SJC-12133

COMMONWEALTH vs. EUGENE TATE.

Middlesex. October 7, 2020. - January 22, 2021.

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

Homicide. Robbery. Armed Assault in a Dwelling. Firearms. Felony-Murder Rule. Self-Defense. Evidence, Self-defense. Practice, Criminal, Argument by prosecutor, Instructions to jury, Capital case.

Indictments found and returned in the Superior Court Department on August 15, 2013.

The cases were tried before Kathe M. Tuttman, J.

Leslie W. O'Brien for the defendant.
Lindsay Russell, Assistant District Attorney, for the Commonwealth.

KAFKER, J. In 2015, a jury convicted the defendant of murder in the first degree on the theory of felony-murder, armed robbery, armed assault in a dwelling, and illegally carrying a

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

firearm.[2] On appeal, the defendant argues that several statements made by the prosecutor in his closing argument constitute prejudicial error. The defendant also argues that the judge erred by denying the defendant's request for a voluntary manslaughter instruction based on self-defense, reasonable provocation, or sudden combat. Finally, the defendant argues that his conviction should be reduced to murder in the second degree because of the circumstances of the crime and because he was only nineteen years old at the time of the murder.

Discerning no error, we affirm the defendant's convictions and, after plenary review of the entirety of the record, we decline to exercise our authority under G. L. c. 278, § 33E, to reduce the verdict or order a new trial.

1. Facts. We summarize the facts that the jury could have found at the defendant's trial, reserving certain details for our discussion of the legal issues.

In June 2013, the defendant approached Robert DeLuca, someone he knew from high school, looking to buy a small quantity of marijuana. DeLuca connected the defendant with Shane Corbett and introduced the defendant to Corbett as "G."

[2] The defendant was found not guilty of armed assault with intent to murder and assault and battery by means of a dangerous weapon.

The defendant purchased two ounces of marijuana from Corbett at Corbett's house. After the sale, the defendant and Corbett exchanged cell phone numbers.

On July 2, 2013, the defendant called Corbett looking to buy a pound of marijuana. Corbett did not deal in that quantity, but he knew that the defendant could buy that quantity from Steven Piro. Corbett reached out to Piro to tell him that the defendant, who would be accompanied by another person, wanted to purchase a pound of marijuana. Piro told Corbett to have the defendant contact him directly. Once the defendant contacted Piro, Piro contacted his own supplier, Mario Fiume, to arrange the transaction. Fiume agreed to do the sale at his house but told Piro that only one person would be allowed inside at a time. The terms of the sale were $3,200 for one pound of marijuana, with Corbett getting $300. Piro told Corbett the details and told him that the deal would happen later that night.

Corbett contacted the defendant and had the defendant meet him at a parking lot in Stoneham so that the defendant could follow Corbett to Fiume's house. Before meeting with the defendant, Corbett and his friend, Timothy Kinneally, stopped at Corbett's home and picked up a baton and a Taser to bring with

them.[3] At the parking lot, Corbett and Kinneally met with the defendant and another unidentified black male who was bigger than the defendant.[4] The defendant showed Corbett and Kinneally a stack of money. Corbett and Kinneally then led the defendant and the unidentified male to Fiume's house in Stoneham. By the time they arrived at Fiume's house, it was nighttime.

Piro met Corbett, Kinneally, the defendant, and the unidentified male in the driveway. Piro, Corbett, and the unidentified male walked into the garage while Kinneally and the defendant stayed in their vehicles. When the three men entered the garage, Fiume and George Tecci, a friend of Piro and Fiume, were already in the garage. There were two cars in the garage -- one was covered and the other was a blue classic car. On the covered car, there were multiple air-sealed bags of marijuana. The unidentified male and Fiume discussed the marijuana while the unidentified male inspected the bags. The unidentified male told Fiume that the defendant would need to look at the marijuana before they purchased it. The unidentified male also told Fiume that he was uncomfortable doing the deal in the garage and wanted to do it outside by his vehicle. Fiume

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[3] Kinneally also had a knife at this point.

[4] There is no evidence in the record identifying this male, so we refer to him simply as "the unidentified male." Several witnesses testified that the unidentified male referred to the defendant as his cousin.

insisted that the deal take place in the garage. The two went back and forth, agitating Fiume. Fiume then told the unidentified male to leave and bring the defendant into the garage. He left and the defendant entered the garage.

