SJC-11586

COMMONWEALTH vs. JOSHUA FERNANDES.

Suffolk. February 3, 2021. - July 1, 2021.

Present: Budd, C.J., Gaziano, Lowy, Kafker, & Wendlandt, JJ.

Homicide. Firearms. Constitutional Law, Jury, Equal protection of laws, Fair trial, Admissions and confessions, Waiver of constitutional rights by juvenile, Voluntariness of statement, Sentence. Due Process of Law, Fair trial. Fair Trial. Evidence, Expert opinion, Admissions and confessions, Voluntariness of statement. Witness, Expert. Jury and Jurors. Practice, Criminal, Jury and jurors, Challenge to jurors, Instructions to jury, Fair trial, Admissions and confessions, Waiver, Voluntariness of statement, Severance, Trial of defendants together, Argument by prosecutor, Sentence, Capital case.

Indictments found and returned in the Superior Court Department on July 1, 2010.

A motion to suppress evidence was heard by Patrick F. Brady, J., and the cases were tried before him.

Rosemary Curran Scapicchio for the defendant.
Cailin M. Campbell, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. In May of 2010, when the defendant was sixteen years old, he shot and killed fourteen year old Nicholas Fomby-Davis on a street in Boston. At a joint trial, the defendant and his codefendant Crisostomo Lopes were both convicted of murder in the first degree. In accordance with G. L. c. 265, § 2, as the statute stood at the time of his trial, the defendant was sentenced to life in prison without the possibility of parole.[1]

In this direct appeal, the defendant argues that reversal of his convictions is required because of issues with jury empanelment, the statute requiring him to be tried as an adult, the exclusion of expert testimony on juvenile brain development, the jury instructions on extreme atrocity or cruelty, the denial of his motions to suppress and to sever, and certain statements in the prosecutor's closing argument. After considering all of these issues, and reviewing the whole case as required by G. L. c. 278, § 33E, we affirm the defendant's convictions. We remand for resentencing, however, in accordance with Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 658-659 (2013), S.C., 471 Mass. 12 (2015), where we held that a life sentence for a juvenile defendant, without the possibility of

[1] The defendant also was convicted of unlawful possession of a firearm, for which he received a sentence of from four to five years' imprisonment, to be served concurrently with the life sentence.

parole, violates art. 26 of the Massachusetts Declaration of Rights.

1. Factual background. We recite the facts the jury could have found, reserving some details for later discussion of specific issues.

On a Sunday evening in May 2010, the victim and his older brother were riding around their neighborhood in Boston on a scooter; the brother was driving and both were wearing helmets. Near an intersection, the brother almost collided with a man on a bicycle as the man rode off the sidewalk into the street. The brother stopped the scooter and was able to see the man, briefly but clearly, while the man rode away. The brother later identified the man as Lopes. A short time later, the brother stopped at their house to pick up some cash so they could go to a fast food restaurant, while the victim continued to do laps around the block on the scooter, wearing his brother's helmet.

At around the same time, Anthony Williams, an off-duty Boston police officer and a member of the department's youth violence strike force, was driving through the neighborhood in his personal vehicle when he saw the defendant and Lopes walking on the street with a bicycle. Their manner of walking, as though they were "on a mission," made Williams suspicious, so he pulled over to watch them. Williams observed the two wait by an intersection, crouching down and appearing to be looking for

someone; the defendant had his hand in his pocket. When the victim passed by on the scooter, Lopes darted out into the street, grabbed the victim, and beckoned to the defendant. The defendant approached, removed a gun from his pocket, and shot the victim three or four times at close range.

Williams had an unobstructed view of these events from inside his stopped vehicle, five to six feet away. His testimony was corroborated, with minor variations, by another eyewitness, as well as by surveillance video footage. The footage, however, did not capture the actual shooting.

The victim stumbled from the middle of the street into a nearby store, where he fell to the ground and started shaking. He was gasping for air and had blood on his shirt. He was carried outside to the sidewalk, where another police officer who arrived on scene attempted to revive him as he passed in and out of consciousness. Paramedics arrived and treated the victim, but by that point he showed no signs of life, and he was pronounced dead on reaching the hospital. The victim had suffered gunshot wounds to the chest, near his left armpit, and on his right thigh.

The defendant meanwhile fled down the street and around a corner, holding a gun, with Williams driving after him and giving instructions to other officers over his radio, including one who arrived on the scene in a marked cruiser. At some point

while he was running, the defendant slowed down and ducked near a Toyota Camry, parked along the street next to a pickup truck; thereafter, Williams no longer saw the gun in his hand. Williams eventually overtook and arrested the defendant with the assistance of one of the officers from the cruiser. That officer observed that the defendant was smiling. The defendant was pat frisked and no weapon was found. After a brief search, a .25 caliber pistol was located under the Toyota Camry that was parked where the defendant had been seen to duck down as he was running. Ballistics analysis later established that it was the weapon that had been used to kill the victim.

Immediately after the defendant had been handcuffed, Lopes, on a bicycle, appeared behind the officers; Williams noticed that he was the same person who earlier had grabbed the victim from the scooter, so Williams arrested Lopes. As he was being taken into custody, Lopes said to Williams, "What are you going to do, shoot me? You can catch one, too" -- a threat that Williams understood to mean that he himself would get shot. Lopes then yelled, "Homes Ave., motherfuckers," and "that's right, bitches, Homes Ave. on the block," referring to a nearby street and a gang police knew to be based there.

In a statement to police several hours after the shooting, the defendant disavowed any knowledge of how the killing

occurred.[2] He said that he had been walking alone when the scooter "came at" him, trying to hit him, and that he then "just blacked out." Sometime after 1 A.M., while the defendant and Lopes were in nearby cells at the police station awaiting booking, Lopes yelled to the defendant at least three times, in Cape Verdean Creole, that the defendant should "take the fault." The defendant responded, but neither the officers in the booking area nor Lopes were able to hear what he said.

