SJC-11582

COMMONWEALTH vs. DWAYNE MOORE.

Suffolk. February 7, 2022. - May 31, 2022.

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

Homicide. Constitutional Law, Assistance of counsel. Cellular Telephone. Evidence, Disclosure of evidence, Relevancy and materiality, Exculpatory. Jury and Jurors. Practice, Criminal, Capital case, New trial, Postconviction relief, Assistance of counsel, Disclosure of evidence, Argument by prosecutor, Jury and jurors, Challenge to jurors.

Indictments found and returned in the Superior Court Department on January 7, 2011.

The cases were tried before Jeffrey A. Locke, J., and following review by this court, 474 Mass. 541 (2016), a motion for a new trial, filed on December 14, 2016, was heard by him.

Chauncey B. Wood for the defendant.
Cailin M. Campbell, Assistant District Attorney (Edmond J. Zabin, Assistant District Attorney, also present) for the Commonwealth.

WENDLANDT, J. The defendant, Dwayne Moore, was convicted on indictments charging murder in the first degree for the shooting deaths of Simba Martin, Levaughn Washum-Garrison,

Eyanna Flonory, and Flonory's two year old son, Amanihotep Smith. Another victim, Marcus Hurd, was shot but survived; Hurd's injuries left him paralyzed below his shoulders. The events occurred in September 2010 in the Mattapan section of Boston. The defendant was first tried for this so-called "Mattapan Massacre" along with a codefendant in early 2012; the jury acquitted the codefendant but were deadlocked as to the defendant.[1] Following a second jury trial, the defendant was convicted of four counts of murder in the first degree on the theory of felony-murder. The defendant timely appealed.

Following his convictions, the defendant moved for a new trial, arguing that both the prosecutor and defense counsel failed to correct allegedly false testimony, that he had been provided ineffective assistance of counsel, and that both newly discovered and wrongfully withheld exculpatory evidence suggested a key witness committed the shootings with his fellow gang members. The motion judge, who was also the trial judge in the second trial, ordered discovery and held a six-day evidentiary hearing. He denied the defendant's motion.

In this consolidated appeal, the defendant contends that both the prosecutor and his trial counsel failed to use cell

[1] The jury acquitted the defendant of a charge of trafficking in cocaine but did not reach a verdict as to the remaining indictments.

phone records to correct allegedly false testimony, that additional details of cell phone records revealed through a new analysis constituted newly discovered evidence warranting a new trial, that a combination of newly discovered and wrongfully withheld exculpatory evidence cast doubt on the Commonwealth's theory of the case and would have been a real factor in the jury's deliberations, that the prosecutor's closing argument was improper and prejudicial, and that the judge erred in declining to strike a juror for cause. The defendant also requests that we exercise our authority under G. L. c. 278, § 33E, to reduce the degree of guilt. We affirm the defendant's convictions and the order denying his motion for a new trial, and we discern no reason to grant relief under G. L. c. 278, § 33E.

1. Background. a. Facts. We recite the facts in the light most favorable to the Commonwealth, reserving some details for later discussion. Commonwealth v. Combs, 480 Mass. 55, 57 (2018).

i. Premeditated plan. In September 2010, the defendant invited Kimani Washington[2] to join him in a robbery involving cocaine. Kimani agreed to participate in the robbery and, upon the defendant's request, said he would get a gun for the defendant. The opportunity to consummate their plans presented

[2] Because several witnesses share the same surname, we refer to each by their first names for clarity.

on the evening of September 27, 2010. The defendant arrived at Kimani's mother's home on Fowler Street, where Kimani was with his brother, Charles Washington, and his cousin, Edward Washington, in Charles's room.[3] The defendant told Kimani that "he wanted to do the lick tonight."[4] Kimani agreed and told Edward that, because he was going to do the robbery, he "needed that MAC again" -- referring to a firearm he understood that Edward possessed. Edward left the apartment and inferably retrieved the firearm, a MAC-10, which Kimani then gave to the defendant. Kimani armed himself with a Ruger nine millimeter firearm. Edward took Charles's car, a silver BMW, and drove the defendant and Kimani to the site of the planned robbery, Martin's home.

When they arrived at their destination, the defendant and Kimani got out of the car and sat across the street from Martin's house. The defendant "made a couple of phone calls to

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[3] The defendant called Kimani three times during the evening before the killings occurred, at 10:48 P.M., at 11:08 P.M., and at 11:09 P.M. Cell site location information (CSLI) data showed that the defendant's first call connected to the cell tower just over a mile north of Kimani's mother's home. The defendant's second two calls to Kimani connected to a cell tower near Kimani's mother's home on Fowler Street. Testimony at trial established that cell phones typically connect to the cell site with the strongest signal at any given time -- that is usually, but not always, the closest tower.