The unidentified male had selected one of the bags of marijuana, and the defendant agreed with his selection. Like the unidentified male, the defendant expressed concern about doing the deal in the garage because he thought he might be robbed. He also wanted to do the deal outside. This agitated Fiume, who told the defendant to leave. The defendant and the unidentified male then drove away. Corbett, Tecci, and Piro also left.

Later that night, the defendant called Piro and told Piro that he wanted to go back to Fiume's house to complete the deal. Piro was in his car with Tecci at the time. Piro contacted Fiume, who initially did not want to do a second transaction. By this point, Fiume was with the victim, Joseph Puopolo, whom Fiume had invited to his house to smoke marijuana. Puopolo encouraged Fiume to complete the deal, so Fiume told Piro that he would do the deal as long as the defendant came to the house in Piro's car and only one person would come into the garage at a time.

Piro and Tecci met the defendant and Jesse Williams, a different individual from the unidentified male that was there

earlier that night, at a gasoline station in Stoneham. The defendant and Williams got into Piro's car, with Williams sitting in the rear passenger's side seat and the defendant in the rear driver's side seat. Piro drove to Fiume's house, which was about two minutes away. Piro and Williams got out of the car and went into the garage while Tecci and the defendant remained in the car. When Piro and Williams entered the garage, Fiume and Puopolo were already in the garage. There was a single bag of marijuana on the covered car, the same bag that the defendant and the unidentified male had picked earlier. Fiume showed it to Williams. Williams wanted to confirm with the defendant that this was the right bag of marijuana. Fiume was hesitant about letting the defendant come into the garage but ultimately let him come inside. Piro left the garage and went to the driveway to tell Tecci and the defendant to come into the garage. At this point, Fiume and Puopolo were standing between the two vehicles, with Fiume closer to the entrance to the garage and Puopolo behind him.

Once the defendant entered, Williams and Fiume began negotiating over the price, which Fiume eventually lowered. Williams showed Fiume that he had money for the deal, and Fiume responded by pulling out a stack of cash and telling the defendant and Williams that he also had money. Williams then said he had to go outside to take the amount for the deal from

his stack of money because he did not feel comfortable doing it in the garage. Williams went outside briefly and then came back in and told Fiume he thought he would be robbed if he tried to buy the marijuana. Fiume got angry and told the men to leave.

At this point, both Williams and the defendant pulled out guns.[5] Williams aimed his gun at Tecci's face, ordered him to move, and then moved towards Fiume. Tecci left the garage and ran towards a friend's house. Piro unsuccessfully tried to knock the gun from the defendant's hand. The defendant then stood with his gun aimed at Puopolo. As Williams charged at Fiume, he told Fiume to give him the marijuana and the money. Fiume grabbed the bag of marijuana from the car, put it behind his back, and backed up toward the back of the garage. Fiume attempted to punch Williams. Williams then shot Fiume, who fell to the ground. Puopolo then moved towards the defendant, and the defendant shot Puopolo. Piro then ran out of the garage. Tecci testified that he heard a single gunshot as he fled. After seeing Williams and the defendant run from the garage, Piro went back into the garage and saw that the bag of marijuana that had been on the trunk of the car was gone.

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[5] Three witnesses testified that one of the guns was a revolver and the other was a semiautomatic handgun. There was conflicting testimony about who had which gun; Tecci and Fiume testified that Williams had the revolver, but Piro testified initially that the defendant had the revolver but later admitted on cross-examination that he did not remember who had which gun.

Puopolo was discovered lying face down on the ground just inside the front door of the house. He eventually died from a single gunshot wound. The bullet passed through his left arm and then entered the chest cavity in his upper left chest area. The medical examiner recovered a single bullet from Puopolo's right chest cavity. A State police ballistician testified that the bullet was a .38 caliber brass-jacketed round with a lead core. This bullet was the only ballistics evidence admitted in evidence.[6]

The Commonwealth introduced substantial evidence identifying the defendant as the individual that was present on both occasions at Fiume's garage. A fingerprint recovered from the interior of the rear driver's side door of Piro's car matched the left index finger of the defendant. Fiume identified the defendant in a photographic array several days after the shooting, saying, "That's the guy that shot Joe. He was there both times. That's the guy one hundred percent. He shot Joe."[7] At trial, Fiume identified the defendant as the person who shot Puopolo.[8] Piro also identified the defendant at

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[6] No other bullets or shell casings were ever recovered.

