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SJC-12753

COMMONWEALTH vs. CHARLIE BREA.

Suffolk. October 5, 2020. - August 6, 2021.

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

Homicide. Defense of Others. Evidence, Consciousness of guilt, Flight, Hearsay, Information stored on computer, Motive. Practice, Criminal, Instructions to jury, Request for jury instructions, Argument by prosecutor, Capital case.

Indictments found and returned in the Superior Court Department on March 11, 2011.

The cases were tried before Linda E. Giles, J.

Amy M. Belger for the defendant.
Paul B. Linn, Assistant District Attorney, for the Commonwealth.

LOWY, J. The defendant, Charlie Brea, was convicted of murder in the first degree on a theory of deliberate premeditation.[1] The jury could have found that, during a scuffle

[1] The defendant also was convicted of unlawful possession of a firearm.

outside a bar, he fired multiple shots, one of which struck and killed the victim, Luis Montanez.

The defendant makes four claims on appeal: (1) that the judge erred in failing to instruct on voluntary manslaughter as the defendant had requested; (2) that the judge erred in allowing a Boston police detective to testify about the contents of a certain record of the United States Customs and Border Protection agency (Customs) that he saw on a computer screen at Logan Airport, showing that the defendant left the country shortly after the shooting; (3) that the judge improperly instructed the jury in response to the defendant's closing argument, in which his attorney argued the absence of evidence of motive; and (4) that the prosecutor in his closing argument improperly asked the jurors to recall an event, unrelated to the case, that occurred during a view of the crime scene. We affirm, and having reviewed the entire record, we decline to grant relief pursuant G. L. c. 278, § 33E.

Background.[2] The shooting occurred in the early morning hours of October 23, 2010, outside the Breezeway bar on Blue Hill Avenue in the Roxbury section of Boston. The defendant and several of his friends and acquaintances arrived at the bar

[2] We recite the basic facts regarding the homicide and the defendant's flight, reserving for the analysis section additional facts that pertain to the specific issues raised by the defendant.

shortly after 1 A.M. Some of them had also been together at a different bar in the South Boston section of Boston earlier in the night. Among the group was Wendy Perellu, who had been romantically involved with the defendant.[3] Also in the group were the defendant's friend Jonathan Aguasvivas and Aguasvivas's younger brother, Waldo Aguasvivas, who was casually acquainted with the defendant.[4] The defendant, Perellu, and another friend had traveled to the Breezeway from South Boston in the defendant's automobile.

There was some evidence that while the defendant and his group were inside the bar, one of the other patrons directed a homophobic slur at Waldo. There was no physical altercation, and the situation was eventually defused by Jonathan. At some point after that incident, the defendant told Perellu to wait for him and then left the bar.

Some of the following relevant events were captured by security cameras that were mounted outside the Breezeway and on a market located a short distance away on Blue Hill Avenue. Footage from both locations was in evidence. The footage showed that the defendant left the bar at approximately 1:43 A.M. and

[3] Perellu testified that she was no longer romantically involved with the defendant at the time of the murder.

[4] Because the Aguasvivas brothers share a last name, we refer to them by their first names.

spoke with the Aguasvivases' uncle outside for about one minute. He then walked to his car, which was parked near the market, and entered the vehicle. The defendant then started the engine, turned on the headlights, and made some type of movements near the dashboard and center console. Fewer than two minutes later, he turned off the vehicle and the headlights, left the vehicle, and walked back to the bar.

A police search of the defendant's car days after the shooting revealed that the vehicle had a secret compartment ("hide") located behind the dashboard. The hide could be unlocked by turning on the vehicle and the headlights; activating the rear window defroster, the button for which was located on the dashboard; and pressing the control button for the side mirrors on the driver's side door.[5] The Commonwealth maintained at trial that, when he went to his vehicle, the defendant retrieved a firearm from the hide that he later used to shoot the victim. Because there was evidence that patrons sometimes were frisked when they entered the bar, and because there was also evidence, described infra, that the defendant shot the victim shortly after returning from his vehicle, the jury could infer that the defendant was not armed when he

[5] Inside the hide the police found plastic bags containing cocaine, pills, a possible "cutting" agent, and air fresheners. The defendant's fingerprint was found on one of the bags.

entered the establishment earlier in the night and that he retrieved the weapon from his vehicle after leaving the bar.

The victim and two of his friends arrived at the bar at approximately 1:46 A.M., a few minutes after the defendant had left and gone to his vehicle but before he returned. They remained outside the bar. A handful of others were outside as well. The defendant returned from his vehicle at 1:47 A.M. and remained outside, too. Within a minute or two, most of the members of his group left the bar and gathered outside. At approximately 1:50 A.M., an argument occurred and a fistfight broke out.[6] There was evidence that the fight began after someone "sucker punched" Waldo. The security footage showed both the victim and the defendant entering the fray just moments after the fistfight began; there was no testimony, however, and the footage does not show, that anyone physically struck the defendant at any point either before or after the fight began. Within seconds, someone fired multiple shots, one of which hit the victim in the face and killed him.[7]

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[6] The security footage showed the defendant using his cell phone at approximately 1:48 A.M. as he waited outside the bar, and members of his group hastily leaving the bar shortly thereafter. The Commonwealth argued that he had planned with his group to meet outside for a confrontation. The defendant argued that the victim and his two friends acted in concert with the man who earlier had verbally assaulted Waldo inside the bar.

