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SJC-10476

COMMONWEALTH vs. YAT FUNG NG.

Suffolk. October 4, 2021. - March 3, 2022.

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

Constitutional Law, Assistance of counsel. Practice, Criminal, Assistance of counsel, New trial, Capital case, Appeal by Commonwealth, Opening statement, Request for jury instructions. Judicial Estoppel. Self-Defense.

Indictments found and returned in the Superior Court Department on August 20, 2004.

A motion for a new trial, filed on May 1, 2020, was heard by Maynard M. Kirpalani, J.

Ian MacLean, Assistant District Attorney (Lynn S. Feigenbaum, Assistant District Attorney, also present) for the Commonwealth.
James L. Sultan for the defendant.

CYPHER, J. In the early morning hours of May 23, 2004, the defendant, Yat Fung Ng, met Karriem Brown, the victim, outside a bar in the Fenway area of Boston. A verbal confrontation ensued, and minutes later, the defendant shot the victim once in

the forehead, resulting in the victim's death thirty days later. A jury convicted the defendant of murder in the first degree and unlawful possession of a firearm. The trial judge sentenced the defendant to imprisonment for life without the possibility of parole on the murder conviction.[1] Following his convictions, the defendant filed a motion for a new trial, which was denied. This court consolidated the defendant's appeal from the denial of his motion for a new trial with the direct appeal from his convictions. Following oral argument on the consolidated appeal, our review of the case pursuant to G. L. c. 278, § 33E (§ 33E), alerted us that trial counsel's performance may have been constitutionally ineffective, but review of that issue was impeded because the defendant did not raise a claim of ineffective assistance of counsel in his motion for a new trial or appellate brief, and therefore, no evidentiary hearing had been conducted on the issue. This court then remanded the case for an evidentiary hearing on the sole issue of trial counsel's performance with instructions that, should the judge determine that trial counsel had been constitutionally ineffective, the judge should order a new trial.

[1] The defendant's concurrent sentence of from four years to four years and one day on the firearm conviction was deemed served at the time of sentencing.

After the case had been remanded but before an evidentiary hearing had been held, the defendant's appellate counsel filed a second motion for a new trial on the ground that trial counsel had provided ineffective assistance, addressing the issues identified in this court's order of remand and raising an additional issue related to trial counsel's potential ineffective assistance. After an evidentiary hearing, the motion judge concluded that the defendant had received constitutionally ineffective assistance at trial and, therefore, allowed the defendant's second motion for a new trial. The case is now before this court on the Commonwealth's appeal from the judge's allowance of the defendant's second motion for a new trial. For the reasons discussed below, we reverse.

Background. We recite the relevant facts as found by the motion judge, supplemented by the record, reserving certain facts for later discussion. We consider the facts 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).

A bar in the Fenway area of Boston closed at around 2 A.M. on May 23, 2004, and the staff ushered out the patrons. Once outside the bar, two groups of patrons engaged in a verbal altercation that eventually became physical, with some amount of pushing and punching. The victim did not initiate the fight

but, after witnessing it, joined in the aid of his friends. During the fight, the victim "start[ed] throwing bodies," and when "somebody tried to hit [the victim], . . . [the victim] hit him and punche[d] through." The victim also pushed a woman and a man to the ground. There is no evidence in the record suggesting that either individual was injured. When the woman said that she was going to call the police, the victim grabbed her purse and threw it onto the median in the middle of the street. The victim did not pursue the woman as she then retrieved her purse. According to one witness, the victim was "waving his arms, kind of ranting," "his eyes were crazy," and he appeared to be "on something besides alcohol." As the fight was ending, the victim's friend retrieved a fraternity cane[2] from his car and began twirling it, telling members of the other group involved in the fight, "You don't want any of this." The friend never struck or touched anyone with the cane. The victim was never armed and was observed to have nothing in his hands throughout and after the fight.

The defendant was not a member of either group, nor was he involved in the fight. After the victim pushed the woman to the ground, the defendant "instinctively took his jacket off and ran

[2] A "fraternity cane," also known as a "step cane," is a type of cane used by those in some African-American fraternities during step dances.

right over to the scene." The defendant angrily confronted the victim and his friends, threatening them by saying, "You think you're bullet proof, you think you're bullet proof," "What's up, tough guys? You think you're bullet proof? I got something for you. I got something for you in my trunk. You think you're bullet proof?" The defendant then specified that what he had in the trunk for the victim and victim's friends was a gun.

The victim and defendant continued to exchange words after the victim entered his friend's car. The victim eventually got out of the car, threw his jacket on the ground, and began walking toward the defendant while hitting his own chest and angrily asking the defendant why the defendant was threatening him. The defendant walked toward the defendant's car, with the victim walking after him. The victim continued to yell at the defendant as he walked, at one point telling the defendant that he "better run." The defendant did not respond but quickened his pace and continued walking toward his car in a manner that one witness described as "with a purpose." According to this witness's uncontroverted testimony, the witness told the defendant something to the effect of, "It's over," to which the defendant responded, "It's not over for me" or "I have business."

When the defendant reached his car, he stopped at the driver's side door, and then searched through the trunk and

emerged with a gun.[3] The defendant pointed the gun at the victim and said, "Yeah, you want this? You want this?" The victim, who was unarmed, responded, "Go ahead, do it. Do it," and "What are you gonna do, shoot me? Go ahead, shoot me." The victim and defendant were at least ten feet apart when the defendant fired the fatal shot, hitting the victim in the forehead.[4] The defendant then got into his car and fled the scene.

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[3] There is conflicting evidence in the record regarding the defendant's behavior at his car and where in the car the gun was located. Three witnesses testified that after the defendant reached his car, he looked through the trunk, then went to the driver's side, opened the door, went or reached into the car, and came out with a gun. Two other witnesses testified that the defendant went directly to the driver's side of the car, opened the door, reached or went into the car and came out with a gun. All of these witnesses also testified that the defendant and victim were relatively far apart, with the distance between them ranging from "three car lengths" to approximately "twenty-five feet," and that the victim was stationary and making no attempt to approach the defendant before the defendant shot the victim.

Two other witnesses testified that the defendant went directly to, searched in, and retrieved a gun from the trunk of the car. The final two witnesses to testify about the defendant's behavior around the car stated that the defendant went into the driver's side of the car first, then went to and searched through the trunk, and then emerged from the trunk of the car with a gun. These final two witnesses are cited by the defendant as those whose testimony is most favorable to him. See note 4, infra. We agree with the defendant's analysis. Thus, it is these witnesses' version of the events that we adopt.