The jury deliberated for less than one day before finding the defendant guilty of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty; further, the jury convicted him of possession of a firearm. Lopes also was found guilty of murder in the first degree on both theories; in 2018, we affirmed his conviction. See Commonwealth v. Lopes, 478 Mass. 593, 607 (2018).

2. Discussion. The defendant argues that reversal of his convictions is required because the use of peremptory challenges to exclude younger members of the venire from the jury violated his constitutional rights; the statute requiring him to be tried as an adult is unconstitutional; he was improperly precluded from offering expert testimony on juvenile brain development;

[2] The interview was conducted in English, with an officer who spoke Cape Verdean Creole present to assist the defendant's parents, who spoke little English. See part 2.e.i, infra.

the jury should not have been instructed on the theory of extreme atrocity or cruelty; statements he made to police should have been suppressed; his trial should have been severed from that of his codefendant; and the prosecutor's closing argument was improper.

a. Jury empanelment. The defendant argues that his right to an impartial jury under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights was impaired by the prosecutor's use of peremptory challenges to keep younger members of the venire from being seated on the jury. See Batson v. Kentucky, 476 U.S. 79 (1986); Commonwealth v. Soares, 377 Mass. 461, cert. denied, 444 U.S. 881 (1979).[3] Of the Commonwealth's thirty-two peremptory challenges, the prosecutor used twenty-one on college students,

[3] The defendant also suggested in passing in his brief, without citation to any authority, that the jury selection procedure violated his due process rights, beyond those of the established Batson-Soares framework. In a postargument letter, the defendant supplied a citation to Peters v. Kiff, 407 U.S. 493, 502 (1972), in which the United States Supreme Court held that "a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner." That case, however, concerned racially discriminatory jury lists; it did not involve peremptory challenges. In addition, the Court's reliance on due process grounds in that case is not material here; the case was decided before the Sixth Amendment right to a jury trial was held to apply to the States, see Commonwealth v. Soares, 377 Mass. 461, 479 n.15 & 480 n.19 (1979).

and an additional five on nonstudents under the age of thirty. The prosecutor told the judge that

> "the Commonwealth has tried to exclude or to use challenges on the individuals who are less than [twenty-five] or college students. It is the Commonwealth's position, based upon experience, that individuals who are in college, not to disparage, but they often times have difficulties in deciding what classes to take, never mind whether or not somebody is guilty of first-degree murder."

Counsel for the defendant objected to these challenges strenuously and repeatedly. Eventually, one college student was seated, after the prosecutor had exhausted the Commonwealth's peremptory challenges.

Article 12 protects a "defendant's right to be tried by a fairly drawn jury of his or her peers." Commonwealth v. Jones, 477 Mass. 307, 319 (2017). Peremptory challenges thus may not be used "to exclude members of discrete groups, solely on the basis of bias presumed to derive from that individual's membership in the group." Soares, 377 Mass. at 488. "Discrete groups that are protected include groups defined by potential jurors' sex, race, color, creed, or national origin." Commonwealth v. Obi, 475 Mass. 541, 551 (2016).[4] In Soares,

[4] "A prima facie violation of the fair cross-section requirement is made out by a showing that (1) the group allegedly discriminated against is a 'distinctive' group in the community, (2) that the group is not fairly and reasonably represented in the venires in relation to its proportion of the community, and (3) that underrepresentation is due to systematic exclusion of the group in the jury selection process."

supra at 488-489, we said that art. 1 of the Massachusetts Declaration of Rights, as amended by art. 106 (Equal Rights Amendment), was "definitive" as to the "generic group affiliations which may not permissibly form the basis for juror exclusion," namely, sex, race, color, creed, and national origin. See Commonwealth v. Aponte, 391 Mass. 494, 507 (1984).

Federal constitutional jurisprudence reaches a similar result by focusing on how the use of peremptory challenges to target members of certain protected groups violates the equal protection rights of both the defendant and the excluded juror. Commonwealth v. Sanchez, 485 Mass. 491, 493 (2020). See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130 (1994). Federal decisions have focused on ensuring "jury selection procedures that are free from [S]tate-sponsored group stereotypes rooted in, and reflective of, historical prejudice." Commonwealth v. Smith, 450 Mass. 395, 407, cert. denied, 555 U.S. 893 (2008), quoting J.E.B., supra at 128.

We considered constitutional challenges to the jury selection process at issue here when deciding the codefendant's appeal. There, we stated that "young adults are not considered a discrete protected group for the purposes of Batson-Soares peremptory challenges," and noted in support of this view both

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Commonwealth v. Bastarache, 382 Mass. 86, 96-97 (1980), quoting Duren v. Missouri, 439 U.S. 356, 364 (1979).

our own prior decisions, as well as a wide consensus among courts in other jurisdictions. Lopes, 478 Mass. at 597. See, e.g., Commonwealth v. Oberle, 476 Mass. 539, 544-545 (2017) (upholding judge's denial of peremptory challenge by defendant, because "age is not a discrete grouping defined in the [Massachusetts] Constitution, and therefore a peremptory challenge may permissibly be based on age"); Commonwealth v. Samuel, 398 Mass. 93, 95 (1986) (rejecting Soares challenge to prosecutor's exclusion of unspecified number of "young women" from jury). See also United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987) ("young adults" are not "cognizable group" for purposes of equal protection clause). While we have not entirely foreclosed reexamination of what is encompassed in art. 1's "distinctive" groups,[5] our cases make clear that age is

[5] In Commonwealth v. Smith, 450 Mass. 395, 405-407 (2008), we declined to decide whether a peremptory challenge based on sexual orientation or being transgender would violate art. 12 or the equal protection clause. The court noted that the assertion of bias in juror selection was made only on appeal, defense counsel did not object to the prosecutor's challenge, and no reason for the challenge was given. Id. These absences, in conjunction with the lack of a factual record concerning the potential juror's "sex, transgender[] status, and sexual orientation . . . impeded the trial judge's ability to draw an inference that purposeful discrimination had occurred." Id. at 407.

