the inflammatory nature of a photograph outweighs its probative value." Commonwealth v. Cardarelli, 433

[28] On direct appeal from a conviction of murder in the first degree pursuant to G. L. c. 278, § 33E, we review an unpreserved error to determine whether it resulted in a substantial likelihood of a miscarriage of justice, which exists if the error is "likely to have influenced the jury's conclusion." Commonwealth v. Goitia, 480 Mass. 763, 768 (2018), quoting Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014). No application of that standard is necessary here, given that we discern no error.

Mass. 427, 431 (2001). Although "'special caution is warranted' in some circumstances, such as where the body has been altered [(as during an autopsy)] after the injuries were inflicted," Commonwealth v. Bell, 473 Mass. 131, 143 (2015), cert. denied, 136 S. Ct. 2467 (2016), quoting Cardarelli, supra, it is equally well established that "photographs indicating the force applied and portraying the injuries inflicted may properly be admitted on the issue of whether the murder was committed with . . . premeditation and deliberation." Commonwealth v. Keohane, 444 Mass. 563, 573 (2005), quoting Commonwealth v. Ramos, 406 Mass. 397, 406-407 (1990).

The path of the bullet, from the back of his head, through the victim's skull, and out his eye, was indisputably pertinent to the Commonwealth's theory of murder in the first degree: deliberately premeditated execution, accomplished by ambushing the victim from behind.[29] Further, despite the grisly nature of the photograph, it provided an alternative that avoided the

[29] Although the defense did not actively contest the medical examiner's opinion regarding the cause and manner of death, it did not stipulate to that opinion. Thus, it remained incumbent upon the Commonwealth to produce sufficient evidence to support a conclusion, beyond a reasonable doubt, that the shooter intentionally killed the victim and that he or she did so with deliberate premeditation. That the shooter transported a loaded gun to the crime scene and then shot the victim in the head at close range and by surprise from behind was sufficient to demonstrate deliberately premeditated murder. See Commonwealth v. Andrews, 427 Mass. 434, 440-441 (1998), and cases cited.

prosecutor from having to place an even more disturbing image before the jury, showing the bullet hole through the globe of the eyeball. During a sidebar conference, the prosecutor explained that typical practice for demonstrating the wound track would involve introducing photographs of both the entry and exit wounds. Since the exit wound here involved the bullet coming through the victim's eye socket and out his eyeball, the Commonwealth suggested that the photograph with the metal stake inserted through the wound track, which showed the victim's head in profile, would be less graphic. The transcript suggests that both defense counsel and the judge agreed with that assessment.

Finally, the autopsy photograph also informed conflicting arguments concerning the bullet trajectory. The Commonwealth's theory of the case was that just as the victim stepped across the threshold into the building, the defendant, who was standing just outside the open front door, reached through the entryway holding a semiautomatic firearm and shot the victim in the back of the head: the bullet traveled straight through the victim's skull and out his eye socket with such force that it hit the wall at the far opposite end of the hallway, where it left a small dent in the tile about two feet below the ceiling, on the wall immediately to the left of the rear exit. The lead homicide detective testified that crime scene investigators had located the spent nine millimeter projectile lying on the floor

just beneath the dent in the tile, which he described as a "kind of gouge in the wall consistent with a ricochet."

The defense emphatically dismissed the plausibility (or even possibility) of this theory, based upon its spatial inconsistency with the medical examiner's description of the wound track as slightly down and to the right, the position of the six foot, two inch tall victim at the time he was shot, and the Commonwealth's allegation that the shorter defendant fired the shot at close range on a level surface. Introduction of the autopsy photograph during the medical examiner's testimony[30] enabled the Commonwealth to clarify for the jury that the medical examiner's description of the wound track as "slightly downward and slightly to the right" assumed that the victim was standing upright with his head held straight and facing forward at the time he was shot.[31] She also testified that there was no

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[30] It was defense counsel who first raised the issue of the bullet trajectory as opposed to the wound trajectory as described in the autopsy report -- during cross-examination of the lead detective and before the medical examiner had testified. During a sidebar discussion, defense counsel explained that the line of questioning was part of an effort to "deal with" what counsel referred to during questioning as "quote, unquote a ricochet" at the opposite end of the hallway.