[4] There is conflicting testimony about the moments immediately preceding the shooting. According to most witnesses, the victim stopped moving after the defendant retrieved the gun, and the two men were at a distance of at least two car lengths from each other when the defendant pulled the trigger. According to the witness whose testimony appellate

The defendant, who did not testify, did not contest at trial that he was the shooter. The defendant's trial counsel had decided before trial to argue that the defendant shot the victim in self-defense, largely based on the anticipated testimony of Omar Sierra about a call with the defendant that occurred approximately twenty minutes after the shooting. Trial counsel anticipated that Sierra would testify that the defendant had stated, "[H]e came at me, he came at me, so I had to shoot him." Trial counsel previewed this anticipated testimony in her opening statement. A few days later, after trial counsel had argued that the statements would be admissible either for the nonhearsay purpose of showing the defendant's state of mind or pursuant to the spontaneous utterance exception to the hearsay rule, the trial judge ruled that the defendant's statements to Sierra were inadmissible, and Sierra did not testify. Trial counsel continued to argue a theory of self-defense and did not pivot to a theory that the shooting was mitigated from murder to manslaughter by heat of passion upon reasonable provocation.

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counsel claims is most favorable to the defendant, the victim continued walking quickly toward the defendant, and the defendant fired the gun when the victim was about ten feet away. According to another witness whose testimony the defense references in its brief, after the defendant retrieved the gun, the victim and the defendant walked toward each other until they were approximately five feet apart. They then walked backward until there was a distance between them of fifteen to twenty feet. At that point, the defendant raised his gun and fired the fatal shot.

Although the Commonwealth and trial counsel previously had submitted proposed jury instructions that included instructions on both self-defense and heat of passion upon reasonable provocation, the Commonwealth did not renew or otherwise discuss this request at the charge conference, at which the judge discussed only a possible self-defense instruction. At an exchange at sidebar immediately following the jury charge, the Commonwealth asked whether trial counsel was "requesting heat of passion and sudden combat for manslaughter?" Trial counsel asserted that she was seeking only an instruction on self-defense, effectively waiving an instruction on reasonable provocation. The Commonwealth then stated, "So you are not seeking the other two, any other prongs [other than self-defense]? That's fine." The defendant was convicted of murder in the first degree.

At an evidentiary hearing on the issue of the defendant's trial counsel's performance, the motion judge credited trial counsel's testimony in its entirety. In granting the defendant's second motion for a new trial, the judge found that trial counsel's preview of Sierra's anticipated testimony in her opening statement and her failure to pivot from a theory of self-defense to a theory of reasonable provocation after the exclusion of Sierra's testimony were manifestly unreasonable strategic errors and her waiver of a jury instruction on

reasonable provocation was not strategic, but was instead an error precipitated by the difficult personal circumstances with which trial counsel was dealing during trial. The Commonwealth appealed.

Discussion. We conclude that trial counsel was not ineffective for previewing Sierra's anticipated testimony in her opening statement, as the decision to preview such testimony was strategic and not manifestly unreasonable when made, trial counsel's failure to produce the testimony was due to circumstances beyond her control, and the failure did not deprive the defendant of an available, substantial ground of defense. We also conclude that trial counsel was not ineffective for failing to assert a theory of heat of passion upon reasonable provocation at trial or for waiving a jury instruction on the same where, as here, the circumstances surrounding the shooting do not provide legally adequate provocation. As we conclude that there is no other ground on which to affirm the motion judge's allowance of the defendant's second motion for a new trial, we reverse.

1. Standard of review. Under § 33E, a defendant convicted of murder in the first degree has an automatic right to appeal from that conviction directly to the Supreme Judicial Court and receives "a more searching and comprehensive standard of review than ordinary appellate procedure." Commonwealth v.

Billingslea, 484 Mass. 606, 610 (2020). When a case comes before this court pursuant to a direct appeal under § 33E, we conduct plenary review of the entire trial record and have "the authority to grant relief because of an error that the defendant did not raise at trial or on appeal." Id. at 617. Where an error is unpreserved or unargued, this court will only grant relief under § 33E where "the error created a substantial likelihood of a miscarriage of justice by having 'likely . . . influenced the jury's conclusion.'" Id., quoting Commonwealth v. Goitia, 480 Mass. 763, 768 (2018).

Although the defendant originally appealed from his conviction pursuant to § 33E, this case currently is not before this court on an appeal by the defendant. Instead, it is here on the Commonwealth's appeal from the motion judge's allowance of the defendant's second motion for a new trial. This court has not consolidated the Commonwealth's appeal with the defendant's direct appeal but instead considers the Commonwealth's appeal on its own. Therefore, the standard of review that typically applies when this court reviews a grant of a motion for a new trial applies here. Commonwealth v. Alvarez, 433 Mass. 93, 101 n.8 (2000), citing Commonwealth v. Hill, 432 Mass. 704, 710 n.14 (2000) ("Where the defendant's motion for a new trial was allowed and the matter is before us on the Commonwealth's appeal, we do not apply the substantial

likelihood of a miscarriage of justice standard provided by G. L. c. 278, § 33E").

We review a decision to allow a new trial "to determine whether there has been a 'significant error of law or other abuse of discretion'" and only reverse the motion judge's decision if it is "manifestly unjust" (citations omitted). Commonwealth v. Lessieur, 488 Mass. 620, 627 (2021). See Commonwealth v. Perez, 484 Mass. 69, 73 (2020), citing Commonwealth v. Gorham, 472 Mass. 112, 117 (2015). An appellate "court may affirm a ruling . . . on grounds different from those relied upon by the motion judge, so long as 'the correct or preferred basis for the affirmance is supported by the record and the findings.'" Commonwealth v. Henry, 488 Mass. 484, 495 (2021), quoting Commonwealth v. Mauricio, 477 Mass. 588, 595 (2017). Abuse of discretion occurs "where the judge made a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives." Commonwealth v. Grassie, 482 Mass. 1017, 1017-1018 (2019), quoting Commonwealth v. Grassie, 476 Mass. 202, 214 (2017). "Judges are to apply the . . . standard [under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001),] rigorously and should grant [a motion for a new trial] only if the defendant comes forward with a credible reason that outweighs the risk of prejudice to the Commonwealth."

Commonwealth v. Kolenovic, 471 Mass. 664, 672 (2015), S.C., 478 Mass. 189 (2017), citing Commonwealth v. DiCicco, 470 Mass. 720, 728 (2015).

A motion judge's "findings of fact after an evidentiary hearing on a motion for a new trial will be accepted if supported by the record." Kolenovic, 471 Mass. at 672, quoting Commonwealth v. Walker, 443 Mass. 213, 224 (2005). "We consider the record in its entirety . . . to determine whether 'there exists in the record before us evidence to support the judge's decision to order a new trial.'" Kolenovic, supra at 673, quoting Commonwealth v. Preston, 393 Mass. 318, 324 (1984). Where, as here, the motion judge did not preside at the trial, deference is owed "only to the judge's assessment of the credibility of witnesses at the evidentiary hearing on the new trial motion, but [an appellate court is] in as good a position as the motion judge to assess the trial record" (quotations omitted). Commonwealth v. Montez, 450 Mass. 736, 754-755 (2008), quoting Commonwealth v. Haley, 413 Mass. 770, 773 (1992). "Where a new trial is sought based on a claim of ineffective assistance of counsel, the burden of proving ineffectiveness rests with the defendant." Montez, supra at 755, citing Commonwealth v. Comita, 441 Mass. 86, 90 (2004).

