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SJC-11930

COMMONWEALTH vs. MATTEO TROTTO.

Worcester. December 2, 2020. - June 24, 2021.

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

Homicide. Felony-Murder Rule. Kidnapping. Joint Enterprise.

Evidence, Joint venturer, Hearsay, Testimony before grand jury, State of mind, Relevancy and materiality, Death certificate. Practice, Criminal, Hearsay, Confrontation of witnesses, Cross-examination by prosecutor, Instructions to jury, Capital case. Constitutional Law, Confrontation of witnesses.

Indictment found and returned in the Superior Court Department on March 20, 2012.

The case was tried before Richard T. Tucker, J.

Robert F. Shaw, Jr., for the defendant.

Ellyn H. Lazar, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. In May of 2014, the defendant was convicted of murder in the first degree on a theory of joint venture felony-murder, with aggravated kidnapping as the predicate felony, in connection with the disappearance of Kevin Harkins in Worcester

in February of 1994. As the Commonwealth now concedes, the conviction of murder in the first degree was invalid, because at the time of the offense, the felony of aggravated kidnapping did not exist, so the defendant could have been found guilty only of felony-murder in the second degree. The defendant challenges in this direct appeal the sufficiency of the evidence of murder in the second degree. He also raises issues related to the substantive use of grand jury testimony after a finding that a witness was feigning loss of memory, certain inadmissible hearsay statements, and improper Bowden evidence. See

Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980). In addition, the defendant asserts a number of other errors at trial, including improper cross-examination by the prosecutor and incorrect jury instructions.

Having carefully examined the record, we affirm the conviction of felony-murder, and decline to exercise our authority under G. L. c. 278, § 33E, to reduce the verdict or to order a new trial. Nonetheless, due to the issue with the predicate felony of aggravated kidnapping, we vacate the conviction of murder in the first degree and remand the matter to the Superior Court for entry of a verdict of guilty of murder in the second degree and for resentencing.

1. <u>Background</u>. We recite the facts the jury could have found, viewing them in the light most favorable to the

Commonwealth and reserving certain details for later discussion.

Commonwealth v. Salazar, 481 Mass. 105, 107 (2018).

a. The incident. In February of 1994, the victim was working at a pub in Worcester and living in an apartment above it. He was a frequent user of cocaine and would obtain cocaine from the defendant. The defendant was close friends with John Fredette and Elias Samia; they referred to each other as "brothers."

On the evening of February 15, 1994, the victim was a patron at the pub. At around 10:30 P.M., a dark sedan driven by Fredette pulled up across the street from the pub. The defendant got out of the vehicle, entered the pub, and gestured to the victim to come outside. The victim did so, leaving behind a half-finished bottle of beer, a package of cigarettes, keys, and a jacket. The victim and the defendant crossed the street to the sedan. The victim started to get into the rear passenger's side seat, but the defendant opened the front passenger door; the victim got into the front seat, followed by the defendant, and the sedan drove off. A fourth individual was sitting in the rear seat.

About three and one-half hours later, at around 2 $\underline{\underline{A}}$. $\underline{\underline{M}}$. on February 16, 1994, now-retired Millbury police Chief Mark Moore, then a patrol officer, observed a dark Chevrolet Impala traveling northbound through Millbury on Route 146, from the

direction of Rhode Island, at ten miles per hour above the speed limit; the location where Moore first saw the sedan is about three miles south of Worcester and approximately thirty-six miles from Providence, Rhode Island. After following the vehicle for a short distance, Moore decided to execute a traffic stop. The vehicle was a 1985 Chevrolet Impala that was registered to Samia. When Moore made the stop, Samia was driving, and Fredette was in the front passenger seat; the defendant was not in the vehicle. After Moore asked Samia for his driver's license and the vehicle's registration, Samia provided his license but said that he did not have the registration with him because he recently had had the Impala repainted and had given the registration to his insurance company.

When Moore requested consent to search the vehicle, Samia did not give a clear answer. Moore went around to the passenger's side, asked Fredette to get out, and entered the vehicle himself to look at the inspection sticker on the windshield from the interior; he discovered that the sticker did not match the license plate. While inside the vehicle, Moore smelled marijuana. Consequently, he searched the entire vehicle, as well as Fredette and Samia. The search of the vehicle produced a small film canister containing marijuana residue. Moore then observed what he believed to be blood on

the front passenger seat, the floor in front of that seat, the driver's side door, and Fredette's clothing. Fredette told a second police officer, who had joined Moore at the scene, that he had been punched in the face during a bar fight; there were no apparent injuries on Fredette's face. Moore did not search the glove compartment or the trunk, because Samia stated that he did not have a key to open them. Eventually, Moore allowed Samia and Fredette to continue on their way in the Impala, without issuing a traffic citation for speeding or for the invalid inspection sticker. The entire stop lasted approximately fifty minutes.

A few hours later, at around 5:30 A.M. on February 16, 1994, James Whalen, a mechanic, received a call from the owner of the automobile sales, salvage, and repair shop in Charlton where he worked, asking him to report to work early. Whalen knew Samia and the defendant and had worked on their vehicles in the past. Whalen remembered working on a 1985 Chevrolet Impala belonging to Samia, which originally had been painted blue, but later was painted black. When Whalen reached his workplace, a black Chevrolet Impala was parked outside the shop. Shortly thereafter, the defendant arrived and told Whalen that Whalen had to help in getting rid of the Impala, and to "keep [his] mouth shut" or his "family would never be safe."

Whalen began dismantling the Impala, placing the interior parts in a Dumpster behind the shop. Larger pieces were taken to a private garage to be cut up with a torch. Whalen and some of his coworkers then discarded the pieces in various places, including a wooded area and a Dumpster behind a different shop. One passenger door was thrown into a pond behind that shop.¹ That same day, the license plate for a 1985 Chevrolet Impala belonging to Samia was returned to the registry of motor vehicles.

b. Investigation. In March of 2002, Anthony Carlo, an acquaintance of the defendant, made a statement to Worcester police asserting that he had talked to the defendant about the victim's disappearance. In 2006 and again in 2012, Carlo was called to testify before a grand jury about what he had heard. Testifying under a grant of immunity at the defendant's trial, Carlo said that he no longer remembered anything about the matters. The prosecutor thereafter was allowed to introduce substantively Carlo's testimony before the second grand jury. Carlo had testified before that grand jury that the defendant told Carlo that the defendant, Fredette, and Samia had picked up

¹ In 2005, a dive team from the Worcester fire department recovered the passenger's side door of an automobile from the pond. The door was identified as being consistent with that of a 1985 Chevrolet Impala that originally had been painted blue and was repainted in black.

the victim at the pub; while they were in the vehicle, a gun the defendant had been holding accidentally discharged, killing the victim and spreading blood everywhere; the three men dumped the victim's body at a location Carlo was not told; and the vehicle subsequently was destroyed.

c. <u>Trial</u>. At trial, multiple witnesses, including the victim's sister and the mother of his daughter, testified that they had not seen or heard from the victim after February 15, 1994. A State police research analyst explained that searches of certain public records databases had not revealed any indication of the victim being active after February 1994. The Commonwealth also introduced a "delayed return of death" certificate that had been issued in 2012; the certificate declared the victim to be dead as of February 15, 2001.