[7] Six spent .22 caliber shells were found at the scene. The Commonwealth's ballistics expert testified that they were all

The Commonwealth presented two witnesses who described the shooter. Tyrone Brooks, one of the victim's friends, testified that the shots were fired from behind him, and when he turned to look in that direction, he saw a person holding what "looked like a gun." He described the person as a male, shorter than him,[8] weighing approximately 260 pounds or more, and wearing a gray hooded sweatshirt. He identified the person he believed to be the shooter on the bar's security footage. Two other witnesses who had testified previously -- Perellu and Joseph Monette -- each identified the defendant on the security footage as he entered the bar earlier that night; the jury could see the defendant's heavy-set build and the fact that he was wearing a gray hooded sweatshirt. From this, the jury could conclude that the man described by Brooks (and pointed out by him on the video footage) was the defendant.

The second witness to describe the shooter was Abdullah Galloway, a security employee of the bar who was off duty but present outside the bar that night. Galloway initially stated at trial that he did not see who fired the shots. However, given Galloway's evasiveness in response to the prosecutor's

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fired from the same weapon. The bullet removed from the victim was also .22 caliber. The weapon was never located.

[8] The jury could see, when the defendant and witness were asked at trial to stand side by side, that the defendant was the shorter of the two.

questions, the judge permitted the prosecutor to read from Galloway's grand jury testimony. The judge instructed the jury that they could use that testimony as substantive proof in the case if they believed it. See Commonwealth v. Daye, 393 Mass. 55, 65-75 (1984). See also Commonwealth v. Sineiro, 432 Mass. 735, 741 (2000). Galloway had testified before the grand jury that the shots were fired by "someone in a gray hoodie"; "about five-six, five seven"; and "a lot heavier" than 250 pounds. He also had testified that he was "about two or three feet" from the shooter and had an unobstructed view of him.

Most of those who were near the shooting -- including the defendant, members of his group, and the two friends with whom the victim had arrived -- ran from the scene.[9] The security footage shows the defendant pulling up the hood on his gray sweatshirt to conceal his face as he fled. He then got into his car and drove away quickly, without waiting for Perellu or the other friend with whom he had arrived. Perellu, who up until that point had remained inside the bar, then left the building

[9] One of the defendant's acquaintances, Monette, ran to a friend's automobile parked nearby at the corner of Blue Hill Avenue and a side street, Waverly Street. As Monette was about to enter the passenger's side of the vehicle, he was shot both of his legs. He testified that he saw his shooter coming at him from Waverly Street, not from the direction of the bar. A bullet removed from one of his legs was .38 or .357 caliber; it could not have been fired from a .22 caliber weapon. His shooter was never identified.

and departed in a different vehicle driven by one of the defendant's other friends.

The Commonwealth adduced evidence that the defendant not only fled the scene after the shooting, but also left the country. Perellu, who lived next door to the defendant in the same housing complex in South Boston, testified that she saw him only once or twice in the days afterward. Perellu testified at trial that the defendant had spoken previously about going to the Dominican Republic to visit his father. The judge also allowed the prosecutor to read from Perellu's grand jury testimony, see Daye, 393 Mass. at 75, in which she stated that the defendant had told her he was planning to go to the Dominican Republic in December, "but not so fast like that." The other witnesses who knew the defendant testified at trial that they did not see him at all after the shooting.

In addition, the Commonwealth presented testimony from Boston police Detective Steven Ridge, who had personally observed a record in the Customs computerized database that showed, among other things, that on October 30, 2010, seven days after the shooting, the defendant purchased a one-way ticket to travel to the Dominican Republic the next day, and that he in fact boarded the flights. Although the defendant objected to this particular testimony and challenges it on appeal, as discussed infra, he did not dispute that he had traveled to the

Dominican Republic and remained there until he was extradited in May 2017 to face the charges in this case.

The defense at trial was twofold. First, the defendant argued mistaken identification, i.e., that he was not the shooter. Second, and in the alternative, he maintained that he acted in response to reasonable provocation and sudden combat and in defense of Waldo.

Discussion. 1. Request for manslaughter instruction. The defendant contends that the judge erred in failing to instruct the jury on manslaughter based on reasonable provocation, sudden combat, and excessive use of force in defense of another. Because the defendant preserved the issues, we review for prejudicial error. See Commonwealth v. Odgren, 483 Mass. 41, 46 (2019).