2. Ineffective assistance of counsel. When a defendant who has been convicted of murder in the first degree raises an

ineffective assistance of counsel claim as part of a direct appeal pursuant to G. L. c. 278, § 33E, such claims are not reviewed under the familiar test set forth in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Commonwealth v. Seino, 479 Mass. 463, 472 (2018), citing Commonwealth v. Wright, 411 Mass. 678, 681-682 (1992), S.C., 469 Mass. 447 (2014). Instead, they are analyzed under the more favorable substantial likelihood of a miscarriage of justice test, which asks whether defense counsel erred during trial and, if so, "whether that error was likely to have influenced the jury's conclusion," Seino, supra at 472-473, quoting Wright, supra at 682. "Under this standard, the defendant bears the burden of demonstrating both error and harm." Seino, supra at 473, citing Commonwealth v. Barbosa, 477 Mass. 658, 674 (2017).

As discussed supra, this case currently is not before this court on the defendant's direct appeal; it is here on the Commonwealth's appeal from the motion judge's allowance of the defendant's second motion for a new trial. Thus, the substantial likelihood of a miscarriage of justice standard does not apply, and we instead apply the typical test for ineffective assistance of counsel established in Saferian, 366 Mass. at 96. See Commonwealth v. Brescia, 471 Mass. 381, 387 n.6 (2015), quoting Commonwealth v. Hill, 432 Mass. 704, 710 n.14 (2000) ("When the defendant has prevailed on a motion for a new trial

after a conviction of murder in the first degree . . . , the [G. L. c. 278, § 33E,] standard [requiring review for a substantial likelihood of a miscarriage of justice] does not apply, for, if we affirm the allowance of the motion and the defendant is convicted at retrial, he receives § 33E review on appeal"). We observe, however, that there can be no prejudice under either the Saferian standard or the more favorable substantial likelihood of a miscarriage of justice standard where an error purports to deprive a defendant of a ground of defense unavailable to him as a matter of law.

Under the Saferian test, when evaluating whether a defendant has been deprived of constitutionally effective assistance of counsel, we ask whether "representation fell 'measurably below that which might be expected from an ordinary fallible lawyer,' and [whether] that . . . performance inadequacy 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" Kolenovic, 471 Mass. at 673, quoting Saferian, 366 Mass. at 96. See Commonwealth v. Domino, 465 Mass. 569, 577 (2013). "Essentially, [t]he defendant must demonstrate that better work might have accomplished something material for the defense" (quotations omitted). Commonwealth v. Valentin, 470 Mass. 186, 190 (2014), quoting Acevedo, 446 Mass. at 442.

Where a claim of ineffective assistance of counsel is based on a tactical or strategic decision, "the test is whether the decision was manifestly unreasonable when made," and involves "some deference to avoid characterizing as unreasonable a defense that was merely unsuccessful" (quotations and citations omitted). Kolenovic, 471 Mass. at 673-674. This inquiry is not done with the benefit of hindsight and "requir[es] a focus on the point in time when counsel made the challenged strategic decision." Id. at 674, citing Commonwealth v. Glover, 459 Mass. 836, 843 (2011). "Substantively, [o]nly strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent are manifestly unreasonable" (quotations omitted) Kolenovic, supra, quoting Commonwealth v. Pillai, 445 Mass. 175, 186-187 (2005).

a. Opening statement. The defendant asserts that trial counsel provided ineffective assistance when she previewed certain anticipated testimony in her opening statement that was never produced. "In determining whether failure to produce evidence promised in an opening statement is ineffective assistance of counsel, we look at whether there was some incompetency in the preparation of the statement and whether the failure to produce evidence was due to events beyond counsel's control or had strategic justifications." Commonwealth v.

Garvin, 456 Mass. 778, 791 (2010), citing Commonwealth v. McMahon, 443 Mass. 409, 425 (2005).

After approximately fourteen months of preparation, trial counsel's theory of the case going into trial was that the defendant shot the victim in self-defense. Trial counsel believed Sierra's expected testimony as to the defendant's statement approximately twenty minutes after the shooting, "[H]e came at me, he came at me, so I had to shoot him," "went directly to [the defendant's] state of mind to prove that he was in fear[,] to solidify his self-defense." Trial counsel expected the Commonwealth to call Sierra to testify but intended to call Sierra as a witness herself if the Commonwealth declined to do so. Trial counsel's expectation was based on conversations with the Commonwealth, as well as the fact that the Commonwealth brought Sierra to Massachusetts from New Jersey, where he was then incarcerated, for the sole purpose of making him available to testify at trial. Trial counsel interviewed Sierra prior to trial.

These facts do not suggest "inadequate preparation, incompetency, or inattention." Commonwealth v. Nardone, 406 Mass. 123, 127 (1989). On the contrary, trial counsel developed a theory of the case over several months, and Sierra's testimony was central to that theory. She reasonably expected the Commonwealth to call Sierra to testify at trial. Trial counsel

also reasonably believed that, should the Commonwealth not call Sierra as a witness, she herself would be able to call him and have Sierra testify to the defendant's statement.[5] Compare Commonwealth v. Martin, 484 Mass. 634, 641 (2020), cert. denied, 141 S. Ct. 1519 (2021) (preview in opening statement manifestly unreasonable where defense counsel did not intend to call witness, Commonwealth told judge in presence of defense counsel it was unsure whether it would call witness, and Commonwealth's opening did not allude to witness's testimony or describe any evidence in witness's unique knowledge).

Additionally, trial counsel's failure to produce Sierra's testimony at trial was due to circumstances beyond her control. Although the Commonwealth had previously taken steps to secure Sierra's presence in the Commonwealth for the sole purpose of making him available to testify at trial and had listed Sierra as a potential witness on the witness list filed with the court, on the day of Sierra's scheduled testimony, the Commonwealth

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[5] We need not and do not reach the issue whether the judge erred in excluding the testimony. For even if trial counsel's decision to preview the testimony had been manifestly unreasonable at the time of her opening statement, it would still not constitute constitutionally ineffective assistance of counsel where, as discussed infra, the later failure to produce the promised testimony did not "deprive[] the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Kolenovic, 471 Mass. 664, 673 (2015), S.C., 478 Mass. 189 (2017), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

announced that it had decided not to call Sierra as a witness. Trial counsel argued several times during trial that Sierra's testimony was admissible; however, the trial judge ruled inadmissible Sierra's testimony as to the defendant's statements.