The Commonwealth's theory of the case was that the victim had not cooperated in a scheme organized by the defendant to procure false testimony to help Fredette, who had been arrested in a "sting" operation in September 1993 and charged with drug trafficking and related offenses. John Mayotte, the victim's roommate, testified that on February 11, 1994, the defendant and Fredette visited the victim's home.² Mayotte overheard their

² Robert Beahn, who also lived above the pub, testified that the defendant and Fredette had visited the victim on February 11, 1994.

conversation and saw the victim being given a large bag of cocaine. The defendant wanted the victim to appear at Fredette's trial and "say that he was the informant, and that he had lied." Apparently as a result of a weekend of heavy use of cocaine, however, the victim ultimately did not appear in court to testify.

Several witnesses offered testimony about the victim's statements to the effect that, as a result of having flubbed the scheme to present false testimony, he now feared the defendant. The victim told John Mayotte, for instance, that the defendant and Fredette were going to "come after him." Dawn Mayotte, John Mayotte's sister, who previously had dated the defendant, testified that the victim confided in her that he was supposed to "go to court and say that he had done something that he did not do and take the blame so that [Fredette] did not go to jail" and that if he did not do so the defendant "was going to kill him." The Commonwealth argued that these statements, introduced as evidence of the victim's state of mind, showed that the victim would not voluntarily have entered a vehicle with the defendant, and thus in fact had been kidnapped at that point.

The jury were played an audio-video recording of an interview with the defendant in July 2006, conducted by Captain Steven Sargent of the Worcester police department, in which the

defendant disavowed any involvement in or knowledge about the killing. The defendant himself did not testify.

The jury were instructed on murder in the first degree on theories of deliberate premeditation and felony-murder; they convicted the defendant of felony-murder. Samia and Fredette were tried separately; both also were convicted. See Commonwealth v. Fredette, 480 Mass. 75 (2018); Commonwealth vs. Samia, Mass. Super. Ct., No. 1285CR00178 (Worcester County Nov. 3, 2014).³

2. <u>Discussion</u>. The defendant maintains that his conviction must be vacated and judgment must enter in his favor because the life felony which is the basis for the conviction of felony-murder in the first degree did not exist at the time of the offense, and the conviction cannot be reduced to a lesser degree of guilt because the evidence was insufficient to support a conviction of nonaggravated kidnapping. The defendant also challenges certain hearsay statements by the victim; the substantive introduction of grand jury testimony; the sufficiency of the evidence that a Massachusetts court had jurisdiction over the offense; purportedly improper questioning

³ Elias Samia commenced his direct appeal in this court, and then filed a motion for a new trial in this court, which was transferred to the Superior Court for decision; any appeal therefrom was ordered to be consolidated with his briefs on direct appeal, if any are filed. That motion is pending in the Superior Court. See Commonwealth vs. Samia, No. SJC-12023.

by the prosecutor; the introduction of a delayed return of death certification; and the introduction of testimony by a State police analyst concerning databases in which someone else had collected data. The defendant also asks this court to exercise its authority under G. L. c. 278, § 33E, to grant a new trial.

a. Conviction of felony-murder on the basis of a predicate felony that did not exist at the time of the offense. The defendant contends that his conviction of murder in the first degree cannot stand because it is based on the felony of aggravated kidnapping, an offense which the Commonwealth concedes did not exist at the time of the victim's death. The offense of aggravated kidnapping, G. L. c. 265, § 26, is kidnapping "while armed with a dangerous weapon and inflict[ing] serious bodily injury thereby." The offense was enacted in 1998, see G. L. c. 265, § 26, third par., inserted by St. 1998, c. 180, § 63, and did not exist in 1994. See Fredette, 480

Mass. at 87. A conviction of murder in the first degree, based on a crime that did not exist when the victim was killed, would amount to an unconstitutional ex post facto application of the current law. Id. at 87-88.

The offense of kidnapping, which did exist in 1994, is a lesser included offense of aggravated kidnapping. See Commonwealth v. Pearson, 87 Mass. App. Ct. 720, 721 n.1 (2015). By convicting the defendant of felony-murder with a predicate

felony of aggravated kidnapping, the jury necessarily concluded that the defendant had kidnapped the victim. Under the language of G. L. c. 265, § 26, both today and as it stood in 1994, a conviction of kidnapping (without the intent to extort money) provides for a sentence of imprisonment "for not more than ten years." Because kidnapping is not a felony punishable by a term of incarceration of up to life in prison, it can support a conviction of felony-murder only in the second degree. See G. L. c. 265, § 1 (killing during commission of felony that is "punishable with death or imprisonment for life" is murder in first degree); Commonwealth v. Burton, 450 Mass. 55, 57 (2007). At a minimum, therefore, the defendant's conviction must be reduced to felony-murder in the second degree.

b. <u>Sufficiency of the evidence</u>. The defendant also challenges the sufficiency of the evidence to support a conviction of felony-murder in the second degree. As the crime here was committed before this court's decision in <u>Commonwealth</u> v. <u>Brown</u>, 477 Mass. 805 (2017), cert. denied, 139 S. Ct. 54 (2018), significantly restricting those situations in which a defendant can be convicted of felony-murder, see <u>id</u>. at 826-836 (Gants, C.J., concurring), we rely upon the previous, long-standing standard, see <u>Commonwealth</u> v. <u>Matchett</u>, 386 Mass. 492, 503 n.12 (1982). Under our pre-<u>Brown</u> standard, "[a] conviction of felony-murder in the second degree requires the jury to find

that (1) the defendant committed or attempted to commit a felony with a maximum sentence of less than imprisonment for life,

(2) a killing occurred during the commission or attempted commission of that felony, and (3) the felony was inherently dangerous or the defendant acted with conscious disregard for the risk to human life." Commonwealth v. Bell, 460 Mass. 294, 308 (2011), S.C., 473 Mass. 131 (2015), cert. denied, 136 S. Ct. 2467 (2016), quoting Commonwealth v. Christian, 430 Mass. 552, 558 (2000), overruled on another ground by Commonwealth v. Paulding, 438 Mass. 1 (2002).

The defendant asserts that the evidence here was insufficient to establish that a kidnapping occurred, the kidnapping was committed with conscious disregard for human life, and the kidnapping was sufficiently connected to the killing. In addition, the defendant argues that there was insufficient evidence to prove that the killing occurred within Massachusetts.

We analyze the legal sufficiency of the evidence under the familiar <u>Latimore</u> standard, that is, whether, "after viewing the evidence in the light most favorable to the prosecution, <u>any</u> rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (citation omitted).

<u>Commonwealth</u> v. <u>Latimore</u>, 378 Mass. 671, 677 (1979).

"[C]ircumstantial evidence and inferences drawn therefrom may be

sufficient," so long as the inferences that must be drawn are "reasonable and possible"; they need not be "necessary or inescapable." Commonwealth v. Fernandes, 478 Mass. 725, 739 (2018), quoting Commonwealth v. Linton, 456 Mass. 534, 544 (2010). A conviction, however, "may not rest on the piling of inference upon inference or on conjecture and speculation."