"[V]oluntary manslaughter is an intentional killing that is mitigated by extenuating circumstances." Commonwealth v. Haith, 452 Mass. 409, 415 (2008). The Commonwealth must prove beyond a reasonable doubt that no mitigating circumstances, such as reasonable provocation, sudden combat, or excessive use of force in defense of another, existed to reduce the defendant's culpability. See Commonwealth v. Camacho, 472 Mass. 587, 602 (2015); Commonwealth v. Acevedo, 427 Mass. 714, 716 (1998). When assessing whether a defendant is entitled to an instruction on voluntary manslaughter, we consider the trial evidence in the

light most favorable to the defendant. See Commonwealth v. Howard, 479 Mass. 52, 57 (2018); Commonwealth v. Acevedo, 446 Mass. 435, 442-443 (2006).

Viewing the evidence in that light, the jury could have found that there was a name-calling incident inside the bar at some point during the night on which the defendant was there; that the victim and his friends, acting in concert with the man who had insulted Waldo, someone with whom the defendant was casually acquainted,[10] inside the bar, later instigated an argument and fight outside the bar; that someone in the victim's group was the first aggressor, having "sucker punched" Waldo as he stood outside; that the defendant either witnessed the punch or at least immediately became aware that a fight had broken out; and that he fired multiple shots in response. There was no evidence, however, that anyone else among the combatants had displayed a gun or other weapon before the defendant fired, let alone that the defendant saw (or even though he saw) a gun or other weapon. After examining each of the defendant's arguments in the context of these facts, we discern no error.

a. Reasonable provocation. "Reasonable provocation is provocation by the person killed [or, in the case of transferred

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[10] Waldo also testified that he knew the defendant because his brother was friendly with the defendant. He was not a "close friend," but "like just an acquaintance, like hi and bye situation."

intent, by someone else] that would be likely to produce such a state of passion, anger, fear, fright, or nervous excitement in a reasonable person as would overwhelm his capacity for reflection or restraint and did actually produce such a state of mind in the defendant. The provocation must be such that a reasonable person would have become incapable of reflection or restraint and would not have cooled off at the time of the killing, and that the defendant was so provoked and did not cool off at the time of killing" (footnotes omitted). Model Jury Instructions on Homicide 75-76 (2018), and cases cited. See Howard, 479 Mass. at 59-62 (discussing instruction on reasonable provocation). To support an instruction on manslaughter based on reasonable provocation, "[t]he evidence must be sufficient to create a reasonable doubt in the minds of a rational jury that a defendant's actions were both objectively and subjectively reasonable." Commonwealth v. McLeod, 394 Mass. 727, 738, cert. denied sub nom. Aiello v. Massachusetts, 474 U.S. 919 (1985). See Acevedo, 446 Mass. at 443; Commonwealth v. Groome, 435 Mass. 201, 220 (2001).

Two flaws with the defendant's argument render it unpersuasive. First, there was no evidence presented at trial that the defendant was subjectively provoked. See Commonwealth v. Colon, 449 Mass. 207, 220, cert. denied, 552 U.S. 1079 (2007) ("Provocation and 'cooling off' time must meet both a subjective

and an objective standard" [emphasis added]); Commonwealth v. Iacoviello, 90 Mass. App. Ct. 231, 242 (2016) ("The law, however, also requires subjective evidence that [the defendant] actually did lose control in a heat of passion, thereby leading him to immediately fire his weapon back at [the victim]"). Although the defendant did witness an acquaintance get punched and the resulting scuffle between some of his friends and their adversaries, he did not indicate in any way that this caused him to experience "a sudden transport of passion or heat of blood." McLeod, 394 Mass. at 738, quoting Commonwealth v. Hicks, 356 Mass. 442, 445 (1969). Without such evidence, the defendant's argument fails at the outset.

Second, no rational jury, considering the situation objectively, could have believed on this record that a reasonable person in the defendant's position would be provoked to act as he did. No threatening action was directed toward the defendant. At most, he witnessed a casual acquaintance being punched before he joined in and fired. Compare Commonwealth v. Brown, 387 Mass. 220, 227 (1982) (unarmed victim choking defendant with shirt insufficient provocation to explain stabbing victim twenty-seven times); Commonwealth v. Rembiszewski, 363 Mass. 311, 321 (1973) ("It is an extravagant suggestion that scratches [inflicted by the victim on the defendant's face] could serve as provocation for a malice-free

but ferocious attack by the defendant with a deadly instrument"). The defendant points to no case, nor are we aware of any, in which we have held that a person acting as he did -- employing deadly force in response to a punch directed at someone with whom he was only casually acquainted -- was entitled to a manslaughter instruction based on reasonable provocation. Considering that even "physical contact between a defendant and a victim [who initiated the contact] is not always sufficient to warrant a manslaughter instruction," Commonwealth v. Walden, 380 Mass. 724, 727 (1980), we decline to create such a precedent here.

