SJC-11386

COMMONWEALTH vs. PATRICK GRIER.

Suffolk. March 11, 2022. - August 9, 2022.

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

Homicide. Firearms. Jury and Jurors. Criminal Offender Record Information. Practice, Criminal, Jury and jurors, Challenge to jurors, Instructions to jury, Argument by prosecutor, Capital case. Evidence, Opinion.

Indictments found and returned in the Superior Court Department on February 25, 2009.

The cases were tried before Judith Fabricant, J.

Rosemary Curran Scapicchio for the defendant.
Paul B. Linn, Assistant District Attorney, for the Commonwealth.

KAFKER, J. Based on his fatal shooting of De'Andre Barboza, the defendant, Patrick Grier, was convicted by a Superior Court jury of murder in the first degree and unlawful possession of a firearm. On appeal from these convictions, the defendant argues reversible error in (1) the trial judge's

failure to require the Commonwealth to provide a race-neutral explanation for its use of peremptory challenges; (2) the prosecutor's use of peremptory challenges to strike potential jurors based on their youth; (3) the judge's instructions to the venire that an impartial juror must put aside his or her personal experiences, thoughts, and opinions; (4) the judge's decision to excuse a juror for cause after it was revealed, based on a criminal record check, that the juror had not disclosed prior arrests and charges; (5) the prosecutor's closing argument, which the defendant claims vouched for a witness's credibility, appealed to the jurors' emotions, shifted the burden of proof, and improperly undermined his Bowden defense, see Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980); and (6) the judge's allowance of opinion testimony by a detective. Because we conclude that the defendant's arguments are without merit, we affirm his convictions.

Background. We summarize the facts as the jury reasonably could have found them. On the evening of November 30, 2008, the defendant and his close friend, Tratasia Day, were at Ada's Market, a store in the Dorchester section of Boston. While at the store, they encountered the victim, who was in the store with Jaquan Lewis. The defendant proceeded to have a conversation with the victim outside the store. After this encounter, the defendant appeared quiet and upset.

The next morning, December 1, 2008, Day -- who was sixteen years old at the time -- went to the house where her friend Anays Mercedes lived, with the intention of walking to school with her. Upon learning that Mercedes would not be going to school that day, Day decided to skip school, arranging instead to meet up with the defendant. The pair met at Elmhurst Street in Dorchester, proceeding from there to Washington Street. That morning, the defendant was wearing a black jacket with gray design elements, including Champion brand logos on the left sleeve and left and right chest areas. He was also wearing a black baseball cap with a pinwheel design.

As the pair were passing the Caribbean Market on Washington Street, Day noticed Lewis and the victim inside. Lewis and the victim both then came out of the market. After Lewis called out to Day, she turned back to talk to him. Meanwhile, the defendant continued walking down Washington Street toward the corner with Lyndhurst Street, turning onto Lyndhurst Street when he reached the corner. The victim also headed toward that corner.

When the victim reached the corner of Washington and Lyndhurst Streets, the defendant shot him while advancing up Lyndhurst Street toward Washington Street, causing him to fall to the ground. With the victim on the ground, the defendant continued to open fire at him, firing at least two more shots.

One shot struck the victim in the head, while two shots wounded his legs. The victim was subsequently transported to Boston Medical Center in an ambulance. He died two days later on December 3, 2008, as the result of fatal brain injuries caused by the gunshot wound to his head.

Immediately following the shooting, the defendant fled the scene, running across Washington Street. Upon hearing the shots, Day and Lewis also started running, dashing across Washington Street and down Aspinwall Road. When Day passed the Citizens Bank on Aspinwall Road, the defendant caught up with her and threw the gun he used to shoot the victim at her, telling her to take it. She caught the gun, a .22 caliber revolver with a shortened barrel, and tucked it in her waistband before continuing to run down Aspinwall Road. When the defendant was running past 18 Aspinwall Road, he threw his baseball cap into the yard, where it was later recovered by the police. The defendant and Day continued running down Aspinwall Road, where they were pursued by two police officers in a cruiser onto Talbot Avenue and then Colonial Avenue. Getting out of their cruiser on Colonial Avenue, the officers chased after the defendant and Day on foot, with one officer stopping Day and the other stopping the defendant. When approaching the defendant, the apprehending officer noticed a strong smell of gunpowder coming from him. The other officer, who stopped Day,

performed a patfrisk of her and felt a weapon in her waistband. A third officer who subsequently arrived at Colonial Avenue recovered the .22 caliber gun from Day's waistband and brought it to police headquarters to be analyzed.

The defendant and Day were then separately transported to the police station. At the station, some items of clothing worn by Day and the defendant were collected, including a pair of gloves from Day and a jacket from the defendant. A criminalist took surface samples, known as "stubs," from the hands of both the defendant and Day for gunshot primer residue testing.[1] The stubs taken from both the defendant and Day's hands tested negative for gunshot residue, as did Day's jacket and gloves. When the defendant's jacket was subsequently tested, however, the cuffs were found to be positive for gunshot residue.

Discussion. 1. Peremptory challenges of potential jurors. a. Racial discrimination. The use of peremptory challenges to exclude potential jurors solely because of their race is prohibited by the equal protection clause of the Fourteenth Amendment to the United States Constitution, see Batson v. Kentucky, 476 U.S. 79, 89 (1986) ("the Equal Protection Clause

[1] Adhesive-coated stubs are an alternative method of collecting gunshot residue to using alcohol-moistened swabs. See Reid, Chana, Bond, Almond & Black, Stubs Versus Swabs? A Comparison of Gunshot Residue Collection Techniques, 55 J. Forensic Sci. 753, 753 (May 2010).

forbids the prosecutor to challenge potential jurors solely on account of their race"). Article 12 of the Massachusetts Declaration of Rights similarly proscribes the "use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community." Commonwealth v. Soares, 377 Mass. 461, 486 (1979). Groups defined by race are among the particular or "discrete" groups, membership of which is an impermissible basis for peremptorily striking a potential juror under art. 12. Id. at 488-489.