not included. To the extent that the defendant asks us to revisit these past holdings, we decline to do so.[6]

b. Trial in adult court. The defendant argues that G. L. c. 119, § 74, which required him to be tried in the Superior Court, rather than in the Juvenile Court, violates the constitutional guarantees of due process and equal protection. Specifically, at the time of the shooting, G. L. c. 119, § 74, as amended through St. 1996, c. 200, § 15, provided that charges of murder in the first or second degree against "a person who had at the time of the offense attained the age of fourteen but not yet attained the age of seventeen" should be brought "in accordance with the usual course and manner of criminal

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[6] Historically, the exercise of peremptory challenges has been "viewed as the right to reject jurors legally qualified to sit," possibly on no greater basis than the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." Soares, 377 Mass. at 484, quoting 4 W. Blackstone, Commentaries *353 (1807). We have noted the need for "a balance between the goal of diffused impartiality in the petit jury and the limitations inherent in a feasible and fair process of jury selection," of which the peremptory challenge has long been a cornerstone. Soares, supra at 485. Criterion beyond those enumerated in art. 1, including age, as well as income, educational level, and occupation, among others, also could be used to delineate a meaningfully distinct group within society. Were all of these to become impermissible grounds for the exercise of peremptory challenges, however, the result would be "to transmute peremptory challenges into challenges for cause." Commonwealth v. Mitchell, 367 Mass. 419, 420 (1975). Indeed, peremptory challenges themselves are not essential to the constitutional guarantee of a fair trial by an impartial jury, and some have advocated for their outright elimination. See Batson, 476 U.S. at 108 (Marshall, J., concurring).

proceedings," i.e., in the Superior Court rather than in the Juvenile Court.[7] The defendant urges us to apply strict scrutiny to this statute, and to hold that it is not the least restrictive means by which to achieve a compelling government interest. Because no suspect class is at issue, and no fundamental rights are impinged by the statue, we are unable to do so.

We apply strict scrutiny "[w]here a statute implicates a fundamental right or uses a suspect classification." Commonwealth v. Weston W., 455 Mass. 24, 30 (2009), quoting Goodridge v. Department of Pub. Health, 440 Mass. 309, 330 (2003). "All other statutes, which neither burden a fundamental right nor discriminate on the basis of a suspect classification, are subject to a rational basis level of judicial scrutiny."[8] Commonwealth v. Freeman, 472 Mass. 503, 506 (2015), quoting Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655, 668-669 (2011), S.C., 461 Mass. 232 (2012).

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[7] The statute since has been amended to apply to juveniles up to the time of their eighteenth birthdays, see St. 2013, c. 84, §§ 25, 26, but still requires those who are at least fourteen years old to be tried as adults in the Superior Court.

[8] Where constitutional questions are at issue, we also use a standard of heightened scrutiny -- "intermediate scrutiny" -- that falls between these two categories. See, e.g., Chief of Police of Worcester v. Holden, 470 Mass. 845, 857-859 (2015); Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 246-247 (2006), and cases cited; Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 197-198 (2005).

Although "[t]he differences between being tried in the Superior Court and in the Juvenile Court are considerable," Commonwealth v. Walczak, 463 Mass. 808, 827 (2012) (Lenk, J., concurring), a fundamental right such as would trigger strict scrutiny is not at stake, see Freeman, 472 Mass at 506–507. While "[l]aws that directly infringe on fundamental rights, such as liberty from constraint, are subject to strict scrutiny," Matter of a Minor, 484 Mass. 295, 309 (2020), no such direct infringement arises solely from the fact of being tried in the Superior Court rather than in a different court. Due process protections, for example, and the right to a fair trial apply in both the Juvenile and the Superior Courts. Furthermore, "[j]uveniles [who have been] charged with murder are not a suspect class." Charles C. v. Commonwealth, 415 Mass. 58, 69 (1993). To review under strict scrutiny therefore would be inappropriate here.

Under rational basis review, we do not "consider the expediency of an enactment or the wisdom of its provisions." Freeman, 472 Mass. at 508, quoting Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 544 (1974). Rather, we examine only whether "an impartial lawmaker . . . logically [could] believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." Freeman, supra, quoting English v. New England Med.

Ctr., Inc., 405 Mass. 423, 429 (1989), cert. denied, 493 U.S. 1056 (1990).

We previously have held that the Legislature reasonably could have concluded that proceedings in the juvenile justice system were not "sufficient to protect the public from the risk of harm posed by juveniles who commit murder." Charles C., 415 Mass. at 69. We therefore discern no grounds on which to overturn a clear legislative decision that "juveniles charged with murder are not entitled to the benefit of a juvenile justice system that is 'primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders, and geared toward the correction and redemption to society of delinquent children.'" See Commonwealth v. Soto, 476 Mass. 436, 439 (2017), quoting Commonwealth v. Hanson H., 464 Mass. 807, 814 (2013). Thus, the fact that the defendant was tried in the Superior Court did not violate his constitutional rights.

c. Expert testimony. The defendant argues that the judge erred in declining to allow expert testimony on juvenile brain development and the differences between juveniles and adults, as relevant to whether the defendant had the requisite intent to kill. The defendant contends that this error was a violation of his due process rights. We conclude that there was no error in the judge's decision to exclude the testimony.

i. Standard of review. "Where a party in a criminal trial seeks to offer an expert opinion, the judge, as gatekeeper, must first determine whether the proponent of the evidence has met the five foundational requirements for admissibility: (1) that the expert testimony will assist the trier of fact because the information is beyond the common knowledge of jurors; (2) that the witness is qualified as an expert in the relevant area of inquiry; (3) that the expert's opinion is based on facts or data of a type reasonably relied on by experts to form opinions in the relevant field; (4) that the theory underlying the opinion is reliable; and (5) that the theory is applied to the particular facts of the case in a reliable manner." Commonwealth v. Polk, 462 Mass. 23, 31 (2012). "The decision to exclude expert testimony rests in the broad discretion of the judge and will not be disturbed unless the exercise of that discretion constitutes an abuse of discretion or other error of law." Palandjian v. Foster, 446 Mass. 100, 104 (2006), citing Commonwealth v. Pike, 430 Mass. 317, 324 (1999). See Commonwealth v. Richardson, 423 Mass. 180, 182 (1996).