"A promise by defense counsel in [her] opening statement to produce key testimony, followed by a failure to deliver it may, without more, constitute ineffective assistance of counsel," but it does not constitute ineffective assistance of counsel in all cases. Commonwealth v. Duran, 435 Mass. 97, 109 (2001), citing Anderson v. Butler, 858 F.2d 16, 19 (1st Cir. 1988). Here, trial counsel did not provide ineffective assistance of counsel in failing to produce key testimony promised in her opening statement because her opening statement was not "manifestly unreasonable" when given, her failure to produce the promised testimony was due to circumstances beyond her control, and the failure to produce the promised testimony did not deprive the defendant of an available, substantial ground of defense. Such failure could not deprive the defendant of an available, substantial ground of defense where, as a matter of law, the defendant was not entitled to put before the jury the issue of self-defense or excessive use of force in self-defense and would not have been so entitled even had Sierra's testimony been admitted. Additionally, there was legally inadequate

provocation to make available to the defendant the defenses of heat of passion upon reasonable provocation or heat of passion upon sudden combat. Thus, as will be discussed infra, as a matter of law, the defendant was not entitled to an instruction on any absolute defense or mitigating circumstance[6] of the charge of murder in the first degree.

We acknowledge that the loss of credibility suffered by trial counsel as a result of her "broken promise" to produce Sierra's testimony might have gone to the defendant's case as a whole, rather than only to the issue of self-defense. However, any loss of credibility suffered as a result of trial counsel's broken promise did not, as required to sustain a claim of ineffective assistance of counsel under the Saferian standard, deprive the defendant of an available ground of defense where, as a matter of law, none was available to him. See Kolenovic, 471 Mass. at 673, quoting Saferian, 366 Mass. at 96.

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[6] Self-defense, "if warranted by the circumstances and carried out properly, constitute[s] a complete defense and not merely a mitigating circumstance." Commonwealth v. Carlino, 429 Mass. 692, 694 (1999), S.C., 449 Mass. 71 (2007), citing Commonwealth v. Mejia, 407 Mass. 493, 496 (1990). Excessive force in self-defense, heat of passion upon reasonable provocation, and heat of passion upon sudden combat, on the other hand, constitute circumstances that may mitigate an unlawful killing from murder to manslaughter. See Commonwealth v. Grassie, 476 Mass. 202, 206-207 (2017), S.C., 482 Mass. 1017 (2019); Commonwealth v. Rodriguez, 461 Mass. 100, 107 (2011), quoting Commonwealth v. LeClair, 445 Mass. 734, 740 (2006).

"A defendant is entitled to have the jury at his trial instructed on the law relating to self-defense if the evidence, viewed in its light most favorable to him, is sufficient to raise the issue." Commonwealth v. Gonzalez, 465 Mass. 672, 682 (2013), quoting Commonwealth v. Harrington, 379 Mass. 446, 450 (1980). "When deadly force is used, . . . a defendant is entitled to an instruction on self-defense where there is 'evidence warranting at least a reasonable doubt' that he '(1) had reasonable ground to believe and actually did believe that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force, (2) had availed himself of all proper means to avoid physical combat before resorting to the use of deadly force, and (3) used no more force than was reasonably necessary in all the circumstances of the case.'" Gonzalez, supra, quoting Commonwealth v. Harris, 464 Mass. 425, 432 (2013).

A self-defense instruction is not warranted "unless there is some evidence that the defendant availed himself of all means, proper and reasonable in the circumstances, of retreating from the conflict before resorting to the use of deadly force." Commonwealth v. Benoit, 452 Mass. 212, 226-227 (2008). Even "a person attacked with deadly force must retreat whenever it is possible to do so in safety." Commonwealth v. Gagne, 367 Mass. 519, 524 (1975), citing Commonwealth v. Crowley, 168 Mass. 121,

126 (1897), and other cases. Here, the defendant had a clearly available avenue of escape -- his car -- that he failed to use before resorting to deadly force. As a result, he could not claim that he shot the victim in self-defense.

As discussed supra, after exchanging words with the victim, the defendant walked back to his car. The defendant opened the driver's side door, then went to the rear of the car, opened the trunk and leaned inside it for at least a few seconds, and retrieved a gun. In the light most favorable to the defendant, the closest the victim got to the defendant was a distance of five feet. The victim never made or attempted to make physical contact with the defendant. The victim was visibly unarmed. The defendant had time to reach and open the driver's side door, walk to the rear of the car, open the trunk, search in the trunk, and retrieve a gun. Instead, the defendant could have simply entered the car after opening the driver's side door and driven away. In other words, "there is no evidence that raised a reasonable doubt that the defendant could not have avoided physical combat with the victim or was unable to retreat." Gonzalez, 465 Mass. at 684.

We confronted an almost identical issue in Commonwealth v. Diaz, 453 Mass. 266, 280 (2009), overruled on other grounds by Commonwealth v. Womack, 457 Mass. 268, 273-274 (2010). There, we held that self-defense was unavailable to a defendant who had

access to a vehicle as a means of retreat, but who chose instead to reach inside that vehicle to retrieve a firearm and shoot his victim. Diaz, supra. As in Diaz, nothing stopped the defendant from driving away from the fight; indeed, he did so moments later after shooting the victim. See Commonwealth v. Mercado, 456 Mass. 198, 209 (2010) (no self-defense where defendant free to leave but returned with firearm); Commonwealth v. Avila, 454 Mass. 744, 769 (2009) (defendant reasonably could have retreated from altercation on public street). Cf. Commonwealth v. Ortega, 480 Mass. 603, 611-612 (2018) (victim's possession and use of firearm may make retreat unreasonable). Here, because the defendant reached for his firearm rather than his keys, a self-defense instruction was unwarranted.[7] Thus, because a self-

[7] We do not discount the testimony regarding the violent actions of the victim just before the shooting, nor the evidence that the defendant may have feared that he was faced with an imminent assault. Nonetheless, even if the defendant believed he was threatened with death or serious bodily harm, his failure to use reasonable avenues of escape precluded any claim of self-defense. See Commonwealth v. Hart, 428 Mass. 614, 616 (1999). We also question whether the defendant could have reasonably believed that he was in imminent danger of death or serious bodily harm from the victim, as required to receive a self-defense instruction where the defendant has used deadly force. At most, the defendant witnessed the victim push two people to the ground in the midst of a group melee in which the defendant was not a participant, and where the two people so pushed showed no signs of any injury, let alone serious injury. The victim did not continue to pursue those individuals after he pushed them, apart from grabbing the woman's purse and throwing it onto the median in the middle of the street. Finally, the victim, although walking quickly in pursuit of the defendant, made no

defense claim was unavailable to the defendant, any error by trial counsel relating to the issue of self-defense did not deprive the defendant of an available, substantial ground of defense and did not constitute ineffective assistance of counsel. The motion judge's determination to the contrary was, therefore, an abuse of discretion.

b. Trial counsel's failure to pivot and waiver of instruction on heat of passion upon reasonable provocation. i. Waiver and judicial estoppel. As a preliminary matter, we note that the Commonwealth is not judicially estopped from arguing on appeal that a reasonable provocation instruction was not warranted, nor has the Commonwealth forfeited or waived such argument. The doctrine of judicial estoppel, which applies in both civil and criminal proceedings, "precludes a party in certain circumstances from asserting a position in one proceeding that is contrary to a position that the party previously asserted successfully in another proceeding." East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 621 (1996). See Commonwealth v. Rodriguez, 476 Mass. 367, 375 (2017). "[T]wo fundamental elements are widely recognized as comprising the core of a claim of judicial estoppel. First, the position being asserted . . . must be 'directly inconsistent,' meaning

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overt attempt to strike or otherwise make physical contact with him.