Commonwealth v. Bin, 480 Mass. 665, 674 (2018), quoting

Commonwealth v. Lao, 443 Mass. 770, 779 (2005), S.C., 450 Mass. 215 and 460 Mass. 12 (2011).

i. <u>Kidnapping</u>. To prove nonaggravated kidnapping, the Commonwealth must show that the defendant, "without lawful authority, forcibly or secretly confine[d] or imprison[ed] another person within this [C]ommonwealth against [the person's] will." G. L. c. 265, § 26. Viewing the evidence in the light most favorable to the Commonwealth, the evidence here would have allowed the jury to find that the defendant forcibly confined the victim in the Impala outside the pub, against the victim's will, albeit with constructive rather than actual force.

The jury could have found that because the victim left behind his unfinished beer and a number of personal possessions, such as his keys, cigarettes, and a jacket (on a cold night in the middle of February), the victim intended to return quickly, and not to depart in a vehicle. The jury also could have concluded based on the victim's statements that he feared the

defendant and Fredette, and that the victim would not voluntarily have entered a motor vehicle with the two of them. Four witnesses testified to statements the victim had made to them concerning his fear of what the defendant would do because he had not participated in the scheme to testify falsely at the defendant's brother's trial. Several witnesses recalled the victim explaining that he was afraid the defendant would "come after" him or "kill" him for his failure to participate. Another recalled a conversation in which the victim recounted the defendant's threats to kill his brother's codefendant, and the codefendant's entire family, because the defendant viewed that individual as responsible for what happened to his brother. See part 2.c.iii, infra. The evidence of the victim's fear could have allowed the jury to infer the exercise of "constructive force," that is, "threatening words or gestures" by the defendant that "operate[d] on the mind" of the victim so as to induce him to enter the vehicle. See Commonwealth v. Caracciola, 409 Mass. 648, 652 (1991) (evidence of constructive force was sufficient to support convictions of robbery and rape as crimes of violence). See also Commonwealth v. Boyd, 73 Mass. App. Ct. 190, 193 (2008) ("display of potential force" was sufficient to prove kidnapping).

ii. Conscious disregard of the risk to life. Under our felony-murder doctrine as it stood at the time of the

defendant's trial, a homicide committed during the commission of a felony that was not punishable by death or imprisonment for life was felony-murder in the second degree only if the predicate felony either was inherently dangerous or was committed in circumstances that demonstrated a "conscious disregard of the risk to human life" on the part of the defendant. <u>Burton</u>, 450 Mass. at 57, quoting <u>Matchett</u>, 386 Mass. at 506. See <u>Commonwealth</u> v. <u>Scott</u>, 428 Mass. 362, 364 (1998).

Here, the jury would have been warranted in finding that the manner in which the kidnapping occurred showed a conscious disregard for the risk to human life, even if the evidence did not compel that conclusion. See Commonwealth v. Plunkett, 422 Mass. 634, 639 (1996). Although Moore testified that he found no gun in the Impala, according to Carlo, the defendant said that there had been one, which "went off accidentally while he was holding it," killing the victim. There also was testimony that Samia carried a gun "most of the time." From this, the jury reasonably could have concluded that the defendant either was armed himself or at least knew that one of his coventurers, sitting in the vehicle in which he was confining the victim, was This would be sufficient to establish that the kidnapping involved a conscious disregard of the risk to human life. See Commonwealth v. Benitez, 464 Mass. 686, 689-690 (2013) (joint venture armed robbery requires only one

participant to be armed); <u>Commonwealth</u> v. <u>Fickett</u>, 403 Mass.

194, 196-197 (1988) (sufficient for joint venture armed robbery that defendant knew coventurer had gun); <u>Commonwealth</u> v. <u>Watson</u>, 388 Mass. 536, 544 (1983), <u>S.C.</u>, 393 Mass. 297 (1984) (use of gun tends to indicate that felony "inherently involved a conscious disregard of risk to human life").

- Connection of the kidnapping to the homicide. iii. "For purposes of felony-murder, the homicide and the predicate felony 'need only to have occurred as part of one continuous transaction,'" a requirement that is met when the offenses "took place at substantially the same time and place." Commonwealth v. Morin, 478 Mass. 415, 422 (2017), quoting Commonwealth v. Ortiz, 408 Mass. 463, 466 (1990). The evidence before the jury suggested that the victim died sometime before 2 $\underline{A} \cdot \underline{M}$. on February 16, 1994. If the jury concluded that the defendant intentionally participated in the underlying felony, the kidnapping, he became "liable for a death that 'followed naturally and probably from the carrying out of the joint enterprise, '" even if there was no initial plan to kill. Bin, 480 Mass. at 674, quoting Morin, supra at 421.
- iv. <u>Territorial jurisdiction</u>. The defendant argues that the evidence at trial was insufficient to establish beyond a reasonable doubt that the offense charged was committed by the defendant in Massachusetts, or even that the victim was killed

in Massachusetts. He contends that the only evidence of location introduced at trial involved the victim leaving the pub and getting into the Impala, which was driven away. The stop of Samia's vehicle on Route 146 approximately four hours later did not involve the defendant, who was not in the vehicle. Based on its northward direction of travel, however, the officer who conducted the stop suspected that the vehicle was coming from Rhode Island, approximately seventeen miles away, and requested a "be on the lookout for" alert in Rhode Island. This suspicion, based on no actual evidence of ties to other States, is the entire underpinning of the defendant's jurisdictional claims.

"It is elementary that it must be shown that jurisdiction lodged in the courts of Massachusetts before the defendant can be found guilty of the offence charged." Commonwealth v. Hall, 485 Mass. 145, 153 (2020), quoting Commonwealth v. Combs, 480 Mass. 55, 60 (2018). See Commonwealth v. Fleming, 360 Mass. 404, 406 (1971). "The general rule, accepted as 'axiomatic' by the courts in this country, is that a State may not prosecute an individual for a crime committed outside its boundaries."

Vasquez, petitioner, 428 Mass. 842, 848 (1999). Thus, where "there is a genuine factual dispute about whether a crime was committed in Massachusetts, 'that issue is to be submitted to the jury in the form of an instruction.'" Hall, supra, quoting

Combs, supra at 61. "Where territorial jurisdiction is a triable issue, the Commonwealth's burden of proof is the same as it is for the substantive elements of the crime(s) charged, that being proof beyond a reasonable doubt." Hall, supra, quoting Combs, supra. "Merely because the defendant raised the issue of jurisdiction does not automatically entitle him [or her] to have the issue submitted to the jury." Commonwealth v. Adelson, 40 Mass. App. Ct. 585, 589 (1996). "[N]o jurisdictional instruction is required where the evidence makes it neither reasonable nor possible to assume that the victim was not killed or injured in Massachusetts." Hall, supra, citing Combs, supra. See Commonwealth v. Jaynes, 55 Mass. App. Ct. 301, 308-310 (2002).