[7] In the aftermath of the shooting, Fiume was shown three photographic arrays in total. The defendant's photograph was included in only one of the arrays, the array in which Fiume unequivocally identified the defendant. In the other two arrays, Fiume identified other unknown individuals and Williams.

trial as the person whom he knew as "G," who shot Puopolo, and who was present on both occasions that night. Tecci similarly identified the defendant as the individual who was there both times that night. There were also surveillance video recordings introduced from the gasoline station in Stoneham and from outside Fiume's house that showed the individual identified as the defendant arrive at the house both times that night.

2. Discussion. On appeal, the defendant argues that multiple errors in the Commonwealth's closing argument deprived him of due process and a fair trial. The defendant also argues that the judge erred by failing to give the jury a voluntary manslaughter instruction. Finally, the defendant asks us to use our authority under G. L. c. 278, § 33E, to reduce the verdict because he was nineteen when the crime occurred and because there was little evidence that he fired a shot. We address each argument in turn.

a. Closing argument. i. Ballistics evidence. The defendant challenges several statements made by the prosecutor during his closing argument. The first challenged statements involve comments made about the state of the bullet that was recovered from Puopolo's chest. In his own closing, the

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[8] Fiume conceded on cross-examination that he did not actually see Puopolo get shot. Fiume did testify that, before Williams shot him, he saw the defendant "standing guard watching Puopolo]" and that Puopolo was "cornered by [the defendant]."

defendant argued that only one bullet had been fired and that it hit both victims. He did so based on the absence of ballistics evidence or any other evidence revealing the presence of a second bullet or traces of a second bullet at the scene, and evidence from at least two witnesses who said that they heard a single shot. In response, the prosecutor argued:

> "Yes, there was only one round recovered, but to believe what counsel wishes you to believe, and I'll put this picture up on the garage now. Your memory controls, ladies and gentlemen, but I think Mr. Fiume testified he was standing about here when he got shot. And Mr. Puopolo was up here coming in this direction. So for the round that entered Mr. Fiume's chest when he pointed midchest by the nipple to come out his right flank in a downward direction then go up into the arm of Joseph Puopolo, hit the shoulder and then go down where it lodges in his chest cavity, that's one hell of a round. It had built-in radar and must be something that the military has. There's no jacketed round that can do that. You saw the damage to the round, and you will, there is no damage to that round. Through and through. It goes into the body, and it stays there.
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> "But keep in mind, Mario Fiume suffered penetration of his lungs, penetration to the liver and a fractured rib. And yet that round still has enough strength to go over to Joe Puopolo's arm, into his chest down to both lungs, his aorta and lodge. I would say that's a miracle round, ladies and gentlemen.
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> "And you heard Sergeant Sullivan talk about the damage to the round, minimal. Not uncommon. What type of guns? These guns that are maintained I would suggest by drug dealers are not in the same pristine condition that military personnel keep their weapons or police officers. When he talked about a gun he referred to a stove pipe where the casing doesn't eject from the round." (Emphasis added.)

The defendant objected to this portion of the closing, arguing that there was no evidence regarding what level of damage this type of round could do. The trial judge agreed and, upon request, instructed the jury that their memory of the evidence controls.

"Where, as here, the prosecutor argued facts in closing argument that find no support in the evidence at trial and where that error is preserved by a timely objection, the error is nonprejudicial only if we are 'sure that the error did not influence the jury, or had but very slight effect.'" Commonwealth v. Alvarez, 480 Mass. 299, 305 (2018), quoting Commonwealth v. Hrabak, 440 Mass. 650, 656 (2004). "We consider four factors in determining whether an error made during closing argument is prejudicial: '(1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusions.'" Alvarez, supra at 306, quoting Commonwealth v. Silva-Santiago, 453 Mass. 782, 807 (2009). "[T]he entire record, including the balance of the prosecutor's argument, [is] relevant in determining whether the error was prejudicial to the point of

requiring a reversal of the conviction." Commonwealth v. Kozec, 399 Mass. 514, 523 (1987).