b. Sudden combat. The defendant's claim of sudden combat is also unpersuasive. Sudden combat is "a form of reasonable provocation." Howard, 479 Mass. at 58. See Camacho, 472 Mass. at 601 n.19, quoting Commonwealth v. Walczak, 463 Mass. 808, 820 (2012) (Lenk, J., concurring) ("sudden combat is among those circumstances constituting reasonable provocation"). It "involves a sudden assault by the person killed [or, in the case of transferred intent, by someone else] and the defendant upon each other." Model Jury Instructions on Homicide, supra at 78. See Howard, supra, quoting Commonwealth v. Peters, 372 Mass. 319, 324 (1977) ("sudden combat is one of the events which may provoke the perturbation of mind that can end in" manslaughter). For sudden combat to be the basis for a voluntary manslaughter

instruction, someone "must attack the defendant or at least strike a blow against the defendant." Commonwealth v. Espada, 450 Mass. 687, 696-697 (2008), quoting Commonwealth v. Pasteur, 66 Mass. App. Ct. 812, 822 (2006).

To be sure, there were individuals involved in mutual combat here, but that combat did not involve the defendant until he inserted himself into it. Additionally, that conflict was not directed against him; there was no "sudden assault" upon the defendant. As stated, there was no evidence or reasonable inference to be drawn that the victim or anyone else attacked him or inflicted any blows on him at any time. Therefore, no rational jury could have believed in these circumstances that the defendant shot in response to mutual combat involving himself, or, more precisely, could have formed a reasonable doubt as to mitigate to murder on that basis. Hence no instruction was required on that possibility. The only possible view of the trial evidence (including the security footage), and indeed the defendant's very theory at trial, was that he responded when a fight broke out among the others, not because anyone had attacked him.

c. Excessive force in defense of another. Finally, the defendant argues that he acted in defense of Waldo and was entitled to a manslaughter instruction on that basis. There was

no error in the denial of the defendant's request for this instruction.

Because his intervention was not reasonably necessary, the defendant was not entitled to a voluntary manslaughter instruction. See Commonwealth v. Young, 461 Mass. 198, 208 (2012), quoting Commonwealth v. Martin, 369 Mass. 640, 649 (1976) ("An actor is justified in using force against another to protect a third person when [a] a reasonable person in the actor's position would believe [and the actor actually did believe] his intervention to be necessary for the protection of the third person, and [b] in the circumstances as that reasonable person would believe them to be, the third person would be justified in using such force to protect himself"). See also Haith, 452 Mass. at 415 ("A manslaughter instruction is appropriate where the evidence shows that a defendant used excessive force in an otherwise appropriate exercise of self-defense or defense of another and that death resulted from the use of excessive force"). The evidence shows only that Waldo was punched once in the face and that a scuffle followed. There was no evidence that anyone displayed a gun or other dangerous weapon, that anyone directed any other form of deadly force toward Waldo or any other member of the defendant's group, or that the defendant thought he perceived a deadly weapon or deadly force. Furthermore, Waldo remained standing after being

punched and did not stand alone: he was surrounded by friends, and his brother even intervened after the blow landed. Given these facts, the defendant's intervention -- never mind his armed intervention -- was unreasonable.[11]

2. Consciousness of guilt evidence. To demonstrate consciousness of guilt, the Commonwealth produced evidence at trial that the defendant not only fled the scene after the shooting, but also left the country. Specifically, the Commonwealth called Ridge, who testified that he had personally observed a record in the Customs computer database. After conducting a voir dire of Ridge as well as allowing the parties time to research the issue further, the judge allowed the testimony.[12] The defendant challenges this ruling on appeal,

[11] Even if there had been a right to intervene, there is no evidence that a reasonable person would have believed -- or that the defendant did believe -- that Waldo was in danger of either death or serious bodily harm from which he could only be saved solely by the use of deadly force. See Commonwealth v. Espada, 450 Mass. 687, 692, 695 (2008).

[12] The judge also raised a second concern: the best evidence rule. In response, the prosecutor represented that he had attempted to subpoena the airline's records, but that the records were purged after two years and no longer existed. As for Customs's record, he reported, based on information he had received from Ridge and others, that it was not physically possible to print out a hard copy at the Customs office at Logan Airport and, further, that he had tried multiple times, through multiple means (telephone, e-mail, and subpoena), to secure the written record both from Customs and through the United States Department of Justice, all to no avail.

contending that the Commonwealth failed to demonstrate that the flight information was computer-generated and thus not hearsay.

We review a judge's evidentiary ruling for abuse of discretion. See Commonwealth v. Andre, 484 Mass. 403, 410 (2020). Before setting out the facts pertinent to our analysis, a brief explanation of the distinction between "computer-generated" and "computer-stored" information and its legal relevance is useful.