Both the Sixth Amendment and art. 12 guarantee a criminal defendant's right to present a defense by calling witnesses on his or her own behalf. Commonwealth v. Freeman, 442 Mass. 779, 784 (2004). In Washington v. Texas, 388 U.S. 14, 19 (1967), the United States Supreme Court stated:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . [T]he right to present [the defendant's] own witnesses to establish a defense . . . is a fundamental element of due process of law."

"This right, embodied in the Sixth Amendment and applicable to the States by operation of the Fourteenth Amendment, has long been recognized as 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" Commonwealth v. Francis, 375 Mass. 211, 213-214 (1978), quoting Pointer v. Texas, 380 U.S. 400, 405 (1965). Likewise, art. 12 also guarantees a criminal defendant the "right to produce all proofs, that may be favorable to him," which implies a right "to call witnesses on behalf of the defense." Pixley v. Commonwealth, 453 Mass. 827, 834 (2009), quoting Freeman, supra. Although the right to present a defense "is not absolute," Pixley, supra, "[w]hen relevant expert testimony is entirely excluded by a trial judge, any resulting ruling is suspect," Commonwealth v. Crawford, 429 Mass. 60, 66 (1999).

ii. Nature of the proposed testimony. On June 1, 2012, three days before empanelment began, the defendant filed a "motion in limine to present evidence of mitigation of intent," seeking to present evidence of "diminished capacity to form the intent necessary to commit first-degree murder." During

empanelment, the judge conducted a sidebar hearing on the defendant's motion. Counsel told the judge that she wanted "to introduce evidence not specific to [the defendant] but in general about the whole concept of adolescent brain development and the underdeveloped frontal cortex," and "whether or not there's even a capacity to deliberately premeditate with respect to first-degree murder." She explained, "The only evidence that I've notified the Commonwealth about, and the only evidence that I'm seeking to offer, isn't evidence of my client's brain activity, anything to do specifically with [him]. . . . [W]e don't have any evidence specific to [him] that says that he has anything other than a normal adolescent brain. What I'm saying is a normal adolescent brain is different"[9]

Counsel said that she sought to introduce the evidence in anticipation of the United States Supreme Court's then-pending

[9] The Commonwealth's contention on appeal that no timely or adequate proffer was made is not supported by the record. In March 2011, almost fifteen months before trial, the defendant filed a motion seeking funds for an expert on adolescent brain development; that motion was allowed, and the expert's name was included on the defendant's list of witnesses read to the venire. The substance of the expert testimony sought to be introduced was clearly presented in the motion and at a sidebar hearing. When he filed that motion, the defendant also filed an unsuccessful motion to dismiss his indictment, in which he argued that juvenile brains are not fully developed. This was not a case of "trial by ambush." See Commonwealth v. Reynolds, 429 Mass. 388, 398 (1999). The prosecutor did not object on the ground of an inadequate proffer, nor did the judge base his ruling on that issue.

decision in Miller v. Alabama, 567 U.S. 460 (2012) (mandatory life sentences without parole for those under age of eighteen at time of crime violate Eighth Amendment to United States Constitution). After a discussion of the anticipated ruling in Miller, as well as this court's ruling in Commonwealth v. Ogden O., 448 Mass. 798, 805-806 (2007), upon which the Commonwealth relied, the judge reserved decision on the motion but stated that he was inclined to agree with the Commonwealth that Ogden O. governed, notwithstanding that a decision in Miller might be imminent, until such time as the Miller decision issued. The judge accordingly told defense counsel not to mention juvenile brain development in her opening statement, given that the proffered expert would not be able to address any condition specific to the defendant, and thus the testimony would be inadmissible under Ogden O., supra at 804 ("While a delinquent child may not have the maturity to appreciate fully the consequences of his wrongful actions, as has been explicitly recognized by our Legislature, that does not mean that a delinquent child lacks the ability to formulate the specific intent to commit particular wrongful acts").

iii. Admissibility of testimony. "Whether a defendant, because of youth, was incapable of forming the requisite intent, or possessing the requisite knowledge, or committing murder with extreme atrocity or cruelty, is a question of fact" for the

jury. Commonwealth v. Brown, 474 Mass. 576, 589 (2016). As a general matter, expert testimony may be admissible "whenever it will aid the jury in reaching a decision, even if the expert's opinion touches on the ultimate issues that the jury must decide." Commonwealth v. Okoro, 471 Mass. 51, 66 (2015), quoting Commonwealth v. Federico, 425 Mass. 844, 847 (1997). On the other hand, because "the Legislature has clearly indicated that youth in the defendant's age group are considered capable of committing murder," an expert may not testify that it is "impossible for anyone the defendant's age to formulate the necessary intent" for the crime. Okoro, supra at 65.

As stated, the trial judge relied, in part, on our decision in Ogden O., 448 Mass. at 805-806. In that case, we held that a juvenile defendant was not prejudiced by the failure to present expert testimony on his ability to form the specific intent required for the crime of mayhem. We stated in dicta in that case that "[i]n appropriate circumstances, it might be possible for a particular juvenile to present expert testimony based on scientific evidence demonstrating that the juvenile was unable to form the specific intent to commit a crime because of a mental deficiency, brain injury, or the like." Id. at 805 n.6. Our reasoning was informed by the fact that the defendant had not been charged with murder and already had the benefit of a juvenile justice system founded on an appreciation of the

differences between children and adults. Id. at 807. We also noted, however, that "[m]ore generally, as to evidence that children between the ages of seven and fourteen years are incapable of committing criminal acts because of insufficient brain development, we point out that 'respect for the legislative process means that it is not the province of the court to sit and weigh conflicting evidence supporting or opposing a legislative enactment.'" Id. at 895 n.6, quoting Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Board of Educ., 436 Mass. 763, 772 (2002).