Here, the defendant points out, the judge instructed the jury on the need to find that the kidnapping took place in Massachusetts, as required under the statute, but gave no comparable instruction with respect to a determination where the killing took place. Nonetheless, we discern no error. Nothing in the record remotely suggested that the crime happened outside Massachusetts. The victim, the defendant, and his coventurers lived and worked in Massachusetts and had known each other since childhood. According to testimony from multiple witnesses, the defendant and his coventurers were well known in the pub where the victim left his belongings. The detailed testimony about

the dismantling and disbursement of the Impala by one of the defendant's acquaintances suggested a pattern of scattering objects to be dumped in woods near the airport in Worcester, in local ponds, and in Dumpsters behind local businesses; indeed, Whalen described the locations he thought were best and explained a prior scattering where the same woods had been used. Nothing in the evidence suggests that the defendant and his coventurers decided to drive almost an hour south across State lines with either a prisoner or a body in their vehicle, and then return north again. Given the lack of any events in or any affirmative connection to Rhode Island, it was a "reasonable and possible" inference for the jury to make that the crime occurred within Massachusetts. See Commonwealth v. Gilbert, 366 Mass. 18, 29-30 (1974). See also Jaynes, 55 Mass. App. Ct. at 308-309 (no jurisdictional instruction was required where "circumstantial evidence pointed to Massachusetts as the site of the murder," even though body was discovered in Maine).

c. Evidentiary issues. The defendant raises a number of issues with the judge's evidentiary rulings. The defendant challenges the introduction of evidence from the traffic stop in Millbury, Carlo's grand jury testimony and statements to police, certain hearsay statements relating to the victim's state of mind, the delayed return of the death certificate, and the testimony of a police research analyst about database searches.

i. Statements made during the traffic stop. The defendant argues that statements Samia and Fredette made to Moore and another Millbury police officer, Sergeant Webb, during the traffic stop at approximately 2 A.M. on February 16, 1994, should not have been admitted. Because the defendant objected to the admission of Moore's testimony, we review for prejudicial error. See Commonwealth v. Murungu, 450 Mass. 441, 448 (2008). The statements were introduced, over the defendant's objection, under the joint venture exception to the hearsay rule. This exception "derives from an analogy between a criminal venture and a lawful partnership," Commonwealth v. Bright, 463 Mass. 421, 426 (2012), such that "the statement of each joint venturer is equivalent to a statement by the defendant," Commonwealth v. Stewart, 454 Mass. 527, 535 (2009). To introduce such statements, the Commonwealth must show by a preponderance of the

⁴ The jury also heard a recording from a "turret tape," consisting of condensed portions of conversations between Moore, Webb, and the dispatcher during the traffic stop. The defendant challenges the introduction of this evidence on appeal, arguing that it was an out-of-court statement offered for its truth. As he did not object at trial, we review for a substantial likelihood of a miscarriage of justice. See Commonwealth v. Randolph, 438 Mass. 290, 296 (2002). Even if the tape should not have been introduced, there was no substantial likelihood of a miscarriage of justice. The recorded statements were largely cumulative of testimony by Moore; in addition, although they may have learned that Samia had been speeding, the jury heard that both Samia and Fredette were duly licensed and had no outstanding arrest warrants and that one was licensed to carry mace.

evidence "that a joint venture existed between the declarant and the defendant, and that the statement was made in furtherance of the joint venture, while the joint venture was ongoing."

Commonwealth v. Wardsworth, 482 Mass. 454, 460 (2019). A determination that a joint venture existed is reviewed for abuse of discretion. Commonwealth v. Winquist, 474 Mass. 517, 521 (2016).

At trial, the judge allowed the prosecutor to introduce statements by Fredette and Samia after the Commonwealth established that the Impala in which they were stopped was the same vehicle, belonging to Samia, that the defendant ordered destroyed a few hours later. The jury heard sufficient evidence from which they could have found that a criminal joint venture had existed between Samia, Fredette, and the defendant when the victim got into Samia's Impala, and that the venture was still underway at the time of the traffic stop.

The defendant's role in the kidnapping prior to the stop, and in the destruction of the vehicle after the stop, provided sufficient evidence from which the jury could have found that a joint venture existed. At that point, the participants' interests remained "closely bound together" and had not been replaced by motives of individual self-preservation. See Wardsworth, 482 Mass. at 460, quoting Commonwealth v.

Mavredakis, 430 Mass. 848, 863 (2000). "It is of no consequence

that the defendant was not present [when] the contested statements were made." Bright, 463 Mass. at 437.

The jury also could have found that the statements to Moore and Webb by Samia and Fredette during the traffic stop were in furtherance of the joint venture because they were designed to keep the police from discovering that a crime had been committed. Statements made in an attempt "to avoid detection and detention" are admissible against all joint venturers.

Mavredakis, 430 Mass. at 863, quoting Commonwealth v. Colon-Cruz, 408 Mass. 533, 545 (1990) (statements made by coventurers to police were allowed to be introduced at trial). See

Commonwealth v. Rakes, 478 Mass. 22, 39 (2017) (threats to third party by defendant's coventurer were admissible as efforts to conceal crime). Therefore, there was no abuse of discretion in allowing the introduction of Moore's testimony about the statements by Samia and Fredette during the traffic stop.

The defendant also argues that his rights under the confrontation clauses of the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights were violated because Fredette and Samia did not testify at his trial. "The confrontation clause bars the admission of testimonial hearsay by a declarant who does not appear at trial, unless the declarant is unavailable to testify as a matter of law and the defendant had an earlier opportunity

to cross-examine him or her." Commonwealth v. McGann, 484 Mass. 312, 316 (2020). Statements of joint venturers, however, generally are not testimonial and thus are not barred. 5 See Winquist, 474 Mass. at 521 n.6; Commonwealth v. Carriere, 470 Mass. 1, 9 (2014). See also Crawford v. Washington, 541 U.S. 36, 56 (2004) ("Most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, . . . statements in furtherance of a conspiracy"). Although Fredette and Samia did make certain statements to Moore and Webb, at that time neither officer was aware of, or investigating, the victim's death. While Moore found marijuana, a container of Mace, an inspection sticker that did not match the vehicle, and apparent blood on the floors, doors, and other areas, he ultimately allowed Samia and Fredette to leave in their vehicle, and without a traffic citation. The questions concerning what appeared to be a routine traffic stop were quite different from the type of "formal station-house interrogation" designed to establish facts relevant to a particular offense and to persuade, overbear, or bring pressure to a suspect's decision

⁵ In <u>Commonwealth</u> v. <u>Wardsworth</u>, 482 Mass. 454, 464-465 (2019), we held that statements made to police by a defendant's coventurer were testimonial. There, however, the joint venture already had concluded. Had the joint venture been ongoing, the statements might have "avoid[ed] scrutiny under the Sixth Amendment by virtue of having been made by a coventurer." <u>Id</u>. at 465 n.19. See <u>Commonwealth</u> v. <u>Brown</u>, 474 Mass. 576, 588 (2016).

not to speak. See <u>Commonwealth</u> v. <u>Middlemiss</u>, 465 Mass. 627, 636 (2013), quoting <u>Michigan</u> v. <u>Bryant</u>, 562 U.S. 344, 366 (2011). The defendant's confrontation rights were not violated.