Under both Federal and Massachusetts law, a three-step framework guides the constitutional review of peremptory strikes. First, the party opposing a peremptory strike must rebut the presumption that the strike is constitutionally proper by making out a prima facie case that the purpose for the strike is discriminatory. Second, if the judge finds that a prima facie case of discrimination has been established, the burden shifts to the party seeking to exercise the peremptory strike to provide a group-neutral explanation for the challenged strike. Third, the judge must then determine whether that explanation is genuine and adequate, or whether instead the opponent of the strike has proved a discriminatory purpose behind the strike. See Flowers v. Mississippi, 139 S. Ct. 2228, 2241 (2019); Johnson v. California, 545 U.S. 162, 168 (2005); Commonwealth v.

Sanchez, 485 Mass. 491, 493 (2020); Commonwealth v. Oberle, 476 Mass. 539, 545 (2017).

The defendant contends that the trial judge erred in ruling that the defense had not made out a prima facie case of racial discrimination when the prosecutor exercised peremptory challenges to strike three Black women on the third day of jury selection, and consequently in failing to require the prosecutor to provide race-neutral explanations for the challenged strikes. We review the trial judge's ruling for an abuse of discretion: we do not ask "whether the judge was permitted to find that the presumption [of constitutional propriety] had been rebutted," but rather "whether [s]he was required to have so found" (emphases added). Commonwealth v. Issa, 466 Mass. 1, 10 (2013).

To make out the prima facie case required for the first Batson-Soares step, a party opposing a peremptory strike must "show[] that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Johnson, 545 U.S. at 168, quoting Batson, 476 U.S. at 93-94. See Sanchez, 485 Mass. at 511, quoting Johnson, supra ("the presumption [that a peremptory challenge is constitutionally proper] is rebutted when 'the totality of the relevant facts gives rise to an inference of discriminatory purpose'"). We have emphasized that the burden of making the requisite prima facie showing is "not . . . a terribly weighty one." See Commonwealth v. Jones, 477 Mass.

307, 321 (2017), quoting Commonwealth v. Maldonado, 439 Mass. 460, 463 n.4 (2003). See also Sanchez, supra at 510 (describing first-step burden as "minimal"). We have also made clear that the prima facie case can be made upon a showing of a discriminatory purpose behind even a "single" peremptory challenge. See Issa, 466 Mass. at 8, 9.

In assessing whether a party has met its burden under the first Batson-Soares step of showing a purpose to discriminate against a protected group in the use of peremptory strikes, a trial judge should consider "the totality of the relevant facts." Sanchez, 485 Mass. at 511, quoting Johnson, 545 U.S. at 168. Nevertheless, we have specifically highlighted a number of factors to guide this inquiry:

> "(1) 'the number and percentage of group members who have been excluded'; (2) 'the possibility of an objective group-neutral explanation for the strike or strikes'; (3) 'any similarities between excluded jurors and those, not members of the allegedly targeted group, who have been struck'; (4) 'differences among the various members of the allegedly targeted group who were struck'; (5) 'whether those excluded are members of the same protected group as the defendant or the victim'; and (6) 'the composition of the jurors already seated.'"

Commonwealth v. Henderson, 486 Mass. 296, 311-312 (2020), quoting Jones, 477 Mass. at 322.

Among these factors, "the number and percentage of group members who have been excluded" is "ordinarily . . . the beginning of the inquiry." Sanchez, 485 Mass. at 512 & n.13.

In the instant case, defense counsel pointed out at trial that of the three Black women whom the judge had found indifferent on the third day of jury selection, the Commonwealth had peremptorily challenged all three.[2] The relevant factor, however, is whether a disproportionate number of Black potential jurors were excluded over the entire course of the three days of jury selection, rather than on any particular day taken in isolation. The record here does not disclose sufficient information to allow us to discern how many Black potential jurors were peremptorily challenged overall, or whether the over-all percentage of Black jurors who were challenged was higher compared to the corresponding percentage of jurors from other racial groups.

Given the incomplete information in the available record, we therefore turn to the judge's own analysis. When presented with the defendant's Batson-Soares challenge on the third day of jury selection, the judge responded:

> "I do find a pattern, the pattern is age. It has nothing to do with race. And the pattern with respect to age is clear and obvious and has been consistent throughout, and indeed, is consistent in every criminal case that I try in which prosecutors virtually always challenge young people. I've noticed in this case one exception to that, and the

[2] Defense counsel in fact objected at trial that the prosecutor had challenged all three Black women found indifferent "for cause." It is clear from the context, however, that defense counsel misspoke and meant to refer to peremptory challenges.

> one exception was a young black man who prosecutor did not challenge.
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> "As to race, with that one exception, I do not find a pattern as to race. And I note that we have a very diversified jury. Our jury has included many, many people of color. So, I do not find a pattern, so I am not going to require any information about the other challenges."

The judge's finding of an age-related pattern was well-supported given the facts in the record. Of the sixteen potential jurors struck by the Commonwealth, eight were students, and thus inferably young. This pattern appears to have extended to the three Black jurors whose exclusion the defendant challenges. At least one of the three jurors was a student. A second appeared to be young as well; the judge asked this potential juror whether she was "going to school," suggesting that the juror appeared to be school- or college-aged. Indeed, defense counsel's disagreement with the judge at trial regarding the presence of a pattern with respect to age was also only directed at the third Black juror, who was thirty-one years old.

While the Commonwealth's decision to peremptorily challenge the thirty-one year old Black juror did not conform to the pattern of striking young jurors, the record discloses a possible legitimate explanation for the Commonwealth's decision to challenge that potential juror. Specifically, she revealed in her voir dire with the judge that her younger brother had

been arrested and charged two years prior with drug possession, which the Commonwealth could have legitimately feared would predispose her to be hostile to law enforcement and the criminal justice system. Finally, we note that the other jurors not struck on the third day were middle-aged. Taking the above considerations together, we conclude that the judge could reasonably have discerned a race-neutral explanation for the Commonwealth's challenges to the three Black jurors who were excluded on the third day of jury selection.