We agree that the prosecutor's argument was not supported by the evidence and was therefore error. See Commonwealth v. Rutherford, 476 Mass. 639, 643 (2017) ("closing arguments must be limited to facts in evidence and the fair inferences that may be drawn from those facts"). See also Commonwealth v. Niemic, 483 Mass. 571, 592 (2019) ("a prosecutor may not argue facts not in evidence or misstate the evidence"). There was no testimony, either from the Commonwealth's ballistician or any other witness, about the significance of the condition of the bullet or the type of damage that this round could do. The Commonwealth argues that the bullet itself was admitted in evidence and that the jury could draw these inferences from simply looking at the bullet. We disagree, as these inferences could not be drawn without guiding expert testimony. As such, the argument was error. For the reasons discussed infra, however, we conclude it was not reversible error.

Our analysis begins with the defendant's closing, in which the defendant argued to the jury that one bullet, and thus one shooter, caused the death of Puopolo and the injury to Fiume. The defendant further argued that "[t]he government will say, and just to predict a little bit about what [the prosecutor] is going to argue to you, that the bullet isn't damaged, the slug

isn't damaged enough for all of this activity." Thus, the defendant himself called the condition of the bullet to the attention of the jury before the Commonwealth did, thereby introducing a level of speculation into both arguments, and inviting, if not requiring, a response from the Commonwealth.

The Commonwealth's response, albeit error, also appears to have been more sarcastic hyperbole than factual argument, and we conclude the jury likely would have recognized it as such. "'[E]nthusiastic rhetoric, strong advocacy, and excusable hyperbole' are not grounds for reversal." Commonwealth v. Wilson, 427 Mass. 336, 350 (1998), quoting Commonwealth v. Sanna, 424 Mass. 92, 107 (1997). Some of the factual argument was also supported by the downward trajectory of the bullet as it left Fiume's body.

Moreover, after the defendant objected to the argument, the judge gave a curative instruction to the jury. At the suggestion of defense counsel, the judge instructed the jury that their memory of the evidence controlled and that closing arguments are not evidence. These instructions generally help ameliorate the impact of an error in closing, and were sufficient to address the arguments by both sides. See, e.g., Niemic, 483 Mass. at 596 (curative instructions given before and during final charge that address errors in closing arguments may be sufficient to mitigate errors); Commonwealth v. Salazar, 481

Mass. 105, 118 (2018), quoting Commonwealth v. Hernandez, 473 Mass. 379, 392 (2015) ("the judge properly instructed the jury that closing arguments are not evidence, and it is well-established that '[t]he jury are presumed to follow instructions'").

Most importantly, the jury's conclusions did not hinge on whether one or two shots were fired, or whether the defendant fired the shot that killed Puopolo. The Commonwealth did not need to prove that the defendant actually shot Puopolo for the jury to convict him of murder in the first degree. The Commonwealth proceeded on a joint venture felony-murder theory with predicate offenses of armed robbery and armed assault in a dwelling. Therefore, the Commonwealth simply had to prove that the defendant participated as a joint venturer in the armed robbery of Fiume or in an armed assault in a dwelling during which Puopolo was killed. See Commonwealth v. Kilburn, 438 Mass. 356, 362 (2003) (affirming conviction of murder in first degree on theory of felony-murder where predicate felony was armed assault in dwelling); Commonwealth v. Tevenal, 401 Mass. 225, 229-230 (1987) (armed robbery as predicate felony for felony-murder). See also Commonwealth v. Williams, 475 Mass. 705, 710 (2016) (elements of joint venture armed robbery); Kilburn, supra at 359 n.4 (elements of joint venture armed assault in dwelling). The evidence that the defendant had a gun

and participated in the armed assault in the garage and the armed robbery of Fiume as a joint venturer was sufficient to sustain the verdict.

Finally, we conclude that, in returning their verdict, the jury seemed able to evaluate the credibility of the Commonwealth's witnesses, who, the defendant claims, were improperly bolstered by the Commonwealth's erroneous closing argument. The jury did not find that the defendant committed an assault of Piro with a dangerous weapon.[9] This indicates that the jury rejected at least some of the Commonwealth's theory of the case. See Kozec, 399 Mass. at 517. In particular, the jury did not accept the entire testimony of Piro, who testified that the defendant pointed a gun at him. Significantly, Piro was also one of the witnesses who testified that the defendant shot Puopolo. Given the jury's rejection of at least some of Piro's testimony and their acquittal of the defendant on this specific count, we are not persuaded that the prosecutor's argument