- ii. <u>Carlo's statements</u>. The defendant challenges the substantive use of Carlo's grand jury testimony, and the testimony about Carlo's statements from Sargent. The latter was introduced as part of the Commonwealth's response to a <u>Bowden</u> defense.⁶ Since both Carlo's and Sargent's testimony were objected to at trial, we review for prejudicial error, i.e., an error that had more than a "very slight effect" on the jury (citation omitted). <u>Commonwealth</u> v. <u>Lester</u>, 486 Mass. 239, 247 (2020).
- A. <u>Substantive use of grand jury testimony</u>. In March of 2002, Carlo gave a statement to Worcester police in which he claimed that the defendant had talked to him about the circumstances of the victim's disappearance. In 2006, Officer Timothy O'Connor of the Worcester police department contacted

⁶ A <u>Bowden</u> defense is an argument that the police failed adequately to investigate a crime, so as to raise a reasonable doubt with respect the defendant's guilt. <u>Commonwealth</u> v. <u>Colon</u>, 482 Mass. 162, 186 (2019). See <u>Commonwealth</u> v. <u>Bowden</u>, 379 Mass. 472, 486 (1980). The prosecution may respond to such a defense by introducing evidence that otherwise would be inadmissible hearsay, on the ground that the statements are not being offered for the truth of the matter, but rather to establish the adequacy of the police investigation. See <u>Colon</u>, supra at 186-187.

Carlo to discuss the statement he made in 2002. Carlo ultimately appeared twice before a grand jury, first in 2006 and then in 2012. In the 2006 proceeding, he exercised his right to remain silent, but in 2012 he answered questions to some degree affirming what he said in 2002.

When Carlo was first called to the stand at trial, he claimed not to remember any conversations he had had with the defendant about the victim. He said that he suffered from memory loss as a result of health problems. The prosecutor immediately impeached Carlo using his 2012 grand jury testimony, allowing the jury to hear its key points, including that a gun had gone off in the Impala and that the victim's body had been dumped. See G. L. c. 233, § 23; Mass. G. Evid. § 607 (2021) (party may impeach its own witness).

Thereafter, the judge conducted a voir dire at which O'Connor testified to his conversation with Carlo in 2006.
O'Connor said that Carlo told him at that time that he did not wish to cooperate any further with the police because his earlier statement, while true, had been made in the belief that it would keep him from going to jail on an unrelated drug charge -- a plan that went unrealized. Carlo told O'Connor, "I'm not getting involved anymore, and if they try to call me to testify, I'm going to get amnesia." In a follow-up telephone call with O'Connor, Carlo similarly told him: "I'm done

talking, and if you make me come in, I will make a better witness for the defense than for the prosecution."

After the voir dire, the judge ruled that the Commonwealth could introduce the grand jury testimony substantively, and the Commonwealth did so when Carlo again took the stand. Carlo's grand jury testimony provided the Commonwealth's only direct evidence relating to the victim's death by gunshot in the vehicle and the fate of his body; there was no other evidence that the defendant, who was not present for the traffic stop, was in the vehicle when the victim was killed.

We allow the probative use of a prior statement by a witness who testifies at trial when the prior statement is inconsistent with the witness's in-court testimony, was made under oath (including before a grand jury), was not coerced, and was "more than mere confirmations or denials of statements made by the interrogator." See Commonwealth v. DePina, 476 Mass.
614, 621 (2017), citing Commonwealth v. Maldonado, 466 Mass.
742, 756, cert. denied, 572 U.S. 1125 (2014). See also
Commonwealth v. Daye, 393 Mass. 55, 75 (1984); Mass. G. Evid.
\$ 801(d)(1). A prior statement is inconsistent with testimony in the court room when the witness on the stand claims not to remember the underlying matter and the judge determines that this lack of memory is feigned. See DePina, supra at 614;
Commonwealth v. Sineiro, 432 Mass. 735, 742 (2000). A judge's

determination on these issues "is conclusive as long as it is supported by the evidence." <u>Maldonado</u>, <u>supra</u>, quoting <u>Sineiro</u>, supra at 742 n.6.

Here, the judge made the required findings, which were supported by the evidence, notably by Carlo's statement that he would "get amnesia." The judge was not required to credit Carlo's claim that he was coerced at the 2012 proceeding, see DePina, 476 Mass. at 622, nor does our own review of the transcripts lead us to disagree. The judge also allowed the Commonwealth to use the substance of statements from the grand jury testimony that were in Carlo's own words, as opposed to other responses that were mere affirmative answers to leading questions. Although the Commonwealth did, over the defense's objection, read a few exchanges from the grand jury transcript in which Carlo merely agreed to leading questions, the questions were comprised of quotations from Carlo's 2002 statement. other words, the prosecutor at the grand jury was leading Carlo to adopt his own earlier statements, rather than encouraging him to assent to the prosecutor's version of events. We discern no error in the substantive use of the grand jury testimony.

B. <u>Sargent's testimony</u>. The Commonwealth initially called Sargent to testify about his 2006 interview with the defendant; on cross-examination, defense counsel asked him about lost identification photographs. After the defendant had solicited

this <u>Bowden</u> evidence, on redirect examination, the prosecutor elicited testimony from Sargent about Carlo's 2002 statement. The judge allowed Sargent's testimony to be introduced in response to the defendant's <u>Bowden</u> defense. Sargent largely reiterated information that the jury already had heard from Carlo. Sargent did present at least one new point, namely that Carlo had claimed to have heard from the defendant that when Moore executed the traffic stop in Millbury, Fredette "threw the key in the air vent" because Samia and Fredette both "thought they were going to get arrested, and they didn't get arrested, and how lucky they were that they didn't get arrested." Sargent also testified to Carlo's 2006 conversation with O'Connor, including Carlo's statement that he would "get amnesia" if he were called to testify at trial.

The theory of the defense was that the police investigation had been inadequate, in particular with respect to two witnesses (both dead by the time of trial) who might have given police alternative accounts of the victim's departure from the pub, had police followed up investigating their statements near in time to when they were made. In addition, in closing, defense counsel asked, "Has the police department thoroughly investigated this? I suggest to you they did not. . . . They got holes in their case. They never investigated it. They never followed through. Ladies and gentlemen, that is not proof

beyond a reasonable doubt. That is not good police work. That is not a thorough investigation." In his final charge, the judge instructed that the jurors could consider omissions in the investigation as factors tending to create reasonable doubt.

A "Bowden defense is clearly a two-edged sword: the more wide-ranging the defendant's attack on the police investigation, the broader the Commonwealth's response may be." Commonwealth v. Avila, 454 Mass. 744, 754-755 (2009). We have stressed "the need to use caution in assessing the scope of a rebuttal," because even a broad Bowden defense should "not mean that the case becomes devoid of evidentiary constraint." Id. at 756 n.12. Here, the fact that the police had been in possession of Carlo's statement in 2002 was admissible to explain why they focused their investigation exclusively on the defendant and his associates rather than pursuing alternative theories. At the same time, the testimony elicited from Sargent exceeded the bounds of what was permissible to establish the adequacy of the police investigation; it allowed the jury to hear at least one possibly relevant new fact (the key thrown in the vent), as well as Carlo's statement to O'Connor that he would "get amnesia," which could have affected the jury's assessment of Carlo's credibility.