'mutually exclusive' of, the position asserted in a prior proceeding[;] . . . [and] [s]econd, the party must have succeeded in convincing the court to accept its prior position." Commonwealth v. DiBenedetto, 458 Mass. 657, 671 (2011), quoting Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 640-641 (2005).

Here, the Commonwealth requested an instruction on reasonable provocation at trial. However, the Commonwealth appeared to change course at some point, indicating after the jury instructions had been given that it was "fine" that the judge had not instructed on reasonable provocation and that trial counsel had waived instruction on the same. Thus, it is unclear that the Commonwealth's argument on appeal is inconsistent with the Commonwealth's final position at trial on the reasonable provocation instruction. Even assuming arguendo that the relevant position at trial arises out of the Commonwealth's earlier written request for jury instructions, "the trial judge . . . rejected the Commonwealth's position with respect to" an instruction on reasonable provocation. Rodriguez, 476 Mass. at 376. Where, contrary to the Commonwealth's request, the trial judge did not provide a reasonable provocation instruction, the Commonwealth did not "succeed[] in convincing the court to accept its . . . position" such that judicial estoppel would apply. DiBenedetto, 458 Mass. at 671. Thus, judicial estoppel does not preclude the

Commonwealth from now arguing on appeal that such instruction was not warranted.

Nor has the Commonwealth waived or forfeited the argument. The defendant relies on Commonwealth v. Dery, 452 Mass. 823 (2008), and Commonwealth v. Lam Hue To, 391 Mass. 301 (1984), for the proposition that the Commonwealth may not now argue that the defendant was not entitled to a jury instruction on heat of passion upon reasonable provocation. Neither case supports this conclusion.

Contrary to the defendant's assertion, in Dery, this court considered the Commonwealth's constitutional argument that the defendant could not be tried by a jury of five members, despite that position being inconsistent with its acceptance of such jury at trial. Dery, 452 Mass. at 824. In Lam Hue To, this court concluded that the prosecution had waived its right to argue that certain evidence it had withheld in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963), was not exculpatory or material. Lam Hue To, 391 Mass. at 307-308. The court nevertheless went on to conclude that "it [was] clear . . . that the evidence was exculpatory and material." Id. at 309. The waiver analysis in both cases applied because the party's position at trial was inconsistent with an argument asserted on appeal.

Here, as noted supra, the Commonwealth's position on appeal is not inconsistent with its final position at trial such that its argument on appeal should be deemed waived. Thus, the Commonwealth has not waived the argument that the defendant was not entitled to a jury instruction on reasonable provocation. Because neither judicial estoppel nor waiver prevents the Commonwealth from arguing on appeal that the defendant was not entitled to a jury instruction on heat of passion upon reasonable provocation, the argument is properly before us.

ii. Unavailability of a reasonable provocation instruction. The motion judge found that trial counsel's failure to pivot midtrial to a theory of reasonable provocation was a manifestly unreasonable tactic and that her waiver of a reasonable provocation jury instruction "was not conscious or strategic, but a mistake." Deferring to the motion judge's findings, we nevertheless hold that trial counsel's errors did not deprive the defendant of constitutionally effective assistance of counsel where, as here, there was no legally adequate provocation to support a reasonable provocation instruction.[8]

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[8] As with the defendant's claim of self-defense, any error relating to trial counsel's failure to pursue a defense of reasonable provocation cannot give rise to a substantial likelihood of a miscarriage of justice, because that defense was unavailable to the defendant as a matter of law.

"If any view of the evidence in a case would permit a verdict of manslaughter rather than murder, a manslaughter [instruction] should be given." Commonwealth v. Brooks, 422 Mass. 574, 578 (1996), citing Commonwealth v. Walden, 380 Mass. 724, 726 (1980). "Voluntary manslaughter is an unlawful killing arising not from malice, but from . . . sudden passion induced by reasonable provocation, sudden combat, or excessive force in self-defense" (quotation omitted). Acevedo, 446 Mass. at 443, quoting Commonwealth v. Carrion, 407 Mass. 263, 267 (1990). "Reasonable provocation is provocation [deemed adequate in law] by the person killed . . . 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." Commonwealth v. Brea, 488 Mass. 150, 156 (2021), citing Model Jury Instructions on Homicide 75-76 (2018). A jury instruction on reasonable provocation is warranted only if there is sufficient evidence "to create a reasonable doubt in the minds of a rational jury that a defendant's actions were both objectively and subjectively reasonable." Brea, supra, quoting Commonwealth v. McLeod, 394 Mass. 727, 738, cert. denied sub nom. Aiello v. Massachusetts, 474 U.S. 919 (1985).

Mere "[i]nsults and quarreling alone cannot provide a reasonable provocation." Commonwealth v. Vatcher, 438 Mass. 584, 588 (2003), quoting Commonwealth v. Seabrooks, 425 Mass. 507, 514 (1997), S.C., 433 Mass. 439 (2001). While physical contact is not required, see Commonwealth v. Morales, 70 Mass. App. Ct. 526, 532 (2007), S.C., 464 Mass. 302 (2013), "mere insulting words and threatening gestures, alone, with nothing else do not constitute adequate provocation to reduce a killing from murder to manslaughter" (citation omitted), Howard, 479 Mass. at 61. Conversely, "physical contact between a defendant and a victim is not always sufficient to warrant a manslaughter instruction, even when the victim initiated the contact." Commonwealth v. Felix, 476 Mass. 750, 757 (2017), quoting Walden, 380 Mass. at 727.

The defendant contends that sufficient evidence of reasonable provocation existed where he "interceded as a Good Samaritan to assist a woman after she was pushed to the ground by [the victim] during a violent melee," and was then threatened and pursued by the victim. This argument is unavailing for two reasons.

First, the only evidence in the record to suggest that the defendant's intervention toward the end of the melee was "as a Good Samaritan" is the timing of his initiation of the altercation with the victim; according to one witness, the

defendant "instinctively took his jacket off and ran right over to the scene" after the victim pushed a woman to the ground. However, the defendant's only action on reaching the scene was to threaten deadly force against the victim and his friends. The defendant made no attempts to speak with, check on, or otherwise assist the woman or anyone else. While we must draw "[a]ll reasonable inferences . . . in favor of the defendant" (emphasis added), we will not speculate as to the defendant's motivations where there is no supporting evidence in the record. Commonwealth v. Camacho, 472 Mass. 587, 602 (2015), quoting Commonwealth v. Nichypor, 419 Mass. 209, 216 (1994).