[4] Kimani testified that the "lick" referred to the robbery they had discussed previously.

the house across the street," calling Martin, who was known to be a drug dealer, a total of three times (at 12:29 A.M., at 12:37 A.M., and at 12:52 A.M.).[5] The defendant explained to Martin that he was "downstairs right now" and that he "wanted some weed."

ii. Hurd's arrival at Martin's home. Meanwhile, Hurd, who had planned to purchase marijuana from Martin, arrived at Martin's house in a silver Ford Edge and parked a few houses down. He saw two individuals on the corner near Martin's home. Hurd testified that he called Martin "right before [he] got to [Martin's] street,"[6] asking Martin to come outside. He testified that he saw Martin "[c]oming out of his house on his porch, coming down the stairs" and that Martin was waiting on the porch when Hurd arrived.

The defendant and Kimani watched Martin leave his house and walk to Hurd's car; Martin spoke to Hurd outside the car, but "they was talking for so long [Martin] got inside the car on the passenger side." Hurd testified that he and Martin talked

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[5] The defendant's call records and CSLI confirm that these calls to Martin were made. The first call, at 12:29 A.M., connected to a cell tower south of Martin's home on Sutton Street. The second and third calls connected to a tower closer to Martin's home.

[6] Martin's cell phone records, which were produced to the defendant but were not introduced in evidence at trial, confirm that Hurd called Martin three times: at 12:10 A.M., at 12:33 A.M., and at 12:40 A.M.

"briefly" for "two or three minutes" and completed their transaction.

iii. The robbery. While this drug sale was occurring in Hurd's car, Kimani "[h]ad to try to figure out a way to get in that house" to complete the robbery, so he approached the running vehicle's passenger's side door, where Martin had recently entered. Hurd testified that Kimani said, "Y'all know what time it is," which Hurd understood to mean there was going to be a robbery. Kimani testified that he "pulled [his] gun out" and ordered the two men to "get out the car" and "strip."[7] Hurd and Martin got out of the car and removed their clothes. The defendant, also armed, joined Kimani.[8] Then either the defendant or Kimani ordered Hurd and Martin into Martin's house. Kimani testified that the defendant held his gun to the back of Martin's head as they walked into the house.

There were three other occupants inside Martin's home: Washum-Garrison, who was sleeping on the couch downstairs; and

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[7] Kimani testified that he asked Hurd and Martin to remove their clothes because these men were "drug dealers and they were subject to have a gun as well."

[8] Hurd testified that two other gunmen joined Kimani at this point, coming from a nearby yard, and leading him and Martin into the house. Hurd described two of the gunmen: "One was short and kind of stocky. The other one was a tall, slim young man." He testified that the "tall, slim young man" was holding a weapon that looked like the MAC in a photograph that was introduced in evidence.

Flonory and her son, who were upstairs. Kimani testified that he stayed downstairs with Hurd, while the defendant took Martin upstairs. Kimani ordered Hurd to face the wall, and awakened Washum-Garrison to pat him down; Kimani took drugs and money from Washum-Garrison. Kimani felt that the defendant was "taking too long upstairs," so he went up to investigate. Kimani found the defendant and Martin going through pockets of coats in a closet, and he saw the other two victims, Flonory and her son, in a "back room." The defendant told Kimani to go back downstairs, which he did. Flonory, carrying her son, also went downstairs and lay down on the floor. When Kimani returned downstairs, Edward was inside the apartment, pointing his gun at Washum-Garrison, who was on the couch. Shortly after, the defendant and Martin came downstairs.

Kimani, the defendant, and Edward took a safe, a flatscreen television,[9] a bag, and some drugs out of the house. They loaded those items into Hurd's silver Ford Edge, which was still running. Before leaving Martin's home, Kimani said, "[M]y name is Point, I'm from the Point. If they wanted to find me or get some get-back on the person that got them, they know where to find me." Kimani left the house; he noticed Hurd's and Martin's

[9] Kimani testified that he never saw the television again after it was removed from the apartment. Indeed, it was not recovered.

clothes on the ground, "[p]icked them up and threw them" into Hurd's Ford Edge, and then drove away in that vehicle.