As for the judge's additional observation that the seated jury was "very diversified" and included "many, many people of color," we emphasize that the Batson-Soares framework does not protect against the use of peremptory challenges to exclude "members of all minority ethnic or racial groups lumped together"; rather, it guards against discriminatory "challenges to 'particular, defined groupings in the community.'" Commonwealth v. Jackson, 486 Mass. 763, 772 (2021), quoting Commonwealth v. Lopes, 478 Mass. 593, 600 n.5 (2018). Here, in regard to Black jurors, the record is unclear: it does not indicate the number of Black jurors who were seated, nor does it

reveal the percentage of the seated jury that was comprised of Black jurors.[3]

A final relevant factor is whether the jurors whose exclusion was challenged were members of the same protected group as the defendant or the victim. In the instant case, the defendant and the victim were both Black, and the defendant's claim is that the prosecutor discriminated against Black jurors in his use of peremptory challenges. Where, as here, the defendant shares the group membership of the jurors whose exclusion is challenged as discriminatory, and the victim was also a member of that protected group, we have stated that this factor "does little to tip the balance in either direction." See Jones, 477 Mass. at 322 n.27.

In sum, given the limited record regarding the exclusion and selection of Black jurors, the apparent pattern of striking

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[3] Even if the record disclosed more information about the number and percentage of Black jurors specifically who were seated, too much weight should not be placed on this factor. As we have emphasized, "[w]hile the composition of seated jurors provides a prism through which to determine discriminatory intent, 'that is only one factor among many, and must be assessed in context.'" Commonwealth v. Carter, 488 Mass. 191, 197 (2021), quoting Commonwealth v. Ortega, 480 Mass. 603, 607 (2018). "Placing 'undue weight on this factor not only would run counter to the mandate to consider all relevant circumstances . . . but also would send the unmistakable message that a prosecutor can get away with discriminating against some African-Americans . . . so long as a prosecutor does not discriminate against all such individuals.'" Carter, supra at 198, quoting Ortega, supra.

young jurors but not Black jurors, the objective basis for striking the one Black juror clearly outside the pattern of striking young jurors, and the fact that both the defendant and victim were of the same race, we have no basis for discerning an abuse of discretion in the judge's determination that the defense had not established a prima facie case of racial discrimination in jury selection.

b. Discrimination against young people. Noting that he was twenty years old at the time of the victim's shooting, and twenty-one at the time of trial, the defendant argues that his right to a jury comprising a cross-section of the community under art. 12, and his equal protection rights under the Fourteenth Amendment, were violated when the Commonwealth used peremptory challenges to exclude most young people from the jury.

This argument is unavailing, as "[p]eremptory challenges [are not] prohibited based on age, under either the United States or Massachusetts Constitution." Lopes, 478 Mass. at 597. Our cases have rejected the argument that young people constitute a protected group under art. 12. See Oberle, 476 Mass. at 545 ("age is not a discrete grouping defined in the [Massachusetts] Constitution"). We have likewise concluded that young adults are not a cognizable group for purposes of a Batson equal protection challenge. See Lopes, supra ("every United

States Court of Appeals that has considered the issue has rejected the argument that young adults are a protected group [under Batson] for peremptory challenges"). As recently as in Commonwealth v. Fernandes, 487 Mass. 770, 775-776 (2021), cert. denied, 142 S. Ct. 831 (2022), we have declined to revisit these holdings, and we continue to decline to do so here.[4]

2. The judge's instructions to the venire. On each day of jury selection, the trial judge instructed the venire -- without objection from defense counsel -- on what is required for a juror to be fair and impartial, each time using very similar words. The following remarks, given by the judge on the first day of jury selection, are illustrative:

> "Being fair and impartial doesn't necessarily mean that you've never had any thoughts or opinions or experiences that might be in some way relevant. That probably wouldn't describe many people. Being fair and impartial requires

[4] The court in Soares, 377 Mass. at 488-489, drew the list of groups, membership of which may not be the basis of a peremptory challenge, from the list of protected groups under art. 1 of the Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution (Equal Rights Amendment): sex, race, color, creed, and national origin. This is not, to be sure, a closed list. In Carter, 488 Mass. at 201, we expanded the list of protected groups to include groups defined by sexual orientation, recognizing that "gay individuals historically have faced pernicious discrimination, including by the State, solely because of their sexual orientation." Allowing peremptory strikes based on sexual orientation would "continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals." Id. at 203, quoting SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 485 (9th Cir. 2014). These considerations do not apply to young people taken as a group.

> that you can and you will decide the facts of this case based solely on the evidence presented in the trial of this case. So if you've had some kind of relevant experience or thoughts or views or read something or heard something that might be in some way relevant, that you will put that out of your mind, put that aside, and decide the facts of this case based solely on the evidence presented in the trial of this case."

In her final charge to the jury, however, the judge did not repeat this admonition. To the contrary, she instructed the jurors to consider the evidence while "drawing on [their] own common sense and experience of life."

The defendant now argues that the judge's instruction to the venire that jurors must put aside their experiences and opinions contravened our guidance in Commonwealth v. Williams, 481 Mass. 443, 452 (2019), that "a judge should not require a prospective juror to disregard his or her life experiences and resulting beliefs in order to serve." The defendant further urges that, because the instructions tainted the entire empanelment process, this was structural error requiring reversal. We disagree.

"Structural error is [g]enerally . . . error that necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence" (quotations omitted). Williams, 481 Mass. at 454, quoting Commonwealth v. Hampton, 457 Mass. 152, 163 (2010). Because the right to be tried by an impartial jury is "basic to a fair

trial," errors that undermine the right to an impartial jury are structural errors. Williams, supra at 455, quoting Commonwealth v. Wood, 389 Mass. 552, 564 (1983). We have previously determined, however, that the erroneous dismissal of a potential juror that the defendant had hoped would be seated did not implicate the defendant's right to an impartial jury and therefore did not rise to the level of structural error, "because where a potential juror is erroneously excused, the presumption is that that individual was replaced by another fair and impartial juror." Williams, supra. Here, the purported error did not even directly involve the dismissal of any potential jurors; rather, the challenged instructions simply generally explained to the potential jurors what juror impartiality requires. Any error, therefore, was not structural. Rather, as there was no objection at trial, we review any error for a "substantial likelihood of a miscarriage of justice." See Commonwealth v. Yat Fung Ng, 489 Mass. 242, 247 (2022).