Second, it is well established that the provocation must "come from the victim" and be directed at the defendant. Commonwealth v. LeClair, 445 Mass. 734, 741-743 (2006). For example, in LeClair we expressly rejected the Model Penal Code approach to reasonable provocation, under which a defendant's "belie[f] that the deceased is responsible for some injustice to another" would constitute reasonable provocation. Id. at 741-742. We also more recently have held that being a witness to a physical altercation in which the victim is a participant -- even a violent participant -- is inadequate provocation as a matter of law. See Brea, 488 Mass. at 156-157 (no reasonable provocation where defendant, at most, "witnessed a casual acquaintance being punched before he joined in and fired");

Commonwealth v. Medina, 430 Mass. 800, 809-810 (2000) (inadequate provocation where defendant witnessed victim assault third party with axe, but victim had not "directly threatened or assaulted the defendant" before he struck victim with baseball bat).

Here, at most, the defendant witnessed a violent melee involving nearly a dozen people, in which there was punching, pushing, and shoving, including by the victim. One individual was briefly armed with a fraternity cane, but did not use it on anyone that night, and the victim was unarmed. As the defendant was not a participant in the melee, none of the pushing, shoving, or punching was directed at him, and the actions of the victim or others in the melee could not provide a basis adequate at law for the defendant's reasonable provocation. Indeed, the victim exchanged no words or gestures of any kind with the defendant until the defendant approached the victim and threatened to use deadly force against him.

According to uncontroverted evidence in the record, the first interaction between the victim and the defendant was the defendant approaching the victim and saying, "You think you're bullet proof, you think you're bullet proof," "What's up tough guys? You think you're bullet proof? I got something for you. I got something for you in my trunk. You think you're bullet proof?" and then specifying that what he had in the trunk was a

gun. Because no event broke the chain between the defendant's unprovoked threat of deadly force against the unarmed victim, the defendant's walk back to his car, his search for and retrieval of his firearm, and the defendant's fatal shooting of the victim, the defendant was the first aggressor not just in his argument with the victim but also in the fatal confrontation with the victim. Because there existed an unbroken chain of events between the defendant's threat of deadly force and his shooting of the victim, any reasonable provocation would have had to exist before such chain began. As discussed supra, no such reasonable provocation existed at the time the defendant threatened deadly force against the victim. Thus, as a matter of law, the defendant was not entitled to an instruction on reasonable provocation.

During plenary review of a case pursuant to § 33E, this court declined to reduce a defendant's conviction of murder in the first degree to manslaughter, concluding that "there [was] no evidence suggesting that the defendant killed the victim because he was provoked or engaged in sudden combat" on facts remarkably similar to those here. Commonwealth v. Coleman, 434 Mass. 165, 171 (2001). In Coleman, "the defendant was involved in an altercation involving several persons outside a nightclub . . . . At some point during or after the fight in which several persons had thrown punches, the defendant left the brawl

and went to a nearby automobile where he retrieved a gun from the trunk. He then turned in the direction from which he had come and shot the victim at close range. There was evidence that the victim had followed the defendant to the automobile, but no evidence that the victim was armed at the time of the shooting." Id. at 166.

Here, the facts are even less favorable to the defendant. The defendant witnessed, but was not involved in, a physical altercation involving several persons outside a bar. After the fight had ended, the defendant walked to his nearby automobile, where he retrieved a gun from the trunk. The victim had followed the defendant, but he was unarmed. The victim either walked quickly to a distance of ten feet from the defendant when the defendant fired the fatal shot, or both the defendant and victim had walked toward each other until they were five feet apart and then backed away to a final distance of fifteen to twenty feet when the defendant fired the fatal shot.[9]

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[9] The defense claims that the testimony asserting that the victim walked quickly to a distance of ten feet from the defendant was the most favorable evidence for the defendant. However, the defense also cited in its brief to evidence that the victim walked to a distance of five feet from the defendant. In reviewing such evidence, we look at the record as a whole. The same witness who testified that the defendant and victim walked to within five feet of each other also stated that, after the defendant had retrieved a gun, the victim began backing up and was from fifteen to twenty feet away from the defendant when the defendant shot the victim.

The defense contends that the victim's relatively greater size than the defendant gave rise to reasonable provocation. However, where the defendant had access to a firearm and the victim remained unarmed, we find this argument unavailing. In Commonwealth v. Whipple, 377 Mass. 709, 711-712, 715-716 (1979), this court declined to disturb a conviction of murder in the first degree where the victim and defendant engaged in a fistfight, with the victim weighing over 200 pounds and the defendant weighing only 145 pounds. During that altercation, the victim had struck the defendant with a "two-by-four" but was unarmed at the time of the shooting. Id. at 712, 715. In the course of the altercation, the defendant procured a gun and shot the victim, who was then approximately ten feet away. Id. at 712. There was evidence that the victim may have been moving toward the defendant at the time. Id. Nevertheless, the court concluded that, despite the exchanged blows, "there was no serious injury at any point from the blows exchanged, and no threat of serious injury at least after the two-by-four was discarded." Id. at 715. The court thus analogized the "defendant's taking up of the gun" to cases "in which a defendant, party to a dispute or affray, leaves the scene, procures a weapon, and returns to do murderous work." Id. We also conclude that such an analogy is applicable to the case here.

Also informative are our cases where we have concluded that the evidence presented adequate provocation, particularly in light of the requirement that "[a] victim's conduct must present a 'threat of serious harm' to be considered reasonable provocation." Commonwealth v. Rhodes, 482 Mass. 823, 827 (2019), quoting Commonwealth v. Ruiz, 442 Mass. 826, 839 (2004). In Commonwealth v. Acevedo, 427 Mass. 714, 715 (1998), the issue of provocation "was plainly presented by the evidence" where the victim "was pursuing the defendant with a baseball bat" and, in a confrontation shortly before the fatal incident, "had chased the defendant with a baseball bat and struck [the defendant] several times." We also concluded that there was adequate provocation where, "[a]t trial, the defendant presented evidence that the victim violently attacked [the defendant] with a bat, beat his brother, and chased the defendant with a knife, all immediately prior to the killing." Commonwealth v. Randolph, 438 Mass. 290, 299 (2002). In Commonwealth v. Berry, 431 Mass. 326, 335 (2000), following a verbal argument, "[t]he victim charged the defendant and swung at him with his bare hands" and "hit the defendant with a beer bottle." This "escalating hostility" was sufficient to warrant a reasonable provocation instruction. Id. In Commonwealth v. Little, 431 Mass. 782, 786-787 (2000), there was adequate provocation where the victim was the first aggressor, the defendant was on crutches and

unable to flee, the defendant believed the victim had a handgun and knew him to carry one in the past, and the victim "made a move with his hand to his hip, as if he were reaching for a handgun." Similarly, in Commonwealth v. Niemic, 427 Mass. 718, 719, 721 (1998), S.C., 451 Mass. 1008 (2008), there was adequate provocation where the victim, after reaching into his pants and threatening to shoot a group of young men, threatened to shoot the defendant and then shoved him against a house.