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[9] One of the charged predicate felonies underlying the theory of felony-murder was armed assault in a dwelling. The Commonwealth identified four separate acts that could constitute the independent and distinct act necessary to prove felony-murder -- the armed robbery of Fiume, the assault of Fiume with a dangerous weapon, the assault of Puopolo with a dangerous weapon, and the assault of Piro with a dangerous weapon. The jury found the defendant guilty of the armed robbery of Fiume, the assault of Fiume with a dangerous weapon, and the assault of Puopolo with a dangerous weapon; it did not convict the defendant of the alleged assault of Piro with a dangerous weapon.

impermissibly corroborated or bolstered the testimony of the Commonwealth's witnesses.

In sum, we conclude that prosecutor's statements regarding the bullet did not influence the jury's conclusions and were not prejudicial error.

ii. Statements regarding the defendant and Williams. The defendant also argues that the prosecutor made improper arguments based on race in his closing. Again, to place the prosecutor's arguments in context, we start with the defense counsel's closing, in which he described Fiume multiple times as the "drug kingpin of Stoneham," and the Commonwealth's other witnesses as "devious little drug dealers." Following this, the Commonwealth closed as follows, emphasizing that the defendants were also drug dealers who intended to frighten and rob other drug dealers with guns:

> "[The defendant and Williams] didn't bring guns with them because it was going to be a friendly, cordial act. . . . They brought the guns with them because they didn't want kids from the suburbs they don't not [sic] handle the streets, I'll pull a gun on him he's going to freeze. Well, the kid didn't freeze, the [kid] threw a punch. And Williams pulled the trigger."

The prosecutor later returned to this point, arguing:

> "Were they all stupid? Yes. But Joe Puopolo is dead not because of his stupidity, he's dead because Mr. Tate, Mr. Williams wanted to rip off these kids from the suburbs. They wanted that pound, they wanted the money."

The defendant objected to these statements at the close of the Commonwealth's closing argument. The following exchange then occurred:

> Defense counsel: "Also, my brother said twice in his closing about Tate and Williams ripping off kids from the suburbs, you know."
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> The judge: "I don't know how much more of a suburb Stoneham is than Medford."
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> Defense counsel: "Yeah, I don't either, and there's no -- there's nothing to show --"
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> The judge: "I mean, the suggestion is that Tate and Williams came from an urban area to the suburbs, and that Tate and Williams were more -- were preying on suburban drug dealers who were less sophisticated somehow than Tate and Williams, and I don't know what the evidence is to support that argument . . . ."

In response to the defendant's objection, the judge instructed the jury that they could not draw any adverse inference against the defendant based on where he or Williams were from. The full instruction read:

> "You heard some argument by [the Commonwealth] that the individuals in question went to the suburbs to do a drug rip-off in the suburbs. I [want] to instruct you that you may not draw any negative inference against the defendant with respect to where Jesse Williams or the defendant are from. The evidence that was put before you in this case with regard to that was that Mr. Williams is from Medford and that Mr. Tate grew up there. And I instruct you, as counsel have agreed and as you may know, that Medford is a suburb as is Stoneham."

This instruction was the product of back and forth between the lawyers and the judge that was focused on where the defendants

and the victims were from, whether one group was a more sophisticated or violent group of drug dealers than the other, and whether Medford was in fact a suburb or not.[10] When asked if this instruction was sufficient, defense counsel indicated that it was. There was no argument by either side that the prosecutor was making a race-based argument as opposed to a comparison of the different types of drug dealers.

Because the judge gave a curative instruction, and the defendant did not object to the instruction, we review whether this argument created a substantial likelihood of a miscarriage of justice. See Commonwealth v. Veiovis, 477 Mass. 472, 488 (2017). In determining whether an error created a substantial likelihood of a miscarriage of justice, "[c]losing arguments must be viewed in the context of the entire argument, and in light of the judge's instruction to the jury, and the evidence at trial." Commonwealth v. Muller, 477 Mass. 415, 431 (2017), quoting Commonwealth v. Braley, 449 Mass. 316, 328 (2007).