We begin by emphasizing two crucial points. First, when the trial judge gave the instructions at issue here, she did not have the benefit of our decision in Williams, 481 Mass. 443. Second, the issue here and the issue in Williams, though related, are distinct. In the case before us, the defendant challenges the trial judge's general instructions to the venire

about what juror impartiality requires. By contrast, in Williams, the question was whether the judge properly dismissed a potential juror for cause after the juror expressed uncertainty in her voir dire with the judge about her ability to put aside her beliefs arising from her life experiences and decide the case based on the evidence and the judge's instructions. See Williams, supra at 446. As we explained there, when a juror raises such concerns, a judge is confronted with the difficult task of discerning whether a juror will decide the case based on the evidence and the judge's legal instructions rather than the juror's own preconceptions. Id. at 453. We are not presented with that difficult issue in the instant case, but rather with the judge's introductory remarks to the venire regarding impartiality. There was therefore no error here under Williams.

Nevertheless, although the propriety of a judge's preliminary instructions to the venire was not an issue directly raised in Williams, we recognize that some refinement of the instructions the judge gave here to the venire may be appropriate in light of the guidance provided by Williams.

Much, if not all, of the judge's instructions at issue here was in alignment with the principles we articulated in Williams. She acknowledged that jurors almost inevitably have relevant experiences, opinions, or views, noting that an absence of any

relevant experiences and beliefs "probably wouldn't describe many people." This was in line with our recognition in Williams, 481 Mass. at 453, that it is "arguably impossible" for a juror to "put aside her life experiences and her resulting world view." The judge also properly emphasized that jurors must decide the case based only on the evidence presented. Cf. Williams, supra at 448 (removal of potential juror "appropriate" where he or she unable to set aside preconceived opinion concerning case and "properly weigh the evidence"); Commonwealth v. Brown, 477 Mass. 805, 821 (2017) (during jury selection, judge must examine potential jurors to guard against risk that jurors will be "influenced by factors extraneous to the evidence presented to them" [citation omitted]). In accordance with our guidance in Williams, supra at 452, that "bringing one's life experiences to jury service is appropriate," the judge also explained in her final charge to the jury that jurors could properly draw on their common sense and experience.

Moreover, in explaining to the venire that, as jurors, they would have to put aside any relevant "experience or thoughts or views" they might have, the judge may simply have been indicating that impartial jurors must set aside their preconceived opinions and biases regarding the case, deciding the facts on the evidence presented rather than on extraneous factors. If so, then the judge's instructions were fully

consonant with our teaching in Williams, 481 Mass. at 448, quoting Soares, 377 Mass. at 482, that where a juror has "formed an opinion regarding the case," the juror must "set aside that opinion or bias and properly weigh the evidence and follow the instructions on the law."

To the extent, however, that the judge was suggesting that impartial jurors must set aside their background opinions born of their life experiences and worldviews, then the judge's instructions were somewhat in tension with the principles that lay behind our decision in Williams. As we explained there, an impartial juror need not set aside "opinions formed based on his or her life experiences or belief system." See Williams, 481 Mass. at 448. Rather, juror impartiality requires only that a juror be able, "given his or her experiences and resulting beliefs," to "fairly evaluate the evidence presented and properly apply the law." Id. at 452, citing Commonwealth v. Entwistle, 463 Mass. 205, 221-222 (2012). In future general instructions, judges should be careful to make clear this distinction between background opinions and preconceived notions regarding the case to be tried. Jurors should not be asked to ignore or erase their relevant life experiences, as that is close to impossible, but rather to decide the case based on the evidence and the judge's instructions, rather than on any "preconceived notions about the case." Williams, supra at 448.

Nevertheless, even if the judge's instructions were not fully consonant with our teaching in Williams, no substantial likelihood of a miscarriage of justice arose from the challenged instructions. The statements at issue were not repeated in the final charge, where the judge instructed the jury in terms that were closely aligned with our guidance in Williams. In addition, the record indicates that of the eighteen potential jurors who were excused because they believed they could not be impartial, all but one expressed opinions or disclosed personal experiences that would not have favored, and in many cases would have been strongly adverse to, the defendant.[5] While one

[5] One excused juror indicated that he was a longtime friend of the victim's family. A second claimed a religious objection to participating in deciding a case to which he had not been an eyewitness. A third disclosed very negative views toward gun and gang violence after his friend was shot. A fourth revealed that she had cousins who were murdered due to gang activity. A fifth claimed she would have difficulty being fair and impartial because she lived close to the area where the shooting took place. A sixth knew the victim personally. A seventh was the aunt of a fifteen year old who had been recently killed. An eighth disclosed negative feelings about anyone who even carried a gun. A ninth confessed that he found it difficult to set aside the strong racial bias he acquired from his parents. A tenth disclosed criminal behavior by her father that affected her emotionally. An eleventh indicated a belief that all gang members should be "put away." A twelfth was friends with a gang unit police officer. A thirteenth had a nephew who was killed in gang-related violence. A fourteenth revealed that his uncle worked for the Boston police department. A fifteenth mentioned that he had personal familiarity with street violence in Dorchester. A sixteenth lived in the area of the shooting and admitted that she felt very strongly about crimes committed in the area. A seventeenth revealed his belief that the defendant

potential juror who was excused did indicate that she had concerns about "inconsistencies within the judicial system," she also revealed that she had a friend who was "murdered by a police officer," and that this would "influence [her] as a juror in [the] case." The judge could reasonably have concluded from this that this particular juror would not have been able to fairly evaluate the evidence and apply the law. For these reasons, we discern no prejudicial error in the judge's instructions; still less did the challenged instructions create a substantial likelihood of a miscarriage of justice.