"The classification of . . . records as computer-generated or computer-stored bears directly on the question whether the admission of the records would violate the rule against hearsay." Commonwealth v. Thissell, 457 Mass. 191, 197 n.13 (2010). Hearsay requires a statement made by a declarant. A "declarant" is "the person who made the statement," and a

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Once the judge found that the best evidence rule was satisfied, Ridge's oral testimony regarding his recollection of the content of the record was a permissible substitute for a hard copy. See generally Commonwealth v. Ocasio, 434 Mass. 1, 6-7 (2001). See also O'Connor v. Boston Retirement Bd., 304 Mass. 471, 472-473 (1939) (written change of beneficiary form and acknowledgement that could not be located "properly shown by oral evidence"); Grover v. Smead, 295 Mass. 11, 13 (1936) (oral testimony of contents of certificate of registration that had been lost or destroyed); Fleming v. Doodlesack, 270 Mass. 271, 275 (1930) (oral testimony concerning contents of letter; "[t]here 'are no degrees in secondary evidence'" [citation omitted]); 20 W.G. Young, J.R. Pollets & C. Poreda § 1008.1 (2d ed. 1998) ("Massachusetts does not recognize 'degrees of secondary evidence'; nor, as a necessary corollary, do our courts compel a party authorized to resort to secondary evidence to produce one class of such evidence rather than any other").

"statement" is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion" (emphases added). Mass. G. Evid. § 801(a), (b) (2021). Whether a computer record contains a statement depends on whether the record is "computer-generated," "computer-stored," or a hybrid of both. Thissell, supra.

"The distinction between computer-stored and computer-generated records depends on the manner in which the content was created -- by a person or by a machine." Commonwealth v. Royal, 89 Mass. App. Ct. 168, 171 (2016). Computer-stored records "merely store or maintain the statements and assertions of a human being." Id., quoting State v. Kandutsch, 336 Wis. 2d 478, 503 (2011). They generally are "documents that contain writings of a person or persons that have been reduced to an electronic form." Royal, supra at 171-172. Computer-generated records, on the other hand, "are those that represent the self-generated record of a computer's operations resulting from the computer's programming." Id. at 171, quoting Kandutsch, supra at 503-504. Such records are created "solely by the electrical or mechanical operation of a computer," not directly by human beings. Thissell, 457 Mass. at 197 n.13. See Commonwealth v. Davis, 487 Mass. 448, 465 (2021); Commonwealth v. Ubeda, 99 Mass. App. Ct. 587, 594 (2021); Royal, supra.

Simply put, because computer-stored records contain statements of human beings, they can in certain circumstances constitute hearsay; but computer-generated records, which contain only the results of computer programs, cannot.[13] See Davis, supra; Commonwealth v. Woollam, 478 Mass. 493, 498 (2017), cert. denied, 138 S. Ct. 1579 (2018), citing Thissell, supra. Admissibility of the detective's testimony in this case thus depends on whether the information he viewed was computer-generated. With this in mind, we turn to the pertinent facts.

a. Evidence from the Federal database. Ridge testified that on or about November 6, 2010, he was assigned to locate and apprehend the defendant. He had received some information in the course of his investigation that the defendant had gone to the Dominican Republic. On November 10, 2010, he met with a Customs agent at Logan Airport in an attempt to confirm that information from the agency's database. Customs maintains a database of all individuals who travel internationally to and from the United States. Ridge stated that he was familiar with the agency, having worked there during college and for some time after graduating.

[13] Computerized records having both computer-stored and computer-generated content are sometimes referred to as "hybrid" records. See Thissell, 457 Mass. at 197 n.13; Royal, 89 Mass. App. Ct. at 172.

Noting that the Commonwealth did not intend to offer a written record from the database, the defendant objected on hearsay grounds to testimony from the detective about the contents of any records. There followed a lengthy discussion at sidebar. The judge, recognizing the issue sua sponte, was especially concerned with whether the record in the agency's database was computer-stored information or computer-generated information and elected to conduct a voir dire of Ridge before proceeding further.

Ridge testified on voir dire that all airlines are required by law to submit information regarding their international flights and international travelers to Customs. When the Federal agent typed in the defendant's name and date of birth at Ridge's request, the computer displayed the details of the defendant's ticket (date purchased, manner of payment, date and time of flights, flight numbers, etc.) and the fact that the defendant actually was on board the scheduled flights. This was information that had been generated by the airline, in this case JetBlue, and submitted by it to Customs.

Ridge also testified that he last worked at the agency in 1993, nearly twenty-five years before the trial; that he was generally familiar with the agency's record-keeping; that he did not believe the system had been updated a great deal since he worked at the agency; that the record he saw on the computer

screen in 2010 "didn't look much different" from the screen he saw when he worked at the agency; but that he did not know for certain whether the computer hardware or software had changed since then.