The introduction of Sargent's testimony therefore was error, but the judge was not asked to, nor did he sua sponte,

provide a limiting instruction, either contemporaneously or in his final charge, that might have helped to mitigate the error by explaining to the jury that they could not consider Sargent's testimony for the truth of what he said. Cf. Avila, 454 Mass. at 755-756 (in response to Bowden defense, judge "repeatedly instructed the jury that the investigators' testimony . . . was presented to enable the jury to evaluate the police"). We nonetheless are "confident that, if the error had not been made, the jury verdict would have been the same." See Commonwealth v. Lodge, 431 Mass. 461, 468 (2000) (improper response to Bowden defense was not prejudicial); Commonwealth v. Raymond, 424 Mass. 382, 388 (1997), S.C., 450 Mass. 729 (2008) (jury's consideration of improperly admitted hearsay did not create substantial likelihood of miscarriage of justice). Almost all the information Sargent conveyed was cumulative; the new detail about the key in the vent was helpful to the Commonwealth's case in chief, but not critical. Inasmuch as all of Sargent's testimony avowedly was based on statements by Carlo, who had testified immediately before Sergeant, the jury were well positioned to evaluate its ultimate reliability.

iii. <u>Introduction of the victim's statements</u>. The defendant challenges the introduction of testimony by four witnesses concerning statements made by the victim. The statements were introduced to show the victim's state of mind,

namely that he feared the defendant, such that the victim would not have entered the vehicle with him outside the pub on the night of February 15 of his own free will (and thus was kidnapped). The defense objected to all these statements.

First, Robert Beahn, who was one of Fredette's customers and was arrested along with Fredette in the September 1993 drug trafficking sting, testified that the victim later told him that the defendant blamed Beahn for what happened to Fredette, and that the defendant planned to kill Beahn and then "take care of [his] family." Second, John Mayotte testified that the victim told him on two occasions that he was "scared" and "afraid" that the defendant and Fredette would "come after him" for failing to participate in the false testimony scheme. Third, Dawn Mayotte testified that the victim confided in her that he was supposed to "go to court and say that he had done something that he did not do and take the blame so that [the defendant's] brother did not go to jail" and that "otherwise [the defendant] was going to kill him." Finally, Daniel Kachadoorian, the manager of the pub, testified that he had heard from the victim a different version of the scheme to help Fredette, according to which the defendant wanted the victim to pay a \$50,000 bribe to a police officer with whom the victim was friendly, so that the officer would change his testimony.

Evidence of a victim's state of mind is admissible where that state of mind is relevant to an essential element of the crime charged. See Commonwealth v. Cheremond, 461 Mass. 397, 408-409 (2012) (evidence of murder victim's state of mind was admissible to prove absence of consent as element of rape); Mass. G. Evid. § 803(3)(B)(i) ("Statements of a person as to his or her present friendliness, hostility, intent, knowledge, fear, or other mental condition are admissible to prove such mental condition"). See also Gilbert, 366 Mass. at 27. We also have emphasized that "a judge must exercise discretion and balance the probative value of such evidence against the prejudicial impact it may have on the defendant's case."7 Commonwealth v. Magraw, 426 Mass. 589, 595 (1998). If admitted, the evidence "may only be used to prove [the victim's] state of mind, and not to prove the truth of what was stated or that a defendant harbored certain thoughts or acted in a certain way." Id. at

⁷ In Commonwealth v. Magraw, 426 Mass. 589, 593-594, 600 (1998), we required that a defendant "open the door" to such evidence, for instance "by claiming that the death was a suicide or a result of self-defense, that the victim would voluntarily meet with or go someplace with the defendant, or that the defendant was on friendly terms with the victim." See Commonwealth v. Keown, 478 Mass. 232, 246 (2017), cert. denied, 138 S. Ct. 1038 (2018) (defendant's argument that victim tried to commit suicide opened door to introduction of victim's statements and Internet browsing history). This analysis, however, is not necessary where the evidence of the victim's state of mind goes to an essential element of a crime that the Commonwealth must prove. See Commonwealth v. Cheremond, 461 Mass. 397, 408 n.3 (2012).

594-595. See Commonwealth v. Qualls, 425 Mass. 163, 169 (1997), $\underline{S}.\underline{C}.$, 440 Mass. 576 (2003) ("A murder victim's statement that he feared the defendant . . . sheds no light on whether the defendant had a motive to kill him . . .").

Here, the Commonwealth had the burden of proving that the defendant had confined the victim "against his will," G. L. c. 265, § 26, in order to establish kidnapping as the predicate offense for felony-murder. All the challenged hearsay statements by the victim were directly or indirectly relevant to the voluntariness of his entry into the Impala with the defendant, and thus relevant to an essential element of the crime of kidnapping.

To the extent that the statements suggested that the defendant was the kind of person who would kill or "come after" people, the victim's statements also were highly prejudicial to the defendant. Beahn's testimony, for instance, indeed was relevant to the defendant's state of mind in so far as it suggested that the victim knew the defendant was a person who would kill. The jury also could have considered the statements not merely as evidence for the victim's state of mind, but also as corroborating the false testimony scheme that the prosecutor presented as explaining the defendant's motive to kill the victim.

Immediately after the testimony by Beahn and John Mayotte, the judge gave a limiting instruction to the effect that the hearsay statements could be considered only with respect to the victim's state of mind in entering Samia's vehicle outside the pub, and whether this entry was voluntary, and not for the defendant's character or propensity to commit violence. The judge repeated a condensed version of this instruction after Dawn Mayotte's testimony, and gave no instruction after Kachadoorian's. In his final charge, the judge also instructed on the proper use of statements attributed to the victim that "may have included references to alleged drug dealing or other bad acts" by the defendant.

It is incumbent on judges to "weigh the probative value of the evidence and the risk of unfair prejudice, and [to] determine whether the balance favors admission." Commonwealth v. McCowen, 458 Mass. 461, 479 n.15 (2010). The question here is a close one. The testimony elicited went beyond what was necessary to show that the victim feared the defendant, and the limiting instructions could have been more forceful. On the other hand, we ordinarily presume that such instructions are understood by the jury and "render[] any potentially prejudicial evidence harmless." See Commonwealth v. Crayton, 470 Mass. 228, 251 (2014), quoting Commonwealth v. Donahue, 430 Mass. 710, 718 (2000). Given what the Commonwealth was required to prove to

establish the crime of kidnapping, we cannot say that the judge's decision to allow introduction of the testimony, mitigated by limiting instructions, was an abuse of discretion.

iv. Delayed return of death certificate. The defendant argues that his confrontation rights were violated by the introduction of a "Delayed Return of Death" certificate for the victim. The document in question is a certified copy, signed by the Worcester city clerk, of a certificate signed by the same clerk. Both the certificate and the copy are dated February 15, 2012; in the blank space to be filled in under "Name and Address of Certifying Physician or Medical Examiner" is a reference to a docket of the Worcester Division of the Probate and Family Court Department with a date of February 29, 2008. Under "Date of Death," the certificate states, "as of February 15, 2001." The record does not disclose anything about the circumstances of the certificate being issued or the probate proceeding that it references.

The Commonwealth offered the certificate under G. L. c. 46, § 19, which provides, in pertinent part, that a "record of the town clerk relative to a birth, marriage or death shall be prima facie evidence of the facts recorded." The key question here, however, is whether the underlying certificate was "testimonial" in nature so as to implicate the defendant's rights to confrontation under the Sixth Amendment and art. 12.