Subsequently, in Okoro, a case involving a juvenile charged with murder, we held that a trial judge did not abuse his discretion in allowing an expert (the same expert sought by the defense here) to testify about how adolescent brain development "could inform an understanding of this particular juvenile's capacity for impulse control and reasoned decision-making," but not about "how the incomplete developmental maturity of the adolescent brain relates to the ability of a teenager to form the required intent for malice" (emphasis added). Okoro, 471 Mass. at 65-66. The ability of an expert to testify with respect to the individual defendant specifically is critical. See Brown, 474 Mass. at 590 (describing decision in Okoro as permitting expert testimony "regarding the development of adolescent brains and how this could inform an understanding of

this particular juvenile's capacity for impulse control and reasoned decision-making on the night of the victim's death" where "expert testimony or other evidence of mental impairment specific to the defendant at the time of the killing" also was before jury). See also Commonwealth v. Fernandez, 480 Mass. 334, 341 (2018) (no error in denying continuance to hire expert on adolescent brain development where defendant did not support motion with "any evidence specific to him").

While the expert in Okoro did testify in general terms about the adolescent brain, his focus on the specific condition of the defendant, who had "borderline deficient" cognitive functioning and a history of "exposure to chronic and severe domestic violence," ensured that the testimony did not cross the line of contradicting the legislative determination that juveniles can be liable for murder. Okoro, supra at 53-54, 64. The court emphasized that the expert testimony "regarding the development of adolescent brains and how this could inform an understanding of this particular juvenile's capacity for impulse control and reasoned decision-making on the night of the victim's death . . . did not amount to an opinion that the defendant (or any other fifteen year old) was incapable of forming the intent required for murder in the first or second degree simply by virtue of being fifteen." Id. at 66.

A judge thus may allow the introduction of expert testimony solely with respect to "general principles and characteristics of the undeveloped adolescent brain" only when it is accompanied by other evidence, such as testimony by a different expert, or medical or school records, specific to the defendant;[10] without this additional evidence, the expert's testimony would present the jury with the impermissible situation discussed in Okoro, 471 Mass. at 65-66. See Brown, 474 Mass. at 590. In this respect, we treat evidence of juvenile brain development differently from evidence about the effects of intoxicating substances, where generalized expert testimony is permitted. See Commonwealth v. Valentin, 474 Mass. 301, 305 & n.9 (2016) (expert testified to general effects of alcohol intoxication); Commonwealth v. Banuchi, 335 Mass. 649, 655–656 (1957) (error to exclude testimony on effect of heavy drinking on mental condition merely because expert had not examined defendant).

Here, the proffered expert testimony explicitly was restricted to evidence concerning adolescent brain development "in general." Defense counsel emphasized that the testimony

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[10] Commonwealth v. Carter, 481 Mass. 352, 371 (2019), cert. denied, 140 S. Ct. 910 (2020). To the extent that we suggested in Carter, supra at 370–371, that Okoro granted a judge the discretion to admit evidence of the "general principles and characteristics of the undeveloped adolescent brain," we clarify that such evidence, without other evidence pertaining to a particular juvenile, is inadmissible.

would not show that the defendant had "anything other than a normal adolescent brain," but instead would relate to "whether or not there's even a capacity to deliberately premeditate" by a juvenile. The proffered testimony thus not only was not particular to the defendant, but also clearly risked touching on the "legislatively resolved issue" of whether anyone the defendant's age could formulate the necessary intent for murder. See Okoro, 471 Mass. at 65. In sum, there was no abuse of discretion in the judge's decision to exclude the expert testimony.

d. Extreme atrocity or cruelty. The defendant argues that the jury should not have been instructed on extreme atrocity or cruelty as a theory of murder in the first degree. The defendant does not challenge the sufficiency of the evidence, but rather argues, as he did in seeking to introduce expert testimony on general adolescent brain development with respect to the question of intent, that the factors that tend to establish that a murder was committed with extreme atrocity or cruelty should not be applied to juveniles.

Here, the defendant also was convicted of murder in the first degree on a theory of deliberate premeditation. "[I]f the jury convict a defendant on two theories of murder in the first degree, the verdict 'will remain undisturbed even if only one theory is sustained on appeal.'" Commonwealth v. Lee, 483 Mass.

531, 548 n.14 (2019), quoting Commonwealth v. Nolin, 448 Mass. 207, 220 (2007).

e. Statements to police. The defendant argues that statements he made to police should have been suppressed because he did not have a meaningful opportunity to consult an informed adult before waiving his Miranda rights, because his invocation of his right to remain silent was not scrupulously honored, and because his statements were not voluntary. "In our review of the denial of the defendant's motion to suppress, we accept the motion judge's factual findings unless clearly erroneous, and independently apply the law to those findings to determine whether actions of the police were constitutionally justified." Commonwealth v. Manha, 479 Mass. 44, 45 (2018), citing Commonwealth v. Molina, 467 Mass. 65, 72 (2014). We conclude that there was no error in the judge's decision to deny the motion to suppress.

i. The interrogation. We summarize the findings of fact by the motion judge (who was also the trial judge) in his ruling on the defendant's pretrial motion to suppress, supplemented by other undisputed evidence introduced at the hearing that is not contrary to the judge's findings. See Commonwealth v. Alexis, 481 Mass. 91, 93 (2018).

After the defendant was taken into custody, a detective telephoned both of the defendant's parents and told them that

they should come to the station because their son had been arrested for a "serious matter." As it was obvious during this brief call that English was not the parents' native language, the detective asked a police officer who spoke Cape Verdean Creole to be present at the interrogation.[11]

The interrogation began at 10:56 P.M. Present were two detectives, the officer who spoke Cape Verdean Creole (but who was not formally trained as an interpreter), the defendant, and his father. One detective read the Miranda warnings in English, while the officer who spoke Creole translated them for the benefit of the defendant's father. The defendant and his father were directed to initial next to the rights on a list after each was explained, and they did so.