Following the voir dire, the judge focused in her discussion with counsel specifically on whether the Customs record was computer-generated or computer-stored information and suspended the detective's testimony until the next trial day to give the parties the weekend to research that issue further. No other evidence was taken on the point. On the next trial day, the judge asked the prosecutor if he wished to be heard further on the issue. The prosecutor stated that "we did a little research" and represented to the judge that, "once a person is a passenger on a plane or scheduled to be a passenger, that information is sent automatically" by the airline to Customs, and that "[t]here's not any human input from that stage forward."[14]

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[14] The entirety of the prosecutor's representation was as follows:

> "Judge, only just to say that we did a little research, JetBlue uses a computer reservation system, CRS, also called Sabre, which is a global distribution system, it's a computer reservation system developed to automate the way that American airlines, not the name brand American Airlines, all American airlines, book reservations.
>
> "The information from the PSN [sic] which is the Passenger Name Record that Detective Ridge would have been looking at

On this basis, the judge ruled that the agency's record was a computer-generated record and, therefore, not hearsay. She overruled the defendant's objection and permitted Ridge to resume his testimony before the jury. Ridge then testified that, according to the record he saw on the Customs computer screen, the defendant purchased a ticket on October 30, 2010, for travel the next day on a JetBlue flight from Boston to New York City, and then on a connecting JetBlue flight to the Dominican Republic, and that he was, in fact, aboard those flights.

b. Analysis of defendant's claim. As its proponent, the Commonwealth had the burden to demonstrate that the record that the detective saw was computer-generated. See Care & Protection of Laura, 414 Mass. 788, 792 (1993). Yet the Commonwealth never

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is a record that the CRS containing the itinerary, etcetera, that's sent to them.

"The AT THE SCENE [sic], which is the Automated Targeting Passenger System, maintains the PNR information from commercial airlines for the Department of Homeland Security and U.S. Customs Border Patrol [sic].

"The bottom line is, Your Honor, is that once it's generated, once a person is a passenger on a plane or scheduled to be a passenger, that information is sent automatically to Homeland Security and the Department of Border Patrol [sic].

"There's not any human input from that stage forward, and therefore, it is a computer generated record and should be allowed into this case."

explained how the defendant's information came to be in JetBlue's computer system. For this reason, admission of the detective's testimony was error.

First, Ridge never testified -- nor was there any suggestion that he was competent to testify -- about JetBlue's computer systems, how JetBlue acquired the information it submitted to Customs, or what the processes were at JetBlue for handling that information before submitting it to the Federal government. And there was no other evidence as to that. In short, the record was inadequate to show that JetBlue's records (including the fact that the defendant actually was aboard the flights), and in turn the Federal record that was created based on the information supplied to it by JetBlue, had been created solely by computer processes without human intervention.[15]

Moreover, the Commonwealth's representations to the court the next trial day begged rather than answered the question whether the information was computer-generated. After spending a weekend researching how JetBlue received and processed flight information, the Commonwealth detailed what happened to this

[15] Any information contained in JetBlue's records that was provided to JetBlue by the defendant was exempt from the rule against hearsay. See Mass. G. Evid. § 801(d)(2). What we do not know, and what we are concerned with here, however, is whether there was any other human involvement in creating or processing JetBlue's records before they were submitted to Customs.

information once JetBlue had entered the information into its computer system. The Commonwealth stated that "once [the information is] generated," there is "not any human input from that stage forward." Yet the Commonwealth did not indicate how the information was generated -- that is, how the information initially is entered into the system. What occurred between the defendant's decision to purchase a ticket and JetBlue's transfer of his flight information to the Federal government is absent from the Commonwealth's representations. As such, we cannot tell whether the connection between these two links in the chain was forged by humans or computers.

The subject matter at issue -- the inner workings of the computer systems of multiple entities, and the way in which information is received, processed, and passed on by those entities -- is clearly technical. Without knowing how JetBlue received and processed the information at issue, the judge was in no position to assess the Commonwealth's representations to determine whether they adequately demonstrated that the Federal record was strictly computer-generated. Consequently, the Commonwealth failed to carry its burden, and the detective's testimony was erroneously admitted.[16]

[16] We leave for another day the question whether a prosecutor's representations -- even assuming they are based on disclosed, reliable information -- would be a sufficient basis on which a judge can determine that computer records are

c. Prejudicial error. Despite this error, the defendant suffered no prejudice. An error is not prejudicial "[i]f . . . the conviction is sure that the error did not influence the jury, or had but very slight effect . . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994), quoting Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445 (1983). See Kotteakos v. United States, 328 U.S. 750, 764-765 (1946).

We can say with fair assurance that Ridge's testimony did not substantially sway the outcome. No doubt, the testimony was probative of the defendant's flight from the country shortly after the shooting. But it was merely cumulative of ample other evidence of his flight. Indeed, it was undisputed at trial that the defendant had gone to the Dominican Republic at some point and remained there for six and one-half years until he was

computer-generated, or whether there must be evidence in the record on that point. See Mass. G. Evid. § 104(a), (b). Cf. Davis, 487 Mass. at 455 n.7.

extradited. Perellu, the defendant's former girlfriend[17] who lived in the building next to his, testified that she only saw him once or twice after the night at the Breezeway before he left for the Dominican Republic, and other witnesses who knew him testified that they did not see him at all after that night. Perellu further testified that the defendant himself had often spoken of going to the Dominican Republic to visit his father, "but not so fast like that." Finally, there was evidence that the defendant was not at his home when the police interviewed his mother and sister there on November 8 and 9, 2010, fewer than three weeks after the shooting.