The above cases all share one fact in common: the victim was either visibly armed or at least suspected of being armed.[10] We rarely have concluded that a defendant was reasonably provoked where a victim was unarmed, and such cases are easily distinguishable from the case currently before us. For example, this court concluded that there was adequate provocation in Commonwealth v. Boucher, 403 Mass. 659, 661, 663 (1989), where the victim, a student of karate, fought with the defendant and "delivered a kick to the defendant's head and continued to attack the defendant." No evidence was presented here that the victim was trained in hand-to-hand combat or any sort of martial

[10] Additional cases where we determined there was adequate provocation include Commonwealth v. Richards, 485 Mass. 896, 919 (2020) (victim stabbed defendant in chest); Commonwealth v. Triplett, 398 Mass. 561, 565, 569 (1986) (defendant testified victim lunged at him with knife); Commonwealth v. Ransom, 358 Mass. 580, 582-583 (1971) (victim stabbed defendant in arm and chased him with knife).

arts. Other cases where we determined that there was adequate provocation in light of an unarmed victim required a physical attack by the victim prior to the use of deadly force by the defendant. See Acevedo, 446 Mass. at 443-444 (victim and friends surrounded defendant, knocked defendant to ground, and repeatedly punched defendant in head); Commonwealth v. Young, 326 Mass. 597, 601 (1950) (struggle started "with a battery committed by [the victim] on the defendant"); Morales, 70 Mass. App. Ct. at 533-534 (victim and two others, at direction of third party, "were approaching [defendant] in order to 'get him,' 'jump him,'" and "victim threw some punches").[11] The situation here is not analogous to these cases where, here, the victim was alone, it was not clear that the victim intended serious bodily harm against the defendant, and there is no evidence the victim ever attempted to strike or otherwise physically attack the defendant.

[11] The Appeals Court concluded that there was adequate provocation in Commonwealth v. Fortini, 68 Mass. App. Ct. 701, 703, 706 (2007), where, viewing the evidence in the light most favorable to the defendant, the victim lunged at the defendant and reached for the defendant's gun, and then continued to reach for the weapon after the defendant stepped back. Although the victim was not armed at the time the defendant pulled the trigger, he was making overt and repeated attempts to arm himself with the defendant's shotgun. Id. at 703. Nothing approaching that set of facts occurred in this case, where the victim, at most, continued walking toward the defendant after the defendant retrieved the gun from his car.

While we have often concluded that a defendant was reasonably provoked when faced with an armed victim, we also have concluded that there was inadequate provocation where a victim was armed, particularly where the victim was responding to an attack or confrontation by the defendant. See Commonwealth v. Brum, 441 Mass. 199, 206 (2004) (victim brandished hammer against third party who had victim in headlock); Commonwealth v. Roderick, 429 Mass. 271, 278-279 (1999) (victim brandished machete against armed robber); Commonwealth v. Curtis, 417 Mass. 619, 629 & n.6 (1994) (victim attempted to strike defendant with "quart bottle full of liquor" after defendant confronted victim).

Where the victim was unarmed, this court frequently has concluded that there was insufficient evidence to warrant a reasonable provocation instruction. It is well settled that "[n]ot all physical confrontations, even those initiated by the victim, are sufficient" to warrant an instruction on reasonable provocation. Commonwealth v. Lugo, 482 Mass. 94, 104 (2019), citing Curtis, 417 Mass. at 629 & n.6, and other cases.

In Commonwealth v. Bertrand, 385 Mass. 356, 363 (1982), quoting Walden, 380 Mass. at 728, we concluded that where a victim, "at most[,] 'put his hand up to swing,'" even where the victim "was taller and heavier than" the defendant, there was insufficient evidence to "warrant a reasonable doubt that

something happened which would have been likely to produce in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint, and that what happened actually did produce such a state of mind in the defendant." In Commonwealth v. Burgess, 450 Mass. 422, 438 (2008), we held that the evidence did not warrant a finding of reasonable provocation where the victim told the defendant, "I'll hurt you," and "the victim pushed [the defendant] hard enough to cause the defendant to strike his back against the refrigerator or some object and bruise him." In Commonwealth v. Bianchi, 435 Mass. 316, 329 (2001), this court held that the victim arguing with the defendant and punching him in the face "was inadequate as a matter of law" where the victim was unarmed, the defendant had precipitated the confrontation in violation of a protective order, the defendant "outweighed the victim by more than 170 pounds," and the defendant "was armed with a fully loaded weapon." We also determined that there was inadequate provocation where the defendant's wife "choked [the defendant] on the neck with [his] shirt." Commonwealth v. Brown, 387 Mass. 220, 227 (1982). In Felix, 476 Mass. at 758, we determined that there was inadequate provocation where the victim "'lunged at' and punched" the defendant.

These cases counsel that "a victim's offensive use of physical force against a defendant will not necessarily

constitute 'adequate provocation,' particularly where the defendant responds with excessive force." Vatcher, 438 Mass. at 589. We also have stated previously that where, as here, "there is no evidence that [the victim] initiated physical contact," the evidence "did not support a finding of sudden passion induced by reasonable provocation, sudden combat, or excessive use of force in self-defense." Commonwealth v. Gulla, 476 Mass. 743, 748 (2017). Further, "[c]ourts are reluctant to find mitigation warranting an instruction on a lesser included offense when the defendant confronts the victim while armed with a deadly weapon." Commonwealth v. Vick, 454 Mass. 418, 420, 429-430 (2009) (no mitigation of armed assault with intent to murder where defendant and victim were part of melee involving "pushing and shoving, arguing, and yelling," victim was unarmed, and defendant shot victim with firearm at close range). Accordingly, where a single unarmed victim[12] responds, albeit angrily, to an unprovoked threat of deadly force by a defendant, and where the victim pursues the defendant by walking quickly after him but makes no attempt to make physical contact with him, we have never held that such behavior could constitute

[12] The record evidence shows that the victim was visibly unarmed. Where there is no evidence that the defendant suspected the victim to be armed and the defense does not argue such, it would be mere speculation for this court to consider that such a suspicion existed here.

"adequate provocation" to support a reasonable provocation instruction. We decline to do so now.