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[11] The defendant himself seemed to speak and understand English well; the judge found, based on testimony by one of the interrogating officers, that the defendant's English was "good," his mother spoke "broken" English and did not appear to understand what the officer was explaining to her, and his father's English was "more fluent" but "obviously not his first language." The judge also added that, in his own observation, the defendant spoke English "very well." He noted that the defendant was a student at a Boston high school, and that, the previous year, the defendant had appeared and testified as a witness, in English, before a grand jury. The prosecutor reported that the defendant's father accompanied him and seemed to understand all of the discussion and spoke English well. During the defendant's interrogation, his father at times spoke in English, and also reminded the defendant of certain statements that one of the interrogating officers had made with respect to gunshot residue, although that statement had not been translated.

The first two rights were translated to the defendant's father as "you have the right to remain silent" and "anything he says, they can use it against him in court." The next right, articulated in English as "you have the right to talk to a lawyer for advice before we ask you any questions and to have him or her with you during questioning," was translated as "you have the right to an attorney before answering any question." At that point, the defendant's father appeared to have become confused; when asked to initial the form, he said in Creole, "I . . . he said if I want to remain silent." After some clarification of the right to remain silent, the fourth Miranda right was translated as "if you don't have the money for a lawyer they will give you a lawyer for free."

Finally, the detective said, in English, "If you decide to answer any question now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer." This so-called "fifth" Miranda warning, see Commonwealth v. Novo, 442 Mass. 262, 271 (2004), was translated as "If any question before a lawyer being here, you can stop at any time, if he wants." When the defendant's father indicated that he did not understand, the officer explained the fifth warning again, saying, "If he decides to answer any question, before having a lawyer here with you, because, here, if you start, you can stop any time, if you want."

Both the defendant and his father then were asked (in English and in Creole, respectively) if they had understood; both responded affirmatively. One of the detectives then said to the defendant, "Okay, so if you understand all those things and you're willing to speak to us without a lawyer present, you just have to sign right here and then the officer will witness it." The defendant responded, "I'm all set." The detective asked, "You don't want to sign it?" The defendant responded, "No." The detective interpreted this as the defendant exercising "his right not to sign the form," and not his right to remain silent.[12] The motion judge found that the officer "reasonably" interpreted the defendant's response "as meaning that the defendant did not want to sign the form." The judge found that the statement "I'm all set" "was not an invocation" of either the right to silence or the right to an attorney, and that the defendant "at no time ever stated that he wished to assert" either of these rights.

The defendant's father was then asked to sign the form, which stated that he had understood the Miranda rights and had

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[12] The detective testified at the hearing, "In my own mind I thought that I he just didn't want to sign it, which I've had plenty of people that don't want to sign it. The signature is a requirement of the Boston Police Department not the law. The law just says you have to give the Miranda. So that's our requirement within the Boston Police Department. And I've had plenty of people that haven't wanted to sign the form that have sat and talked with us for hours."

had a "meaningful consultation" with the defendant. After the gist of the form was translated for him, the father said, in Cape Verdean Creole, "But, I didn't speak to him . . . nothing," and then, in English, that he did not know what had happened. At that point the defendant and both of his parents were permitted to speak privately in the interrogation room; after approximately ten minutes, the defendant's father opened the door and waved the officers back into the room.

The detective leading the interview explained that the officers were "just seeing if either one of you want to talk to us. You don't want to talk to us, you don't want to tell us what happened." The judge found that the detective had "continued to make clear to the defendant that he did not have to speak if he did not want to," and that the defendant "at no time ever stated that he wished to assert his right to silence or his right to an attorney." In response to the detective's explanation, the defendant said, "Nothing happened." The detective replied, "Just to be fair to you I will give you an opportunity [to talk,]" and then explained that a police officer had seen the shooting, that there was some "pretty good evidence" against the defendant, and that the person on the scooter had died and the defendant could be facing a murder charge and possible life imprisonment. At that point, the defendant volunteered that the person on the bicycle "came at

him" and had been trying to hit him. When the officers asked twice about a gun and the defendant's response was inaudible, his father told police that he and his son had talked, and the defendant did not know anything about the shooting. Over the course of the interview, the defendant maintained that he had been by himself, that he had not recognized the victim, that he had "blacked out" when the scooter came toward him, and that he did not remember holding or firing a gun. The interview was concluded at 11:25 P.M., then briefly resumed nine minutes later for a further five minutes, involving questions about the defendant's medical condition, including his seizures.

ii. Meaningful consultation with an interested adult. Although the defendant does not argue that the warnings given to him in English were deficient, juveniles between the ages of fourteen and eighteen must be "afforded the opportunity to consult with an interested adult" before making a voluntary waiver of their Miranda rights. Commonwealth v. Smith, 471 Mass. 161, 165-166 (2015), quoting Commonwealth v. Berry, 410 Mass. 31, 35 (1991). If such an opportunity is not given, a waiver is invalid unless "the circumstances . . . demonstrate a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile." Commonwealth v. A Juvenile, 389 Mass. 128, 134 (1983). While a "genuine opportunity" must be given, there is no requirement that the

opportunity for consultation actually be taken. Commonwealth v. MacNeill, 399 Mass. 71, 78 (1987). Crucially, "the adult who is available to the juvenile must be informed of and understand the juvenile's constitutional rights." Commonwealth v. Alfonso A., 438 Mass. 372, 381–382 (2003).

As the defendant clearly was afforded time to confer (privately) with his parents, the three spoke privately in an interview room, and they themselves chose how long they would speak together, the only question at issue here is whether the defendant's father[13] adequately understood the Miranda warnings, as translated to him, so as to make the consultation a meaningful one.[14] The four pieces of substantial information that the warnings must transmit are that a defendant "has the right to remain silent, that anything he says can be used against him in a court of law, that [the defendant] has the right to the presence of an attorney, and that if [the

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[13] The defendant's mother was not present when the warnings were read.