Here, we discern no substantial likelihood of a miscarriage of justice. We begin by emphasizing that neither side should

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[10] The Commonwealth introduced evidence that the defendant grew up in Medford and went to Medford High School and that Williams had, at some point in the past, lived in a housing development in Medford. There was no evidence as to where either lived at the time of the shooting or from where they came that night. There was also no evidence as to why the defendant and Williams decided to rob Fiume.

have been drawing distinctions between suburban and urban defendants and suburban and urban victims, as these distinctions may be interpreted as grossly improper racist "dog whistles."[11] Nevertheless, in the instant case, the defendant's comments about suburban drug kingpins, and the prosecutor's response that the defendants were more violent drug dealers determined to rip off "kids from the suburbs," were not interpreted by either counsel or the judge as such an offensive tactic, but rather as attempts by both sides to portray the other as being aligned with worse drug dealers. The arguments were also isolated instances in closings that otherwise carefully parsed the evidence. In sum, we discern no substantial likelihood of a miscarriage of justice, as all sides were satisfied by the judge's solution, and the argument itself seems particularly meaningless when comparing drug dealers from Medford and Stoneham.[12]

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[11] As one Federal court has defined it, a "dog whistle" is "the use of code words and themes which activate conscious or subconscious racist concepts and frames. . . . [C]ertain facially non-discriminatory terms can invoke racist concepts that are already planted in the public consciousness . . . ." Lloyd vs. Holder, U.S. Dist. Ct., No. 11 Civ. 3154, (S.D.N.Y. Dec. 17, 2013).

[12] The defendant alternatively argues that if the errors in the Commonwealth's closing are insufficient on their own to warrant reversal, the combined effect of the two errors constitutes prejudicial error such that the defendant was deprived of a fair trial. For the same reasons described above,

b. Voluntary manslaughter instruction. The defendant argues that he was entitled to a voluntary manslaughter instruction and that the judge erred in declining to give one. On appeal, the defendant asks us to apply our holding in Commonwealth v. Brown, 477 Mass. 805 (2017), cert. denied, 139 S. Ct. 54 (2018), to this case and hold that the Commonwealth must prove that the defendant acted with malice in order to convict him of felony-murder. We have previously held that Brown only applied prospectively, see Commonwealth v. Phap Buth, 480 Mass. 113, 120, cert. denied, 139 S. Ct. 607 (2018), and do not revisit that conclusion here. And since the defendant was tried before our decision in Brown, it does not apply to the defendant's trial. See Brown, supra at 807.

We also conclude that the defendant was not entitled to a voluntary manslaughter instruction. "Voluntary manslaughter is an unlawful killing 'arising not from malice, but from . . . sudden [heat of] passion induced by reasonable provocation, sudden combat, or [the use of] excessive force in self-defense.'" Commonwealth v. Richards, 485 Mass. 896, 918 (2020), quoting Commonwealth v. Gonzalez, 465 Mass. 672, 686 (2013). "[A] self-defense instruction must be given when deadly force was used only if the evidence . . . permits at least a

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however, we conclude that the errors in the Commonwealth's closing argument do not constitute reversible error.

reasonable doubt that the defendant reasonably and actually believed that he was in 'imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force.'" Commonwealth v. Pike, 428 Mass. 393, 396 (1998), quoting Commonwealth v. Harrington, 379 Mass. 446, 450 (1980). When determining whether a voluntary manslaughter instruction should have been given, we review the evidence in the light most favorable to the defendant. Richards, supra.

The defendant sought manslaughter instructions on the theories of excessive force in self-defense as well as heat of passion caused by sudden combat. Specifically, he argued that a voluntary manslaughter instruction was warranted because the sale took place in close quarters in the enclosed garage, there was a baseball bat nearby, and the defendant and Williams were outnumbered.

Even when viewing the evidence in the light most favorable to the defendant, the judge correctly concluded that he was not entitled to a manslaughter instruction. The defendant and Williams were the aggressors, as they brandished firearms to rob Fiume and not in response to any threat. The only evidence of any aggression against the defendant or Williams was testimony that Piro tried to knock the gun from the defendant's hand and

that Fiume attempted to punch Williams.[13] But these actions occurred after the defendant and Williams pulled out their guns and pointed them at Fiume and Puopolo, not before. These actions, therefore, would not justify the defendant and Williams's use of deadly force against Fiume and Puopolo. See, e.g., Commonwealth v. Carter, 475 Mass. 512, 522 (2016) (no manslaughter instruction warranted where defendant pointed gun at someone's head during robbery); Commonwealth v. Selby, 426 Mass. 168, 172 (1997) (no manslaughter instruction warranted where "defendant entered the dwelling house of another, carrying a loaded gun, with the intent to commit a robbery"); Commonwealth v. Evans, 390 Mass. 144, 150-151 (1983) (no manslaughter instruction warranted where defendant used gun during armed robbery).