3. Removal of a juror for cause in connection with the failure to disclose prior criminal charges. A juror who had been seated on the second day of empanelment was discovered, following a criminal record check, to have failed to disclose several prior arrests and charges when filling out the juror questionnaire. Specifically, he did not disclose that he had been charged with driving without insurance twenty-three years prior, and that he had been arrested and charged with operating a motor vehicle while under the influence and with narcotics-related offenses fifteen years prior. After an additional voir dire with the juror on the third day of jury selection, the judge excused him for cause, pointing to "concerns about

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was guilty, based on his previous encounters with gang members and the defendant's "appearance."

comprehension and about candor." Defense counsel objected to the juror's removal, noting that he was the only Black male on the jury. On appeal, the defendant argues that the judge abused her discretion in excusing the juror based on decades-old charges, and that the Commonwealth's practice of checking the criminal records of potential jurors is unconstitutional.

a. For-cause removal of the seated juror. We review the judge's decision to excuse the seated juror for an abuse of discretion. A decision constitutes an abuse of discretion 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" (quotation and citation omitted). Commonwealth v. Grassie, 476 Mass. 202, 214 (2017), S.C., 482 Mass. 1017 (2019).

Contrary to the defendant's assertion, the record indicates that the judge did not excuse the juror because of his previous arrests and criminal charges. Rather, the judge excused him due to concerns about his candor and level of comprehension. Despite being prompted to do so on the juror questionnaire and by the judge during her earlier instructions to the venire, the juror did not disclose multiple prior arrests and charges. As the judge reasonably inferred, these failures of disclosure could be explained either by a lack of candor or by a lack of comprehension, both of which would be legitimate reasons to

doubt the juror's suitability to serve.[6] The judge's concerns about the juror's level of comprehension also stemmed from her colloquy with him during the additional voir dire, during which the juror often gave answers to her questions that were nonresponsive. Indeed, defense counsel conceded that the juror "had some difficulty understanding [the judge's] questions." Because the judge reasonably determined that the juror lacked either candor or the ability to adequately comprehend the trial proceedings, she acted within her discretion in excusing him.

b. Constitutionality of checking jurors' criminal records. The defendant contends that, because people of color are stopped, arrested, and prosecuted at a higher rate, the Commonwealth's practice of checking the criminal records of potential jurors during the empanelment process is unlawful because it has a racially disparate impact.

We have interpreted the criminal offender record information (CORI) statute, G. L. c. 6, § 172, to authorize the Commonwealth to access CORI to check the criminal records of jurors in a criminal case to determine their impartiality and

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[6] We have previously held that where jurors failed to disclose their criminal histories, as revealed by a criminal record check, the judge can reasonably infer "that the jurors had concealed their criminal histories purposefully, and thus could not be expected to be impartial or to follow the court's instructions." Commonwealth v. Cousin, 449 Mass. 809, 821-822 (2007), cert. denied, 553 U.S. 1007 (2008).

their qualifications to serve. See Commonwealth v. Cousin, 449 Mass. 809, 816-818 (2007), cert. denied, 553 U.S. 1007 (2008). The defendant's argument, however, is not that prosecutors lack statutory authority to inquire into the criminal records of jurors, but that this practice is unconstitutional because it has a racially disparate impact.

Under the equal protection clause of the Fourteenth Amendment, a neutral law or official act or practice that "has a disproportionately adverse effect upon a racial minority" is unconstitutional "only if that impact can be traced to a discriminatory purpose." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979). See Washington v. Davis, 426 U.S. 229, 239 (1976).

"Our 'review of an equal protection claim under the Massachusetts Constitution is generally the same as the review of a Federal equal protection claim.'" Commonwealth v. Roman, 489 Mass. 81, 86 (2022), quoting Commonwealth v. Freeman, 472 Mass. 503, 505 n.5 (2015). Thus, we affirm that under art. 1 of the Massachusetts Declaration of Rights, the racially disparate impact of an official act or practice would likewise, absent discriminatory intent, be constitutional. See Cote-Whitacre v. Department of Pub. Health, 446 Mass. 350, 391 (2006) (Marshall, C.J., concurring) ("A statute neutral on its face may violate the equal protection requirements of the Federal and the

Massachusetts Constitutions if it results in an intended disparate impact" [emphasis added]).

Because the defendant points to no evidence of discriminatory purpose in the Commonwealth's practice of checking the criminal records of potential jurors, nor does the record reveal any such evidence, his constitutional challenge fails.

4. The prosecutor's closing argument. The defendant claims that the judge made multiple errors in relation to the prosecutor's closing argument. Specifically, he contends that the judge erroneously allowed the prosecutor to vouch for the credibility of Day's testimony, to unduly inflame the jurors' emotions, to shift the burden of proof onto the defense, and to undercut his Bowden defense. We consider the prosecutor's remarks at issue in each claim of error "in the context of the whole . . . closing, as well as the entire case." Commonwealth v. Alemany, 488 Mass. 499, 511 (2021), citing Commonwealth v. Niemic, 472 Mass. 665, 673 (2015), S.C., 483 Mass. 571 (2019). Because the defense did not object at trial to any part of the Commonwealth's closing argument, we review his claims "for a substantial likelihood of a miscarriage of justice." Alemany, supra, citing Commonwealth v. Wright, 411 Mass. 678, 681 (1992), S.C., 469 Mass. 447 (2014).

a. Vouching for Day's testimony. The defendant argues that the prosecutor's closing argument contained improper vouching for Day. The defendant does so in a cursory fashion, claiming first that the Commonwealth "suggested that . . . the grand jury declined to indict Day on murder, and only indicted her as an accessory after the fact"; second, that the Commonwealth "unfairly bolstered [Day's] testimony by suggesting [the defendant] implicated her in a murder, and then the Commonwealth provided her with a deal because she was wrongly implicated"; and third, that the Commonwealth "chose to put [the defendant] on trial, suggesting they had special knowledge of his guilt." The defendant's argument is incorrect as a matter of law and relies on mischaracterizations of the prosecutor's closing argument. None of the prosecutor's statements at issue constituted improper vouching.