[14] As the defendant points out, no consultation took place before the defendant and his father were asked to sign the form indicating that the defendant was waiving his Miranda rights. Nonetheless, although a private consultation "clearly is the most conducive means to the unconstrained and thorough discussion between the adult and child contemplated by our rule," the police "are not required to give a juvenile and an interested adult an unsolicited opportunity" to talk alone. Commonwealth v. Philip S., 414 Mass. 804, 812 (1993). Here, the police did readily offer such an opportunity when the father told a detective that he did not know what had happened.

defendant] cannot afford an attorney one will be appointed for [the defendant] prior to any questioning if [the defendant] so desires." Commonwealth v. Bins, 465 Mass. 348, 357-358 (2013), quoting Miranda v. Arizona, 384 U.S. 436, 479 (1966).

No particular words are required adequately to convey the necessary information; what matters is whether the warnings given "reasonably convey" these rights to the suspect. See Commonwealth v. The Ngoc Tran, 471 Mass. 179, 185 (2015), quoting Florida v. Powell, 559 U.S. 50, 60 (2010). When the Miranda warnings are translated for someone who does not understand English, the rendering accordingly need not be verbatim, but "cannot be so 'misstated to the point of being contradictory' or equivocal." Commonwealth v. Vasquez, 482 Mass. 850, 864 (2019), quoting Bins, 465 Mass. at 363.

The translated warnings here were adequate. The only specific point on which they arguably fell short was with respect to the defendant's right to have a lawyer present during questioning. But the fact that the defendant had a right to a lawyer at no cost "before answering any question" was clearly conveyed; additionally, the father was told twice that if the defendant answered questions without a lawyer, he could stop at any time until a lawyer was "here." This was enough reasonably to convey that the defendant had the right to have an attorney present during the interview. See Commonwealth v. Lajoie, 95

Mass. App. Ct. 10, 15 (2019) (warning that defendant could have attorney "prior to any questioning" was sufficient, despite absence of mention of attorney "during" questioning). "Although the warnings were not the clearest possible formulation of Miranda's right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading." Powell, 559 U.S. at 63. A "meaningful consultation" thus took place between the defendant and his father. See A Juvenile, 389 Mass. at 134.

iii. Invocation of right to remain silent. As noted, the defendant responded to the detective's statement, "if you understand all those things and you're willing to speak to us without a lawyer present, you just have to sign right here," with "I'm all set," and then answered the further question, "You don't want to sign it?" with "No." The defendant contends that this constituted an invocation of his right to remain silent, which should have been, but was not, "scrupulously honored." See Commonwealth v. Clarke, 461 Mass. 336, 343 (2012), quoting Michigan v. Mosley, 423 U.S. 96, 104 (1975). We agree with the motion judge's determination that the defendant did not invoke his right to remain silent.

The United States Supreme Court has held that defendants "unambiguously" must invoke their right to remain silent during a police interrogation. Berghuis v. Thompkins, 560 U.S. 370,

381 (2010). While we have declined to adopt this heightened standard in a prewaiver context (that is, as here, before a subject has indicated that he or she is waiving the Miranda rights) under art. 12, we nonetheless have required that a defendant "act[] with sufficient clarity" to invoke the right. See Clarke, 461 Mass. at 343, 350 (invocation of right was sufficiently clear where defendant shook his head when asked if he wished to speak). Moreover, we have said that when a subject makes an ambiguous invocation of his or her rights, the interrogating officer should "stop questioning on any other subject and ask the suspect to make his [or her] choice clear," a practice that "has the benefit both of ensuring protection of the right if invoked and of minimizing the chance of suppression of subsequent statements at trial if not." Id. at 351–352. Even assuming that the defendant's initial words ("I'm all set") were ambiguous, his straightforward negative response to the clarifying question, "So you don't want to sign it?" confirmed that he was refusing to sign the form, rather than refusing to speak.

iv. Voluntariness. The defendant also argues that his statements to police were not voluntary, regardless of whether he waived his Miranda rights. In determining if a statement to police was voluntary, we examine "whether, in light of the totality of the circumstances surrounding the making of the

statement, the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act." Commonwealth v. Hammond, 477 Mass. 499, 502-503 (2017), quoting Commonwealth v. Tremblay, 460 Mass. 199, 207 (2011). Factors to be considered in making this determination include "promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of Miranda warnings." Commonwealth v. Mandile, 397 Mass. 410, 413 (1986), S.C., 403 Mass. 93 (1988).

On appeal, the defendant offers essentially no reason, other than the fact that he was sixteen years old at the time of the interrogation, to think that his statements were not voluntary. We agree with the motion judge that, once the defendant began speaking, there was "no indication whatsoever that [the] defendant's will was overborne."

f. Severance. The trial judge denied a joint motion from the defendant and his codefendant to sever their trials. On appeal, the defendant argues that severance was necessary due to prejudice from the introduction of certain evidence that was admissible only against Lopes. We disagree.

Trying multiple defendants together when the indictments against them arise from the same events "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice time and energy to serve upon juries, and avoids the necessity of recalling witnesses to successive trials." Commonwealth v. Smith, 418 Mass. 120, 125 (1994), quoting Commonwealth v. Moran, 387 Mass. 644, 658 (1982). Nonetheless, "when the prejudice resulting from a joint trial is so compelling that it prevents a defendant from obtaining a fair trial," severance is required, Moran, supra, as a matter of constitutional law, United States v. Lane, 474 U.S. 438, 446 n.8 (1986). One situation in which severance can be necessary is where codefendants' defenses are "mutually antagonistic and irreconcilable," such that the acceptance of one would preclude the acceptance of the other. Commonwealth v. Vasquez, 462 Mass. 827, 836–837 (2012). "Absent a constitutional requirement for severance, joinder and severance are matters committed to the sound discretion of the trial judge." Commonwealth v. McAfee, 430 Mass. 483, 485 (1999).