Here, the defendant initiated a confrontation with the victim by threatening deadly force. In response, the victim never lunged at the defendant. Cf. Felix, 476 Mass. at 758. The victim never "put his hand up to swing." Cf. Bertrand, 385 Mass. at 363, quoting Walden, 380 Mass. at 728. The victim did not push the defendant. Cf. Burgess, 450 Mass. at 438. The victim did not punch the defendant in the face, nor even attempt to do so. Cf. Bianchi, 435 Mass. at 329. Although the victim had recently pushed two people to the ground in the midst of a chaotic melee between nearly a dozen people, the record provides no evidence that either person was injured at all, let alone seriously, and as discussed supra, because the pushing was not directed at and did not involve the defendant in any way, it could not provide the basis for reasonable provocation.

Finally, the defendant reasonably could not have felt so trapped by the victim's pursuit nor have been in such fear of imminent danger as could have provided a basis for reasonable provocation where he walked back to his car and searched through it for at least several seconds while the victim engaged in no behavior that could serve as adequate provocation, such as an attempt to attack the defendant or otherwise make physical contact. Cf. Glover, 459 Mass. at 842 ("victim's conduct that

caused the defendant to believe he was in imminent danger may be sufficient to support a theory of reasonable provocation" despite reasonable opportunity to retreat). There is no view of the evidence under which the victim's conduct prior to the shooting would provide legally adequate provocation to warrant an instruction on reasonable provocation.

Even if the victim's conduct might have provided legally adequate provocation, there was also no evidence here that the defendant was subjectively provoked, as is required to warrant a reasonable provocation instruction. Bertrand, 385 Mass. at 363, quoting Walden, 380 Mass. at 728. The defense points to no evidence in the record indicating the defendant's subjective provocation. An independent review of the trial record shows that the defendant did not testify or otherwise affirmatively present evidence of his subjective provocation; no witness, including the witness standing next to and speaking with the defendant immediately before the fatal altercation began, offered any testimony addressing the defendant's subjective provocation. We, therefore, conclude that no such evidence exists in the record before us.

The evidence going to the defendant's state of mind showed that (1) the defendant took off his jacket and "instinctively" ran over to the scene of a melee that was then dispersing; (2) the defendant threatened the use of deadly force against the

victim, "gritting" and "putting his hands together"; (3) the defendant informed the victim that the tool of such deadly force was in the defendant's trunk; (4) the defendant walked "purposefully" back to the defendant's car, ignoring the victim's continuing taunts; (5) the defendant quickened his walking pace after the victim said he "better run"; (6) the defendant searched for and then retrieved a gun from the trunk of his car; (7) the defendant turned and taunted the victim with the gun, saying, "Yeah, you want this? You want this?" and, finally, (8) the defendant shot the unarmed victim in the forehead from a distance of at least ten feet. Even drawing all reasonable inferences in favor of the defendant, these actions "reflect[] a presence of mind that is inconsistent with the emotional state required under a theory of reasonable provocation." Glover, 459 Mass. at 844. Any conclusion to the contrary would require mere speculation.[13] Thus, where, as here, there was no evidence of the defendant's subjective provocation, he was not entitled to a reasonable provocation instruction. Therefore, we must conclude that the determination that trial counsel's failure to pivot and waiver of a reasonable

[13] Instructions are not warranted where the evidence would require the jury "to speculate on whether the defendant in the course of the struggle might have been roused to the heat of passion." Commonwealth v. Burgess, 450 Mass. 422, 439 (2008), quoting Commonwealth v. Walden, 380 Mass. 724, 728 (1980).

provocation instruction constituted constitutionally ineffective assistance of counsel was an abuse of discretion.[14]

c. Excessive force in self-defense. "To receive an instruction on the excessive use of force in self-defense, 'the defendant must be entitled to act in self-defense . . . .'"[15] Commonwealth v. Anestal, 463 Mass. 655, 674 (2012), quoting Berry, 431 Mass. at 335. See Commonwealth v. Espada, 450 Mass. 687, 695 (2008), citing Commonwealth v. Walker, 443 Mass. 213, 218 (2005). As discussed supra, the defendant was not entitled to act in self-defense. Therefore, because the defendant was not entitled to receive an instruction on self-defense, he likewise was not entitled to receive an instruction on the excessive use of force in self-defense.

d. Sudden combat. "Sudden combat is 'a form of reasonable provocation.'" Brea, 488 Mass. at 157, quoting Howard, 479 Mass. at 58. "It 'involves a sudden assault by the person killed . . . and the defendant upon each other.'" Brea, supra, quoting Model Jury Instructions on Homicide, supra at 78.

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[14] We acknowledge that our existing case law on this issue provided little guidance to the motion judge, who did an admirable job at the evidentiary hearing of preparing the issue for our review.

[15] We emphasize that an excessive force instruction is only warranted if the alleged excessive force occurred in self-defense, not defense of another. Commonwealth v. Medina, 430 Mass. 800, 809-810 (2000).

Generally, "the combat was unplanned and the defendant was often the one subject to the first physical attacks that escalated into mutual violence." Commonwealth v. Benson, 453 Mass. 90, 97 (2009), quoting Commonwealth v. Clemente, 452 Mass. 295, 321 (2008), cert. denied, 555 U.S. 1181 (2009). "In cases where sudden combat is the claimed provocation, the victim generally must attack the defendant, or at least strike a blow against the defendant in order to warrant a manslaughter instruction." Lugo, 482 Mass. at 104-105.

As discussed supra, the victim did not provide legally adequate provocation to raise the issue of heat of passion upon reasonable provocation. Even viewing the evidence in the light most favorable to the defendant, as we must, the victim never struck or made any physical contact with the defendant, nor attempted to make physical contact with the defendant, "[n]or is there evidence that the defendant objectively believed at the time of the shooting that the victim was armed with a firearm." Lugo, supra at 105. Here, the defendant struck the first blow when he shot the unarmed victim in the forehead from a distance of at least ten feet. Such a scene cannot reasonably be characterized as sudden combat. Therefore, the defendant was

not entitled to a jury instruction on heat of passion upon sudden combat.[16]

Conclusion. Because, as a matter of law, the defendant was not entitled to an instruction on self-defense or voluntary manslaughter instructions based on excessive force in self-defense, heat of passion upon reasonable provocation, or heat of passion upon sudden combat, any error committed by the defendant's trial counsel did not deprive the defendant of an available, substantial ground of defense. Thus, the defendant's trial counsel did not provide constitutionally ineffective assistance, and it was an abuse of discretion to hold that she did. The motion judge's allowance of the defendant's second motion for a new trial is reversed.

The defendant's consolidated appeal from his convictions pursuant to G. L. c. 278, § 33E, and from the denial of his first motion for a new trial is still pending before this court. The parties may submit new briefs on that appeal.

So ordered.

[16] As with the defendant's claims of self-defense and reasonable provocation, any error relating to trial counsel's failure to pursue a defense of sudden combat cannot give rise to a substantial likelihood of a miscarriage of justice, because that defense is unavailable to the defendant as a matter of law.