Although the additional testimony from Ridge about the particular details of the defendant's departure was more specific, both it and the other evidence of flight reasonably led to the same conclusion: that the defendant left his friends and family and fled to the Dominican Republic in the aftermath of the homicide, not simply to see his father for a temporary visit but to move there indefinitely in order to avoid capture and prosecution. See Commonwealth v. Figueroa, 451 Mass. 566, 579-580 (2008); Commonwealth v. Toney, 385 Mass. 575, 583

[17] Some of Perellu's testimony suggested they were no longer "romantically" involved. They would continue to "see each other, but . . . didn't have any commitment."

(1982).[18] Given the other strong evidence of flight that the Commonwealth offered to establish consciousness of guilt, we can safely say that Ridge's testimony was cumulative and therefore not prejudicial.

3. Jury instruction regarding motive. In his closing argument, the defendant's trial counsel argued that the Commonwealth had not shown a motive for the shooting.[19] The

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[18] The judge instructed the jury thoroughly and correctly on the evidence of consciousness of guilt. See Mass. G. Evid. § 1110(a) note, "Jury Instruction on Evidence of Consciousness of Guilt," and cases cited.

[19] Trial counsel began by stating that it was the Commonwealth's burden to prove its case beyond a reasonable doubt. He continued:

> "And I submit to you today it totally and completely failed to do that. They haven't brought you any physical evidence or video evidence that actually shows [the defendant] with a gun. They have not brought you a single credible witness . . . who says that they saw the man in the gray hoodie with a firearm.
>
> "And most importantly, they have completely [failed] to explain to you why this happened if [the defendant] shot [the victim] that night. Why? What was the motive? What was the reason?
>
> "They have not in any way explained this. It is an event that occurs in a complete vacuum, and that is something else I'm going to ask you to consider very strongly when you decide whether they've proven this case."

Later in the argument, after discussing the security footage and the ballistics evidence, he returned to the absence of motive evidence: "So what else does the Commonwealth have? Did they have motive? Did they have any reason, any explanation for why this would happen?"

prosecutor objected, claiming that counsel had incorrectly stated that the Commonwealth was required to prove motive as part of its case, and requested a curative instruction. Trial counsel acknowledged that the Commonwealth was not required to prove motive, but denied telling the jury otherwise; rather, he argued that he had only made the point that the absence of evidence of motive was something the jury could properly consider. The judge agreed with the Commonwealth and gave a cautionary instruction that the Commonwealth was not required to prove motive. The defendant now contends that, having told the jury the Commonwealth did not need to prove motive, the judge erred by not also instructing them, as he had requested, that they could consider the absence of evidence of motive.

It is well settled that the Commonwealth is not required to prove motive as an element of the crime of homicide. Commonwealth v. Carlson, 448 Mass. 501, 508-509 (2007). Yet evidence of motive is not irrelevant. Evidence of motive can be relevant and admissible, for example, on the issues of malice and intent, or perhaps to bolster the Commonwealth's proof of the identity of the perpetrator. Id. at 509. See Commonwealth v. Brooks, 422 Mass. 574, 581 (1996); Commonwealth v. Weichell, 390 Mass. 62, 73 (1983), cert. denied, 465 U.S. 1032 (1984), and cases cited. Conversely, the absence of any evidence of a motive is something a jury might consider as well. Where, for

example, the Commonwealth's evidence of malice, intent, or identity is sparse, a jury might, in the absence of evidence of motive, be left unpersuaded that the Commonwealth has proved its case beyond a reasonable doubt.

We have not spelled out the exact circumstances in which a defendant may be entitled to an instruction that the absence of evidence of motive can be considered, or what precisely a proper instruction should say. See Commonwealth v. Keniston, 423 Mass. 304, 313-314 (1996) (no substantial likelihood of miscarriage of justice where defendant neither requested such instruction nor objected to judge's failure to give same); Commonwealth v. Noxon, 319 Mass. 495, 546 (1946) (judge correctly and adequately charged jury, among other things, that "motive or absence of motive may present considerations of the utmost importance" [emphasis added]).[20]

We need not explore in this case all the possible circumstances in which such an instruction should be given. It suffices to say that where, as here, the Commonwealth requests an instruction informing the jury that it is not required to prove motive as part of its case, the judge should also inform

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[20] Courts in other jurisdictions have taken various approaches on the matter. For a discussion of the different approaches, see Annot., Necessity that Trial Court Charge upon Motive in Homicide Case, 71 A.L.R. 2d 1025 (1960), and cases compiled therein.