"[T]he touchstone of the confrontation clause analysis is whether the primary purpose of a declarant's out-of-court statement is . . . to 'prove past events potentially relevant to later criminal prosecution.'" Middlemiss, 465 Mass. at 634, quoting Bryant, 562 U.S. at 366. Accordingly, "public records are generally admissible absent confrontation," as they are created for routine administrative reasons and "not for the purpose of establishing or proving some fact at trial." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009). Although death certificates are routinely produced for all deaths under G. L. c. 46, § 9, we have held that a death certificate stating the cause of death to be a gunshot wound to the head was testimonial. Commonwealth v. Carr, 464 Mass. 855, 875-876 (2013). We reasoned that "[i]n circumstances where a victim has undoubtedly died an unnatural death, a medical examiner who makes a statement regarding the cause of a victim's death could reasonably anticipate that such statement would likely be used in a criminal trial." Id. at 876.

The certificate challenged here is different from the one at issue in <u>Carr</u>, in that it contains no information about the specific circumstances of the victim's death. Death certificates with the cause of death redacted have been held to be admissible in murder trials in the Commonwealth. See <u>Commonwealth v. Almonte</u>, 465 Mass. 224, 242 (2013).

Nonetheless, the certificate offered in this instance must be treated as testimonial. The document signed by the clerk was a "solemn declaration" that "did not simply attest to the existence and authenticity of records," but rather made "a factual representation" that the defendant was dead. Commonwealth v. Parenteau, 460 Mass. 1, 8 (2011) (certificate from registry of motor vehicles attesting that notice of revocation of license suspension had been mailed to defendant was testimonial). Even assuming that the Probate and Family Court docket on which the clerk relied was not testimonial, the clerk clearly interpreted a Probate and Family Court judge's findings in order to create a new piece of evidence. See Melendez-Diaz, 557 U.S. at 322-323 (confrontation clause is implicated where clerk goes beyond merely "authenticat[ing] or provid[ing] a copy of an otherwise admissible record" to offer "interpretation of what the record contains or shows" or otherwise to "create a record for the sole purpose of providing evidence against a defendant" [citation omitted]).

Moreover, the fact that the original and the copy were issued on the same date strongly suggests that the certificate was deliberately created "for use at the defendant's trial as prima facie evidence [of] an essential element of the charged crime that the Commonwealth was required to prove." See Parenteau, 460 Mass. at 8 (noting that certificate was issued by

registrar after criminal complaint issued). Cf. Commonwealth v. Zeininger, 459 Mass. 775, 788, cert. denied, 565 U.S. 967 (2011) (certificate that breathalyzer machine was functioning normally was not testimonial because technician conducting test had no "particular prosecutorial use in mind" [citation omitted]).

Where, as here, a defendant objects to evidence that was admitted in violation of his or her constitutional rights, we review "to determine whether it was harmless beyond a reasonable doubt" (citation omitted). Wardsworth, 482 Mass. at 458. conclude that the introduction of the certificate was harmless error. The certificate stated simply that the victim was dead "as of February 15, 2001," seven years after the date of his disappearance, and included no other information that corroborated the Commonwealth's case or implicated the defendant specifically. Although the victim's body has never been found, the circumstantial evidence of his death at trial was strong. Friends and relatives testified uniformly that they had not seen or heard from the victim after February 15, 1994, and the victim's name appeared in no public databases. Taken together, a "sudden disappearance," bloodstains, and "a suspect's apparent attempts . . . to conceal the victim's disappearance, or evidence of the crime," are circumstantial evidence of an unlawful killing. State v. Edwards, 278 Neb. 55, 67-68 (2009). See Commonwealth v. Nadworny, 396 Mass. 342, 354 (1985), cert.

denied, 477 U.S. 904 (1986). The Commonwealth thus did not (and did not need to) rely on the certificate; to the contrary, the prosecutor concluded his closing argument by practically disavowing it, stating that "it's not a piece of paper that shows you that Kevin Harkins was killed that night. It is all the other evidence."

The defendant also protests on appeal that the certificate was not provided to the defense in advance of trial. The disclosure of the document was required by our broad automatic discovery provisions for criminal trials. Mass. R. Crim. P. 14 (a) (1) (A) (vii), as amended, 444 Mass. 1501 (2005) (mandatory discovery for the defendant of "all intended exhibits"). See Commonwealth v. Frith, 458 Mass. 434, 439-440 (2010). Defense counsel claimed at trial that he had "never been given a copy," but did not request a continuance. Treating the objection as preserved, for the same reasons given above we conclude that there was no prejudice to the defendant.

v. Research analyst testimony. The defendant raises similar challenges, based on the confrontation clause, with respect to the testimony of the State police research analyst. The analyst testified that her agency was contacted by police to obtain information about the victim. She then described the results of searches using two databases that contain nationwide records from cellular telephone subscriptions, utilities, and

credit reports; in a database of people who had formed corporations in Massachusetts; and in a nationwide insurance claims database. The analyst testified that none of the searches revealed any activity by the victim after 1994, and that in one instance the search results listed the defendant as deceased. No documentary evidence of the search results was proffered.

The analyst's testimony was at best ambiguous as to whether she personally had performed the searches in question. stated initially, "I ran public records databases" for the police, but when questioned as to whether she had searched a particular database, she responded, "Someone in my agency did." Even if the analyst had performed all the searches herself, however, her statements nonetheless would be inadmissible hearsay. Information from a database stored on a computer is hearsay inasmuch as the database "merely store[s] or maintain[s] the statements and assertions of a human being" (citation omitted). Commonwealth v. Royal, 89 Mass. App. Ct. 168, 171-172 (2016) (officer's testimony about results of computer search for status of defendant's driver's license was hearsay). Commonwealth v. Sullivan, 478 Mass. 369, 376-378 (2017), we thus determined that testimony by a State police trooper about the results of a search in a national deoxyribonucleic acid (DNA) database was inadmissible, because no one responsible for

creating the database testified and was subject to cross-examination. See <u>Commonwealth</u> v. <u>Tassone</u>, 468 Mass. 391, 399-400 (2014) (Massachusetts common law affords defendants "meaningful opportunity" to cross-examine prosecution expert about reliability of underlying facts or data).

Here, the prosecutor made no effort to establish that the research analyst, who did not testify as an expert, had personal knowledge of how the databases that she consulted were created and maintained. Apparently conceding that the analyst's statements were hearsay, the prosecutor argued successfully at trial that the evidence of the database searches was admissible as a response to a Bowden argument. The Commonwealth renews this argument on appeal, pointing to assertions in trial counsel's opening statement to the effect that the Commonwealth had "not proven a death." We disagree with this argument. General claims that the prosecution has not proved all of the elements of a crime beyond a reasonable doubt are not the same as claims "that certain tests were not conducted or certain police procedures not followed." Bowden, 379 Mass. at 486. For a defendant to rely on the presumption of innocence should not render the trial "devoid of evidentiary constraint." Avila, 454 Mass. at 756 n.12. Because the analyst's statements were not relevant to any real Bowden defense, they were inadmissible hearsay.

The hearsay in the analyst's testimony, however, additionally was testimonial, thus implicating the defendant's constitutional rights under the confrontation clause. Searches undertaken by law enforcement employees in response to police requests obviously have a primary purpose of "prov[ing] past events potentially relevant to later criminal prosecution" (citation omitted). Middlemiss, 465 Mass. at 634. To permit the resulting testimonial statements "to enter into evidence through the in-court testimony of a second person" violates the confrontation clause. Bullcoming v. New Mexico, 564 U.S. 647, 658 (2011). See Sullivan, 478 Mass. at 377-378 (testimony about DNA database match was testimonial hearsay "without proper foundation to establish personal knowledge").