Vouching consists in the prosecutor "explicitly or implicitly . . . indicat[ing] that he or she has knowledge independent of the evidence before the jury verifying a witness's credibility" (emphasis added). Commonwealth v. Ciampa, 406 Mass. 257, 265 (1989), citing Commonwealth v. Shelley, 374 Mass. 466, 470 (1978), S.C., 381 Mass. 340 (1980). There was no such suggestion of knowledge independent of the evidence in the instant case. While the prosecutor briefly mentioned that Day "came within a whisper of being indicted for

murder," he did so in the context of explaining the charges filed against her. Indeed, the prosecutor followed that remark with these statements: "She was charged, she was arrested, arraigned in Dorchester District Court, her charges were upgraded to murder, and when it came out of the grand jury she was charged with accessory after the fact and unlawful possession of a firearm." This was not vouching for her credibility but simply an accurate description of the grand jury process in Day's case, albeit with a hyperbolic rhetorical flourish characterizing Day as coming within a "whisper" of being indicted for murder.

The prosecutor's remark that the defendant implicated Day in the victim's murder was likewise made in the context of explaining how Day came to cooperate with the Commonwealth. Because Day testified that the defendant had thrown her the murder weapon, urging her to "take [it]," this remark was based on the evidence before the jury. Being firmly grounded in the evidence, the remark accordingly did not constitute vouching.

Finally, the prosecutor did not vouch for Day's testimony by stating that she was "not on trial." Given that defense counsel, in his closing argument, sought to discredit Day and suggest that she may have been the shooter, the prosecutor's statement reminding the jury that she was not on trial fairly "focus[ed] the jury on the question at hand." See Commonwealth

v. Jackson, 428 Mass. 455, 462-463 (1998), S.C., 468 Mass. 1009 (2014). In those circumstances, the Commonwealth could state that the defendant and not Day was on trial without improperly vouching for her credibility.

In sum, we conclude that the prosecutor's remarks at issue did not vouch for Day's credibility by stating or implying that "the government has special knowledge by which it can verify [Day's] testimony." Commonwealth v. Webb, 468 Mass. 26, 32 (2014), quoting Commonwealth v. Washington, 459 Mass. 32, 44 n.21 (2011).

b. Undue appeal to the jury's emotions. The defendant argues that elements of the prosecutor's closing argument unduly inflamed the jury's emotions. Specifically, he contends that the prosecutor unfairly appealed to the jurors' sympathy for the victim by emphasizing the victim's youth, referring to him, for example, as an "unarmed, defenseless" sixteen year old,.[7] This, the defendant claims, went against the prosecutor's "obligation" to argue the Commonwealth's case "in a way that . . . inspires confidence that the verdict was reached based on the evidence rather than sympathy for the victim and [his] family." Commonwealth v. Santiago, 425 Mass. 491, 494 (1997), S.C., 427 Mass. 298 and 428 Mass. 39, cert. denied, 525 U.S. 1003 (1998).

[7] The prosecutor also referred to the victim's youth in his opening statement.

To begin with, we emphasize the victim was in fact an unarmed, defenseless sixteen year old. The prosecutor's remarks thus contained no misstatement of fact. The three references to the victim's youth and single reference to his being defenseless in the prosecutor's closing argument also fall short of what we determined to be an undue appeal to the jury's sympathy for the victim in Santiago. There, the prosecutor in his opening statement "referred five times to the fact that the victim was seventeen years old and pregnant," while in his closing argument, "he referred to those same facts seven more times, and noted four times that the victim was to have a birthday one day after the shooting and that, coincidentally, her twentieth birthday corresponded with the day of the closing arguments in the trial." Santiago, 425 Mass. at 494. In addition, the prosecutor directly and repeatedly invited the jury to consider the victim's youth and pregnancy in their deliberations. Id. at 494-495.

The defendant further claims that the prosecutor sought to outrage the jury by vividly evoking legally immaterial aspects of the crime that would nevertheless provoke a moral and emotional response from the jurors. For example, the prosecutor referred to the victim's killing as an "execution in broad daylight on a busy city street corner." Addressing the jury, the prosecutor drew attention to how the shooting took place "in

your city," at a place and time when "people [were] running their errands." The prosecutor also reminded the jury of how, when they went on a view of the site where the shooting took place, they "stood in the very spot" where the victim was fatally shot.

"[A] prosecutor may argue zealously in support of inferences favorable to the Commonwealth's case that reasonably may be drawn from the evidence." Commonwealth v. Carriere, 470 Mass. 1, 22 (2014), citing Commonwealth v. Johnson, 429 Mass. 745, 748-749 (1999). Accordingly, where a prosecutor's language is "based in fact" and tracks the "odious . . . nature of the crime[] committed," emotive language in a prosecutor's closing argument is permissible as merely "enthusiastic rhetoric, strong advocacy, and excusable hyperbole" (citations omitted). Commonwealth v. Henley, 488 Mass. 95, 131-132 (2021). Although hyperbolic, the closing here did not cross the line. Indeed, we have previously found no error in allowing statements by the prosecutor that remind the jury of what they experienced while on a view, and in the use of emotive rhetoric such as "stalking and hunting" in describing the nature of the crime. See Commonwealth v. Barbosa, 477 Mass. 658, 669-670 (2017).

Here, the prosecutor's references to the deliberate, close-range shooting of the victim in the head as an "execution" reflected the facts of the case. We therefore conclude that the

challenged remarks by the prosecutor did not improperly seek to inflame the jury's emotions.

c. Shifting the burden of proof to the defense. Seeking to discredit the defense's suggestion that Lewis may have been the shooter, the prosecutor urged in his closing argument that "[t]here isn't a shred of evidence that [Lewis] shot a gun that day, or that he had a gun that day," calling the defense's theory of a third-party culprit an invitation "to speculate."[8] This statement, the defendant now argues, impermissibly shifted the burden of proof to him by suggesting that he had some obligation to present evidence to undermine the Commonwealth's case.