[31] The upright and forward-facing orientation, with head straight, arms down by sides, and palms out is known as "the standard anatomic position" and serves as a customary frame of reference in the field.

way for her to determine the actual positioning of the defendant's head at the time he was shot.

We have examined the color photograph, and we conclude that it is not unnecessarily gruesome or shocking, especially in light of its relevance as proof of a premeditated shooting through the back of the head and its probative value on the highly contested issue of the bullet's trajectory. Its prejudicial effect was also mitigated by the judge's careful instruction of the jury. The judge twice instructed the jury, once immediately prior to the relevant medical examiner testimony, and again during the final charge, as to the need to consider the photographic evidence dispassionately and to avoid being swayed by emotion or sympathy. It is appropriate to consider the "effectiveness of limiting instructions in minimizing the risk of unfair prejudice" when weighing the relative probative value of evidence in light of any unfair prejudice. See Mass. G. Evid. § 403 note (2020). See also Commonwealth v. Dunn, 407 Mass. 798, 807 (1990). It was proper for the judge to rule the photograph admissible in evidence here.

b. Admission of impeachment testimony and denial of request for voir dire. On the fifth day of trial, over the defendant's objection, and after conducting a potential witness voir dire, the judge decided to permit the Commonwealth to call

a police witness for the limited purpose of impeaching the credibility of Ross. The officer's testimony recounted an overheard telephone conversation between Ross and an unknown individual in which Ross stated that she had "changed [her] whole testimony" to be more favorable to the defendant because she was "not trying to get [herself] killed for nobody," and her family had been threatened. On appeal, the defendant claims that he is entitled to a new trial because the testimony had no impeachment value, and even if it did, it was unduly prejudicial. He claims that once the jury heard evidence of threats, they were likely to intuit that the defendant was a dangerous person whom they should be hesitant to acquit. For the reasons explained infra, we discern no abuse of discretion in allowing the testimony.

As described supra, on her own initiative, Ross had reached out to police by covertly dropping her telephone number into a squad car about three months after the murder. She told police, and later the grand jury, about a conversation in early May 2009, at a friend's apartment on the second floor of the building where the victim was shot. The defendant and Blaze were sitting at a table with others, bagging up crack cocaine to sell, and there was a gun on the table. Ross stated that whoever shot the victim was "effed up." The defendant looked at her with a smile on his face and said "what you thought." She

started crying and asked him "what did you do," and he again said, "Tricia what you thought." He subsequently remarked that the victim was making too much money, and acknowledged that the victim took a shot to the back of the head. At trial, Ross qualified this testimony significantly, raising questions as to her credibility.

At the outset of her trial testimony, Ross explained that the victim had been her "good friend" for twenty-five years, and then spontaneously told the jury, "I'm not here voluntarily. I was arrested. I was forced to come here." Although she never flatly denied the most important elements of the story she told to police and the grand jury, she substantially downplayed their significance.[32] Ross also made spontaneous statements ingratiating herself to the defendant.[33] She further claimed that the police had come to her house repeatedly in May 2009, she gave them her telephone number because she "had no choice,"

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[32] For example, she admitted that she had spoken with the defendant at her friend's apartment in May 2009, but added that "[h]e was there for maybe a hot second, if that." She testified that there was "a weapon" on the table but added, "[W]ho knows who it belonged to. It could have belonged to anyone in there." When she stated, "[W]hoever did that [to the victim] is effed up," the defendant did smile and say "what you thought," but he was not talking to her. When she asked, "What did you do?" and he said "Tricia what you thought," he was not talking to her then, either.

[33] Ross told the jury, "This young man used to watch my children"; stated, "I very strongly doubt he did this"; and indicated that he was "not a bad guy."

and they told her she had to make a statement. She also stated that she was "force[d]" to testify before the grand jury.