There is also no evidence to suggest that the defendant was provoked by the enclosed nature of the garage or the number of people in the garage. In fact, the defendant had already been in the garage earlier that night when he was alone and surrounded by a similar number of people. That he later sought out Piro and chose to go back to the garage to complete the purchase with Williams severely undercuts his argument that the

[13] There is no evidence that the victim, Puopolo, committed or attempted any act of aggression against the defendant or Williams.

fact that the sale took place in close quarters provoked him. Cf. Commonwealth v. Acevedo, 446 Mass. 435, 443-444 (2006) (basis for reasonable provocation existed where defendant was surrounded by attackers and then repeatedly punched in head and knocked to ground).

Similarly, the fact that there was a single baseball bat in the garage does not support reasonable provocation. There is no evidence that anyone ever reached for or wielded the bat. Significantly, there is no evidence that Puopolo, the victim, did anything to provoke either Williams or the defendant. See, e.g., Commonwealth v. Garcia, 482 Mass. 408, 411 (2019) (no manslaughter instruction where no evidence of "victim's supposed attack against the defendant"). See also Gonzalez, 465 Mass. at 686 (for sudden combat defense, victim must attack or strike defendant); Acevedo, 446 Mass. at 444 ("provocation must come from the victim" [citation omitted]). On the other hand, the defendant and Williams had guns. In these circumstances, where the defendant and a joint venturer initiated an armed robbery, and where the only potential provocations came after the defendant brandished a gun and threatened the victim, it was not error to decline to give a voluntary manslaughter instruction on any of the requested theories. See, e.g., Commonwealth v. Rogers, 459 Mass. 249, 260, cert. denied, 565 U.S. 1080 (2011)

("Generally, in Massachusetts, one who commits an armed robbery cannot assert a claim of self-defense").

c. Relief under G. L. c. 278, § 33E. The defendant argues that we should exercise our authority under G. L. c. 278, § 33E, to reduce his conviction to murder in the second degree for several reasons. He first argues that the evidence that he actually fired a shot was "weak to non-existent" such that a reduction to murder in the second degree would be consonant with justice. This assertion ignores the testimony of at least one eyewitness who testified that he saw the defendant shoot Puopolo. But regardless of who actually shot Puopolo, there was ample evidence that he was killed during the armed robbery committed by the defendant and Williams or, alternatively, the armed assaults in a dwelling. See, e.g., Commonwealth v. Fernandes, 478 Mass. 725, 738-739, 746 (2018) (no relief under § 33E where circumstantial evidence of defendant's participation as joint venturer in shooting); Commonwealth v. Gomes, 475 Mass. 775, 781-782, 792 (2016) (no relief under § 33E where evidence that defendant was, at minimum, driver of car from which shots were fired and in which shooters fled). Relief under § 33E is not appropriate where the evidence showed that, at the very least, the defendant and an accomplice brought guns to a drug deal and used those guns to commit an armed robbery and shoot two individuals. See Commonwealth v. Rolon, 438 Mass. 808, 822

(2003) (where "the weight of the evidence is entirely consistent with felony-murder in the first degree, it is an abuse of discretion to reduce the verdict solely on factors unrelated to the weight of the evidence"). The defendant was without a doubt an active participant in the entire drug deal, as he initiated the original contacts with the Stoneham drug dealers and appeared both times on the night of the murder with two different partners, thereby suggesting that he was orchestrating the drug deal. He was certainly not on the "remote outer fringes" of the felony-murder. Cf. Brown, 477 Mass. at 824.

The defendant also argues that his conviction should be reversed because of his age -- nineteen -- at the time of the robbery. The fact that the defendant was nineteen at the time of the shooting is not alone enough for relief under § 33E. We accordingly reject the defendant's invitation to reduce the verdict on this ground alone.

Finally, we have reviewed the entire record pursuant to G. L. c. 278, § 33E, and discerned no other basis to set aside or reduce the verdict of murder in the first degree or to order a new trial. Accordingly, we decline to exercise our authority.

Judgments affirmed.