Although the admission of the analyst's testimony was constitutional error, as with the introduction of the delayed return of death certificate, we conclude that it was harmless beyond a reasonable doubt. There was significant other evidence of the victim's death. Moreover, the jury were unlikely to have found the analyst's testimony very persuasive; defense counsel effectively brought out on cross-examination that the searches the analyst described would have been unlikely to uncover activity by the victim if he were alive under an assumed identity.

- Other issues. i. Prosecutor's cross-examination of several witnesses. The defendant objects to questions the prosecutor posed during cross-examination of two defense witnesses, Robert Couture and Thomas Daly, both Worcester police detectives who had been involved in 1998 in an investigation into the disappearance of the victim. The defendant called these witnesses to show that they had taken statements from other witnesses who gave alternative accounts of the victim's departure from the pub in 1994, and that there was no follow up on these statements. On cross-examination, the prosecutor sought to emphasize that Couture and Daly had no memory of the investigation, which they had not been directing; did not have any information as to the credibility of the witnesses; and were not in a position to explain why some leads had been followed and others not. The defendant points, for instance, to a series of questions that the prosecutor put to Couture:
 - \underline{Q} : "And you don't know if [the witness] was on crack cocaine at the time?"
 - A.: "I have no idea."
 - \underline{Q} : "You don't know if he was really in the bar at that time?"
 - A.: "No, I don't."
 - \underline{Q} .: "You don't know if he was [the defendant's] best friend?"
 - A.: "No, I don't."

- Q.: "You don't know if he hated [the victim]?"
- A.: "No, I don't."
- \underline{Q} : "You don't know if he was buying a brand new car from John Fredette?"
- A.: "No, I don't."
- \underline{Q} : "You don't know if he was getting a million dollars from Elias Samia?"
- A.: "No, I don't."
- \underline{Q} .: "You don't know what motive he would have had to say anything?"
- A.: "No, I don't."

The prosecutor asked Couture a similar series of questions concerning a different witness.

A prosecutor may not "communicate impressions by innuendo through questions which are answered in the negative," nor may a prosecutor cross-examine a witness "in bad faith or without foundation." Commonwealth v. Fordham, 417 Mass. 10, 20-21 (1994), quoting Commonwealth v. White, 367 Mass. 280, 284, 285 (1975). Here, the prosecutor's questions could be viewed as improperly suggesting that there was some factual basis for thinking that the witnesses were biased, or that the defendant and his coventurers had bribed them to give false statements. Because trial counsel did not object, however, we review for a substantial likelihood of a miscarriage of justice.

Commonwealth v. Randolph, 438 Mass. 290, 296 (2002). The tone

of the prosecutor's questions appears to have been facetious and unlikely to suggest to the jury that the prosecutor expected them to believe what he was saying. Cf. Commonwealth v. Wynter, 55 Mass. App. Ct. 337, 339 (2002) (improper to use leading questions on cross-examination of defendant as main vehicle to present prosecution's theory of motive). Taking the cross-examination as a whole, the prosecutor's strategy clearly was to undermine the value of Couture's and Daly's testimony about the investigation. The judge properly instructed the jury both contemporaneously after Couture's testimony and in his final charge that questions by counsel are not evidence. We conclude that there was no substantial likelihood of a miscarriage of justice created by the questions.

ii. <u>Jury instructions</u>. The defendant maintains that the judge erred in instructing the jury that to convict the defendant of felony-murder in the second degree they were required to find that the "underlying felony was inherently dangerous or the defendant acted with a conscious disregard for the risk to human life." The first alternative should not have been included, as the question whether a felony is inherently dangerous is a question of law for the judge, not the jury. See <u>Commonwealth</u> v. <u>Pfeiffer</u>, 482 Mass. 110, 131, cert. denied, 140 S. Ct. 498 (2019); Scott, 428 Mass. at 364.

Defense counsel did not object to this error at trial. As the challenged instructions related to an offense other than murder in the first degree, we review for a substantial risk of a miscarriage of justice. See Commonwealth v. Bolling, 462
Mass. 440, 452 (2012). We conclude that there was no such risk. To begin, the jury convicted the defendant of murder in the first degree with the predicate felony of aggravated kidnapping, indicating that they were convinced that the defendant committed the kidnapping "while armed with a dangerous weapon and inflict[ed] serious bodily injury thereby upon" the victim. See G. L. c. 265, § 26. Had they proceeded to consider the offense of felony-murder in the second degree, the jury presumably would have found that the kidnapping involved a conscious disregard of the risk to human life.

The defendant also argues that the judge erred in omitting the words "with intent . . . to cause him to be secretly confined or imprisoned . . . against his will," set out in G. L. c. 265, § 26, in instructing the jury and, more generally, by not instructing them on any intent requirement for the kidnapping conviction. There was no error. Where kidnapping is charged under the first clause of § 26, proof of specific intent is not required. Commonwealth v. Traylor, 43 Mass. App. Ct. 239, 243 n.7 (1997). See Commonwealth v. Ford, 424 Mass. 709, 711 (1997) (no proof of specific intent is required for general

intent crimes). The statutory language requiring an intent to confine or imprison applies only to the third clause of § 26 ("forcibly seizes and confines or inveigles or kidnaps another person"), which covers cases where the victim has been seized with force, but not actually confined, or was confined, but not forcibly or secretly. Commonwealth v. Ware, 375 Mass. 118, 120 (1978).

e. Review under G. L. c. 278, § 33E. The defendant argues that we should exercise our power under G. L. c. 278, § 33E, to order a new trial. In particular, he contends that his due process rights were violated by the Commonwealth's reliance on inconsistent theories about the death of the victim at his trial and at the trials of Samia and Fredette.

Although differing evidence was admissible at the different trials with respect to what precisely transpired in Samia's vehicle, the Commonwealth's basic theory remained the same: the defendant led the victim out of the pub and into the car, where the victim later died of a gunshot wound. In his closing argument at the defendant's trial, the prosecutor focused on the defendant's purportedly central involvement in the kidnapping and did not claim that the defendant actually fired the gun that killed the victim. The Commonwealth, of course, was not required to prove who among the defendant and his coventurers was the shooter in order to convict the defendant on a theory of

joint venture felony-murder. Therefore, to the extent that there was any inconsistency as to who fired the fatal shot, this "did not go to the core of the Commonwealth's case, and therefore no due process violation occurred." Commonwealth v. Housen, 458 Mass. 702, 709 (2011).

A thorough review of the record reveals no other issues that would merit the exercise of our broad authority under G. L. c. 278, § 33E, beyond those raised by the defendant on appeal. We are reluctant to view the cumulative effect of trial errors identified by the defendant as more prejudicial than the errors taken individually, where these had minimal if any effect.

Commonwealth v. Hobbs, 482 Mass. 538, 560 (2019). The interests of justice thus are best served by reducing the degree of guilt to murder in the second degree, as we are required to do, for the reasons discussed supra.

3. <u>Conclusion</u>. The conviction of murder in the first degree is vacated and set aside, and the matter is remanded to the Superior Court for entry of a judgment of guilty of murder in the second degree, and for resentencing.

So ordered.