the jury of the corollary principle: that the jury can consider an absence of motive evidence in determining whether the Commonwealth has proved all the elements of the crime beyond a reasonable doubt. See State v. Pinnock, 220 Conn. 765, 790-792 (1992) (proposing instruction for future use that fairly balances related principles, viz., that motive is not element of crime and need not be proved, that absence of evidence of motive may be considered on reasonable doubt, but that even total lack of evidence of motive does not necessarily create reasonable doubt). See also State v. Hunter, 136 Ariz. 45, 49-50 (1983) (error to charge that motive is not element that needs to be proved without also charging, as requested, that "motive or lack of motive is a circumstance that may be considered in determining guilt or innocence"); People v. Hobbs, 35 Ill. 2d 263, 268-269 (1966), cert. denied, 386 U.S. 1024 (1967) (noting value of such instruction, especially in "cases where there is some doubt as to who committed the offense"); Cook v. State, 544 N.E.2d 1359, 1364 (Ind. 1989) (acknowledging that it is "more even-handed and complete," when instructing that motive is not element that needs to be proved, also to instruct that "presence or absence of motive is a circumstance which you may consider").

That said, the instruction that was given was not prejudicial. The judge's statement that the Commonwealth was not required to prove motive was a correct statement of law.

She did not tell the jury that they were not permitted to consider absence of evidence of motive. And perhaps most significantly, this was not a case where there was a complete absence of motive evidence, as the defendant argued; the Commonwealth maintained that the defendant and his group were prepared for a confrontation outside the bar, presumably related to the verbal insult that had been directed to Waldo inside the bar earlier in the night, and that the defendant had armed himself for that very purpose. The motive was evident. The judge's single, brief remark in these circumstances would have had "but very slight effect." Flebotte, 417 Mass. at 353.

4. Prosecutor's closing remarks regarding the view. In his closing argument, the prosecutor asked the jury to recall an event, completely unrelated to this case, that had occurred while they were on the view, and to poll themselves as to the details of the event.[21] He used this argument to make the point

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[21] "Now think about this. We were all together a week ago today when we went on our jury view. When we were out on our jury view, we were standing outside of the Blue Hill Avenue Superette and there was a car with loud music going on while we were trying to make a recording so that the record was clear as to what we were asking, meaning [the defendant's trial counsel] and I were asking you to look at.

"And an incident happened while that car was going. There was music playing. A guy came out and eventually got in that car. He had a couple of words with the police and he drove off.

"You all remember that. You all were there. It was one week ago. For you [twelve] people who wind up deliberating in this

that Brooks's testimony was credible despite some inconsistencies in what he had told the police, what he told the grand jury, what he had told the defendant's investigator, and to what he testified at trial. Just as the jury might not agree on all the details of the incident that occurred on the view, but would agree generally on the "big picture," so too, the prosecutor argued, Brooks was believable notwithstanding his inconsistencies because he was consistent in recounting the "big picture," that the shooter was a heavy-set man with a gray hooded sweatshirt.

The prosecutor's argument was ill advised. Although a view can be helpful to a jury in understanding and assessing the evidence in a case, the view itself is not evidence in a strict sense. See Commonwealth v. Curry, 368 Mass. 195, 198 (1975); Commonwealth v. Dascalakis, 246 Mass. 12, 29-30 (1923). Jurors are carefully instructed (as they were in this case) about the limited purpose of views, and about what they and the attorneys in the case can and cannot do on a view. The jurors should not

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case, I'm going to ask you when you're in that jury room, take a poll . . . ask yourselves and write down these answers. What color was the car? What kind of clothing was the man wearing that drove the car away? What did he say to the police officers?

"I'm going to guarantee you that you won't get [twelve] of the same answers, but you'll have the concept. You all were there. You all know what happened. You all saw, but you're not going to see it in the same way."

be expected to take note of, let alone be asked to remember, events wholly unrelated to the case that they may observe while on a view. Indeed, they should do the opposite. Such events have no bearing on the purpose of the view or on the evidence in the case. It therefore was error for the prosecutor to ask jurors to use the view as fodder for contemplating the fallibility of memory.

The Commonwealth argues that it is permissible to invite jurors "to draw upon their own life experience and common sense." Commonwealth v. Valentin, 474 Mass. 301, 310 (2016). That is correct. The prosecutor in this case went beyond that, however. By calling on the jurors to test their memories of an event that occurred on the view -- unrelated to the facts of the case -- he essentially asked the jury to use the view for something other than the limited purpose for which a view is intended. We have no doubt that he could have made the same point -- that memories are inexact -- just as effectively without invoking the jurors' memories of the event that occurred on the view.

Nevertheless, nothing the prosecutor said rises to the level of prejudicial error. Although he chose a poor example to make his point, the prosecutor's remarks did nothing more than illustrate a noncontroversial, commonsense principle about human memory. The jury surely would have understood it as such.

Therefore, although the prosecutor's closing comments about the view were error, they were not prejudicial.

5. Review pursuant to G. L. c. 278, § 33E. Having reviewed the entire record, as the statute requires us to do, we find no reason to order a new trial, reduce the verdict of murder in the first degree, or grant any other relief.

Judgments affirmed.