In this case, the defendant does not claim that he and his codefendant presented defenses that were actually "mutually antagonistic and irreconcilable." See Vasquez, 462 Mass. at 836–837. Rather, he argues that he was prejudiced by the

introduction of statements by Lopes at the time of his arrest, including his later urging the defendant to "take the fault," and evidence of Lopes's affiliation with a gang. The Commonwealth maintains that all of these statements would have been admissible under the joint venturer exception to the hearsay rule, even if the trials had been severed.

We conclude that the defendant was not prejudiced in any meaningful way by the denial of his motion to sever. The gang evidence and the statement by Lopes that the defendant should "take the fault," while clearly inculpatory of Lopes, were not necessarily inculpatory for the defendant. To the contrary, the latter statement arguably could be understood to suggest that Lopes was urging the defendant to claim responsibility even though Lopes had been the one to do the shooting. More importantly, "[w]here the jury were warranted in finding each defendant guilty on the basis of 'eyewitness testimony and other evidence,' we have concluded that any prejudice resulting from a joint trial was not so compelling that it prevented such defendants from obtaining a fair trial." See Commonwealth v. Akara, 465 Mass. 245, 257 (2013), quoting Commonwealth v. Siny Van Tran, 460 Mass. 535, 543 n.13 (2011). Such was the case here, where multiple eyewitnesses testified to the participation of both the defendant and his codefendant. In these

circumstances, we cannot say that the judge abused his discretion in denying the motion to sever.

g. Closing argument. The defendant argues that certain aspects of the prosecutor's closing argument constitute reversible error, including improper appeals to sympathy, shifting of the burden of proof, and aggressive denigration of the defendant's case. Defense counsel objected five times during the prosecutor's closing argument, and immediately moved for a mistrial at the end of the argument, raising all of the issues presented on appeal. Because the defendant objected, we review for prejudicial error. Commonwealth v. Holbrook, 482 Mass. 596, 603 (2019). We discern no grounds for reversal.

The defendant argues that the prosecutor improperly appealed to the jurors' sympathy by referring to the victim's age some nine times and calling him an "innocent boy." A prosecutor is "entitled to tell the jury something of the person whose life had been lost in order to humanize the proceedings," but must refrain, when "personal characteristics are not relevant to any material issue, . . . from so emphasizing those characteristics that it risks undermining the rationality and thus the integrity of the jury's verdict." Commonwealth v. Santiago, 425 Mass. 491, 495 (1997). We note that "the theory of extreme atrocity or cruelty was an issue in this trial, making relevant and permissible some of the prosecutor's

references to the victim's age." Commonwealth v. Kent K., 427 Mass. 754, 759 (1998) (no new trial required after improper references to victim's age in closing argument). Moreover, when "guilt is clear, improper appeals to sympathy, although troubling, are less crucial." Id. at 761. Any prejudice to the defendant was sufficiently cured by the judge's instructions to the jury that "[r]eason, logic, common sense must govern you, not emotion, not sympathy, not sentiment," and that closing arguments are not evidence. See Commonwealth v. Andre, 484 Mass. 403, 419 (2020).

The defendant also argues that the prosecutor shifted the burden of proof when he said, "Ladies and gentlemen, consider that one key point on cross-examination. Did you notice something missing in the cross examination of Officer Anthony Williams? Did one of those attorneys even ask one single question about the execution?" Although worded infelicitously, this was acceptable commentary on the defendant's tactics, which focused on calling attention to peripheral inconsistencies in testimony by the witnesses. See Commonwealth v. Rutherford, 476 Mass. 639, 644 (2017). "[I]t is not improper per se for a prosecutor to point out to the jury that cross-examination did not produce factual inconsistencies in the testimony of prosecution witnesses, even if such remarks imply that the defendant left material elements of the Commonwealth's evidence

uncontested." Commonwealth v. Tu Trinh, 458 Mass. 776, 787–788 (2011), citing Commonwealth v. Miranda, 458 Mass. 100, 117 (2010). Even if the prosecutor did cross a line here, it was a "brief, isolated statement" that "was not egregious enough to infect the whole of the trial." Commonwealth v. Salazar, 481 Mass. 105, 118 (2018). The judge properly instructed the jury that the burden of proof was on the Commonwealth and that the defendant had no obligation to produce any evidence.

The defendant also challenges asserted personal attacks on defense counsel and on his case in general. Specifically, the prosecutor said, "[Defense counsel] is a tremendously talented lawyer. But I suggest to you that the defense that she puts forward should be an insult to your intelligence, to your common sense." The prosecutor then characterized aspects of counsel's argument as a "farce" and a "distraction." We addressed this issue in Lopes, 478 Mass. at 607, where we said that the prosecutor's words were "overly aggressive . . . but not grounds for reversal." We noted that the judge gave a specific curative instruction as part of the final charge, which included the following:

> "There was some reference to arguments of defense counsel being insulting or a farce or a distraction. Well, those are hard words, and you have to remember, keep in mind that attorneys sometimes engaged in rhetoric. But I want you to remember this. There is nothing wrong with a defendant in any trial challenging the government's proof."

That the same aggressive language was directed specifically at an argument put forward by trial counsel for the defendant here does not change the view we expressed in Lopes. See Commonwealth v. Silanskas, 433 Mass. 678, 703 (2001).

h. Review under G. L. c. 278, § 33E. In his reply brief, the defendant requests that we reduce his conviction to manslaughter based, essentially, on the fact that he was a juvenile at the time of the offense. Because the defendant was a juvenile at the time of the offense, we are ordering that he be resentenced so that he will be eligible for parole on his life sentence, pursuant to Diatchenko, 466 Mass. at 665, which precludes, as the United States Supreme Court has held that the Eighth Amendment does not, Miller, 567 U.S. at 471, a sentence of life imprisonment without the possibility of parole for juveniles. We discern no reason to provide any further relief pursuant to our authority under G. L. c. 278, § 33E.

3. Conclusion. The defendant's convictions are affirmed. The sentence of life in prison is vacated and set aside, and the matter is remanded to the Superior Court for resentencing on the murder conviction in accordance with Diatchenko, 466 Mass. at 665.

So ordered.