A prosecutor impermissibly shifts the burden of proof when he or she calls the jury's attention to the defendant's failure to produce evidence, because in so doing, the prosecutor "signal[s] to the jury that the defendant has an affirmative duty to bring forth evidence of his innocence, thereby lessening the Commonwealth's burden [of proof]." Commonwealth v. Tu Trinh, 458 Mass. 776, 787 (2011). Accordingly, we have cautioned that "[p]rosecutors should scrupulously avoid any statement that suggests that the defendant has any burden to

[8] Jaquan Lewis, to recall, was with the victim the day before the shooting at Ada's Market and on the day of the shooting at the Caribbean Market.

produce evidence." Commonwealth v. Collazo, 481 Mass. 498, 503 (2019), quoting Commonwealth v. McMahon, 443 Mass. 409, 419 (2005). We have also stressed, however, that a prosecutor may properly "emphasize the strong points of the Commonwealth's case and the weaknesses of the defendant's case," even if he or she may thereby "prompt some collateral or passing reflection" on the fact that the defendant has not produced certain evidence. Collazo, supra, quoting Commonwealth v. Nelson, 468 Mass. 1, 12 (2014). Cf. Commonwealth v. Witkowski, 487 Mass. 675, 686 (2021), quoting Commonwealth v. Silva, 471 Mass. 610, 623 (2015) ("A prosecutor is 'entitled to respond to the defense argument and also to comment on the . . . weakness of the defense, as long as argument is directed at the defendant's defense and not at the defendant's failure to testify'" [quotation omitted]).

When the prosecutor's comments at issue are considered in their full context, Alemany, 488 Mass. at 511, it becomes clear that the prosecutor was permissibly arguing that, in light of the evidence that the Commonwealth presented, the Commonwealth's case against the defendant stood in stark contrast with the defense's alternative theory that Lewis was the shooter. Immediately before the prosecutor remarked that there was not "a shred of evidence" that Lewis fired a shot or even had a gun at the scene, he listed numerous pieces of the evidence that implicated the defendant rather than Lewis. Prior to

characterizing the theory inculpating Lewis as "speculat[ive]," the prosecutor put forward affirmative reasons supported by the evidence to doubt that Lewis shot the victim. Thus, the remarks at issue -- when considered in context -- were a "comment on the strength of the Commonwealth's case and the weakness of the defendant's case," Commonwealth v. Garvin, 456 Mass. 778, 799 (2010), which were accordingly permissible.

d. Undermining the defendant's Bowden defense. Under Bowden, 379 Mass. at 485–486, a defendant is permitted to elicit evidence of an inadequate police investigation. See Commonwealth v. Alvarez, 480 Mass. 299, 315 (2018); Commonwealth v. Fitzpatrick, 463 Mass. 581, 597 (2012). From this evidence, the defendant may pursue a so-called Bowden defense, arguing that the jury should "find a reasonable doubt" because "the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits." Alvarez, supra at 316, quoting Commonwealth v. Silva-Santiago, 453 Mass. 782, 801 (2009). The defendant contends that the prosecutor improperly undercut his Bowden defense by two statements he made during his closing argument. First, he told the jury that they "need[ed] to focus on the evidence that was presented" rather than "speculat[ing] on what's not before [them] as opposed to what [was]." Second, he

told them that it was their "job" to decide the facts "not based on speculation, but on the evidence that's been introduced."

Given that, as we noted supra, defense counsel did not object at trial to any part of the prosecutor's closing argument, we review the claim here that the Commonwealth improperly undermined the defendant's Bowden defense for a substantial likelihood of a miscarriage of justice.

We conclude that the prosecutor's statements were permissible, as they generally contrasted the evidence presented in the Commonwealth's case with the defendant's tactic of encouraging speculation about alternative suspects. We have previously held that, where a judge generally instructed a jury to find the facts "solely from the evidence admitted . . . and not from suspicion or conjecture," and did not do so in direct response to a Bowden argument made by the defendant, the judge's jury instruction did not improperly undercut or negate the defendant's Bowden defense. See Alvarez, 480 Mass. at 317-318. Likewise, here the prosecutor's general comparison of the Commonwealth's case with the defendant's, without any particular focus on the defendant's Bowden argument, did not improperly

undercut the defendant's case.[9] The judge therefore did not err in allowing the prosecutor's remarks.

The judge's own instruction to the jury that they were "not to engage in any guesswork about any unanswered questions that may remain in your mind" was likewise not in error, given that the instruction was not given in direct response to a Bowden argument raised by the defendant. Nevertheless, as we noted in Alvarez, 480 Mass. at 318, it would have been "prudent" to omit such language from jury instructions to avoid any risk that the jury would interpret it as somehow negating the defendant's Bowden argument.

5. The detective's testimony relating to the surveillance video evidence. At trial, Sergeant Detective Michael Devane, one of the detectives who investigated the victim's killing, testified in relation to still photographs taken from surveillance video footage captured by cameras installed at a bank and a post office located in the vicinity of the crime scene. The defendant argues that the trial judge erred in allowing this testimony where, first, the testimony amounted to

[9] Indeed, it is less likely that the prosecutor's closing argument undercut the defendant's Bowden argument, given that in the final jury charge, the judge instructed the jury that it was her responsibility to instruct them on the law and that they were to follow the law as she gave it to them. The jury can thus be assumed to have understood that the prosecutor's remarks during his closing argument were not statements of the law.

impermissible opinion testimony by a lay witness, and second, the testimony impermissibly expressed the detective's opinion as to the ultimate issue of the defendant's guilt.

a. Lay opinion testimony. The defendant points to four specific instances where, he contends, Devane's testimony constituted inadmissible opinion evidence. First, Devane testified that the two people depicted in a still image from the bank surveillance video showed two individuals crossing Washington Street toward the side where the Caribbean Market is located. Second, Devane testified that, in a still image capturing a moment at or closely surrounding the time of the shooting taken from the post office camera recording the view onto Lyndhurst Street, there was apparently an image of an individual facing toward Washington Street with his right arm pointed out in front of him. Third, regarding this same image, Devane also testified that the frame of a doorway was obstructing the view of the individual's right hand. Fourth, in relation to an enlarged version of the image that zoomed in on the individual with his arm raised, Devane testified over objection that when he had previously reviewed the image, he "was focused primarily on the left chest area, . . . where the C is."