The defense cross-examination of Ross was brief, establishing that she had not seen the defendant in the vicinity of the building at around 8 P.M. on the night of the shooting and eliciting agreement that the police had badgered her and put words in her mouth. That testimony was effectively impeached by the testimony of the lead homicide detective on the case, who told the jury how Ross had thrown the crumpled lottery ticket with her number scrawled on it into the window of their cruiser and denied that police had provided her with the defendant's name or "fed" other information to her.

Prior to the police witness's impeachment testimony, the judge clearly explained to the jury that the anticipated subject of the testimony would be an overheard partial telephone conversation that occurred just after Ross's testimony. The judge instructed that if they found the officer's testimony credible, they could consider it only for a limited purpose:

> "You may consider such evidence as bearing only on the issue of Ms. Ross's credibility. You may not consider the testimony concerning what [the police witness] may have overheard her say as proof of any of the substantive facts contained in these out-of-court statements, specifically statements allegedly made by Ms. Ross, which I anticipate coming in that she may have been threatened. These statements may have bearing on her state of mind and ultimately on her credibility, but that's the limited purpose for which you may consider the testimony of [the

> police witness] concerning the subject of this telephone conversation."

The judge repeated essentially the same instruction as part of his final charge to the jury, specifically stating that they were only to consider the officer's testimony for its implications concerning the credibility of Ross's in-court testimony, and that it could not be used to establish the truth of any of Ross's out-of-court statements. Cf. Commonwealth v. Lester, 486 Mass. 239, 253 (2020) (jury instruction regarding limited admissibility of prior inconsistent statement may be incorrect where statement carries dual relevance).

The police impeachment witness testified that he had known Ross, in his role as a community service officer, for about sixteen years. He had assisted in transporting her to court to ensure her appearance at trial, but had not been present in the court room during her testimony. On that date, she never mentioned to him that she was frightened. After Ross testified, the officer brought her to a private room in the court house. When she asked if she could make a telephone call, he stepped out of the room to allow her privacy, but from a few feet away, he could still hear her side of the conversation through the closed door. Multiple times during the conversation, she told the person on the other end of the line, "I changed my whole testimony. I'm not trying to get myself killed for nobody."

She stated that "Jimmy Jacks" had threatened to kill her, and she had received forty telephone calls threatening to kill her and her children. According to the officer, Ross also told the person on the other end of the line, "I even told them that [the defendant] babysat my kids," "I told them that they locked me up and they made me testify and they made me say certain things," and "I told them that he didn't do it." She also stated that during her testimony, the defendant had looked up at her and smiled and she smiled back.

We agree with the Commonwealth and the trial judge that the officer's testimony was admissible for the purpose of impeaching Ross's credibility. She had substantially changed her testimony, putting her credibility at issue. The judge also gave a proper limiting instruction. In these circumstances, we discern no abuse of discretion in the judge's weighing of its probative versus its prejudicial value. See Mass. G. Evid. § 403.

Finally, contrary to the defendant's contention, the trial judge's decision to deny the defendant's belated request to conduct a voir dire of Ross was not an abuse of discretion. The record supports the Commonwealth's argument that the defendant was aware of the threats Ross had allegedly received in connection with her involvement in the case. Further, the judge offered to have Ross brought back to court so that the defendant

could recall her, which defense counsel declined. In these circumstances, it was well within the judge's discretion not to permit a voir dire of Ross.

3. Review under G. L. c. 278, § 33E. Finally, the defendant requests that we exercise our statutory authority to reduce the verdict of murder in the first degree in order to prevent a substantial likelihood of a miscarriage of justice, although he makes no substantive argument in support of that request. There was ample evidence at trial to support the conclusion that the shooter had deliberately premeditated killing the victim and to identify the defendant as the shooter. Although there were tensions between defense counsel and the trial judge, who held him in contempt due to an outburst during the jury selection process but deferred sentencing until after the trial, our careful review of the entire transcript revealed nothing improper in the judge's conduct of the trial itself, and we are confident the defendant was not prejudiced as a result. Finding no other basis, relief pursuant to G. L. c. 278, § 33E, is unwarranted.

Judgments affirmed.