Because the fourth instance of purportedly improper opinion evidence was objected to at trial, we review that portion of the

detective's testimony for prejudicial error. Commonwealth v. Pina, 481 Mass. 413, 429 (2019). "An error is not prejudicial only if the Commonwealth can show with fair assurance . . . that the judgment was not substantially swayed by it" (quotation omitted). Commonwealth v. Martin, 484 Mass. 634, 647 (2020), quoting Commonwealth v. Rosado, 428 Mass. 76, 79 (1998). The other portions of Devane's testimony at issue, which were not objected to at trial, we review for a substantial likelihood of a miscarriage of justice. Commonwealth v. Morales, 483 Mass. 676, 677 (2019).

"A lay opinion . . . is admissible only where it is '(a) rationally based on the perception of the witness; (b) helpful to . . . the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge.'" Commonwealth v. Canty, 466 Mass. 535, 541 (2013), quoting Mass. G. Evid. § 701 (2013). Where the jury are capable of viewing video or photographic evidence and drawing their own conclusions regarding what is depicted, a lay witness's testimony about the content of the video or photographs is admissible only if it would assist the jury in reaching more reliable conclusions. See Commonwealth v. Austin, 421 Mass. 357, 366 (1995). Cf. Pina, 481 Mass. at 429-430, quoting Commonwealth v. Vacher, 469 Mass. 425, 441 (2014) (lay witness's opinion concerning identification of person depicted in surveillance photograph

admissible only if witness was "more likely to correctly identify the defendant from the photograph than is the jury").

We conclude that, under this test, Devane's testimony regarding the still image from the bank surveillance video was admissible. While the jurors could see for themselves that the still image depicted a scene with two individuals crossing a street, Devane was providing context that would allow the jurors to better situate the scene and the individuals depicted in it. But even if Devane's testimony here was erroneously admitted, his testimony was not in any way prejudicial to the defendant. Defense counsel conceded in his closing argument that there was "no dispute" that Day and the defendant were walking along Washington Street toward the corner with Lyndhurst Street moments before the shooting. Thus, even if the jury were influenced by Devane's testimony into believing that the defendant was near the scene of the shooting close to the time it occurred, given that defense counsel had conceded that fact, the testimony was of no import, and thus was not prejudicial. A fortiori, it did not create a substantial likelihood of a miscarriage of justice.

The admissibility of Devane's testimony regarding the still images, whether original or enlarged, extracted from the post office surveillance video is a closer question. On the one hand, the jury were able to view for themselves the same still

images that Devane viewed and could review them during deliberations. See Commonwealth v. Wardsworth, 482 Mass. 454, 475 (2019) (noting that jury were able to view same surveillance footage that officers watched as reason against admitting opinion testimony by officers about footage). The detective also did not "possess[] any special familiarity with the defendant that the jury lacked." Vacher, 469 Mass. at 442.

On the other hand, at no point in his testimony did Devane directly offer an opinion that the still image depicted the defendant or his jacket. Devane was allowed only to note in passing that a "C" was visible on the left chest area of the individual appearing in the image. Indeed, Devane did not even propose that the individual depicted was wearing the same clothes as the defendant, nor did he expressly connect the apparently visible "C" with the Champion brand logo on the jacket that the defendant was wearing on the day of the shooting. The judge carefully prevented the officer from drawing conclusions in this regard.[10] Moreover, Devane's testimony could have assisted the jury in evaluating what the still image depicted, given that he was familiar with the type of video surveillance system the post office had as well as the

[10] When the prosecutor asked Devane whether the apparently visible "C" corresponded with the pattern on the defendant's jacket, the judge did not allow Devane to answer, explaining that the jury had to reach their own conclusion on that issue.

particular vantage points of the different cameras in that system, and had reviewed the video surveillance footage "countless times," in his words. Finally, given the obviously grainy quality of the still image and the limited focus of Devane's testimony, the jury would have understood that they would have to scrutinize the still image carefully themselves and draw their own conclusions.

We need not decide, however, whether admitting Devane's testimony regarding the still images taken from the post office surveillance video was in error because the testimony did not prejudice the defendant; still less did it create a substantial likelihood of a miscarriage of justice. Here, a single detective described what the still images at issue depicted, without at any point actually identifying the defendant as the individual seen in them. This stands in stark contrast to the facts of Wardsworth, 482 Mass. at 476-477, where four police officers gave identification testimony regarding surveillance footage. There, we found that as a cumulative effect of the four officers' testimonies, a juror might have "substituted the officers' opinions for his or her own." Id. at 477. Devane's limited testimony here would not have had a similar effect. Accordingly, even if Devane's testimony regarding the enlarged version of the still image should not have been admitted, because the testimony likely had only a slight effect on the

jury and thus did not substantially sway them, admitting the testimony was not prejudicial error. A fortiori, Devane's testimony in relation to the original still image did not create a substantial likelihood of a miscarriage of justice.

b. Opinion testimony as to the defendant's guilt. The defendant argues that when Devane observed that the individual depicted in the enlarged still image with an arm outstretched in a shooting posture had a "C" on the chest area, Devane was opining that the defendant was the shooter, because the Commonwealth had introduced evidence that the defendant was wearing a jacket with Champion brand logos on the chest area on the day of the shooting. This, the defendant contends, was opinion testimony as to the issue of his guilt or innocence, which was inadmissible given that "[n]o witness, including a police witness, may testify as to a defendant's guilt or innocence." Commonwealth v. Hamilton, 459 Mass. 422, 439 (2011), citing Commonwealth v. Hesketh, 386 Mass. 153, 162 (1982). We conclude that Devane did not testify regarding the issue of the defendant's guilt, or even come close to doing so.

Devane's testimony that, in examining the still image showing an individual with his right arm extended outward, his focus was on a potentially identifying design on the individual's jacket shown in the still, was proper. As we noted supra, in giving this testimony, Devane did not directly

identify the defendant as the individual seen in the image, nor did he even express the view that the clothes the individual could be seen wearing matched the clothes that the defendant was found wearing on the day of the shooting. For that reason, the testimony at issue did not identify the defendant as the shooter and accordingly was not inadmissible as testimony as to the defendant's guilt or innocence.

6. Review under G. L. c. 278, § 33E. After a full review of the record, we discern no error or other reason warranting relief under G. L. c. 278, § 33E.

Judgments affirmed.