iv. The shootings. Kimani assumed that the defendant and Edward had already fled. Instead, Edward ordered the five victims out of Martin's house. When he left the house, Hurd noticed that his car was missing. The defendant and Edward ordered the victims to turn right and to turn right again onto Woolson Street. The defendant held his gun to Hurd's back while they walked and told him to "stop turning [his] head around"; Hurd had been looking to see "if there was a chance for [him] to escape." The defendant ordered Hurd to "walk ahead and get in the bushes," where he shot Hurd in the back of the head.[10] Hurd testified that he heard multiple gunshots after he was shot but could not see anything.[11]

At 1:11 A.M., 1:12 A.M., and 1:13 A.M., a Shotspotter sensor around the area of Woolson Street recorded a total of twelve gunshots. When Boston police officers arrived, they found Hurd alive, lying face down in the bushes. Martin was found already deceased, lying face down in the street at the

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[10] The bullet hit Hurd's spinal cord, paralyzing him.

[11] One witness testified that he awoke to the sound of shots being fired, looked out his window, and saw someone with the same height, body, and facial structure as the defendant lean down and shoot one of the victims, who was already lying on the ground.

intersection of Woolson and Wildwood Streets. He had six gunshot wounds, one in his hand, three in his torso, and two in his head. Washum-Garrison was found deceased in the bushes by the steps of a house on Woolson Street; he had been shot once in his chest. Flonory was also found deceased, on the sidewalk on Woolson Street. Flonory had three gunshot wounds (one in her head, one in her right hand, and one in her left hand). Her son had two gunshot wounds, one in his torso and one in his right arm; her son was still alive when police arrived, but he died at the hospital shortly afterwards.[12]

v. The splitting of the proceeds. The defendant and

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[12] Police found twelve shell casings (nine were nine millimeter, two were .40 caliber, and one was .45 caliber) and one nine millimeter spent bullet at the scene. The .45 shell casing matched ballistics from a shooting on Woolson Street that had occurred one month prior. None of the nine millimeter shell casings found at the scene was fired from Kimani's nine millimeter Ruger handgun, but the casings were all fired from the same firearm. The bullets retrieved from the bodies of the victims were also shot from the same nine millimeter firearm, and not from the Ruger. The two .40 caliber shell casings were shot from the same gun, and they were consistent with having been fired from the .40 caliber Iberia firearm seized from Kimani's mother's home a few days after the shooting. The .40 caliber bullet retrieved from Martin's body was consistent with having been shot from that firearm as well.

Kimani testified that the defendant had been carrying a MAC-10, a nine millimeter weapon that was not recovered. Kimani testified that Edward had a gun that was "similar to [his Ruger] but all black," a description that matched the Iberia .40 caliber firearm. The Commonwealth argued in its closing argument that the defendant may have switched guns to get the Iberia before shooting Martin in the head with the .40 caliber weapon.

Edward returned to Kimani's mother's home, where they met Kimani; they planned to "divide the goods that [they] got from the robbery." Kimani asked the defendant, "What took so long?" The defendant explained, "We had to go back . . . [t]o kill everybody." The defendant, Kimani, and Edward then brought in the safe, which they were unable to open; a bag filled with guns and drugs; and $1,800 in cash, which they split three ways.[13] Kimani then left his mother's apartment with the defendant, again driving the silver Ford Edge, and dropped the defendant off near the Forest Hills neighborhood in the Jamaica Plain section of Boston before driving to the Grove Hall neighborhood in the Roxbury section of Boston.

vi. The investigation. Meanwhile, a police officer who responded to the scene of the shootings questioned Hurd as they removed him from the bushes, and Hurd told him that the shooters had stolen his car. Officers began to look for a vehicle matching the description provided by Hurd: a rented silver Ford sport utility vehicle with out-of-State plates.[14] One officer

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[13] Kimani testified that he awakened his mother, Charlene Washington, at that time and tried to introduce her to the defendant. Charlene also testified that Kimani awakened her at 1:37 A.M and asked her to "meet [his] friend," and she described the friend as "about Kimani's complexion," "taller than Kimani," and with a "very, very low haircut." This description matched the defendant.

[14] A transmission describing the vehicle had also been sent out to other officers in the area.

found a vehicle matching the description in Grove Hall, and he called other officers to set up a perimeter. Kimani testified that he noticed a Boston police cruiser pull alongside the Ford Edge while he was in Grove Hall, so he tried to "appear like [he] was nowhere near that truck, that Ford Edge." The police officers saw Kimani walk away from the Ford Edge, and the officers moved to secure the car and to stop Kimani.

After additional officers and detectives arrived, they began to question Kimani about "a two-year-old [who] just got killed." One detective seized the keys to the Ford Edge from Kimani's pocket, although Kimani denied having any connection with the vehicle. Kimani accompanied the officers to an interrogation room at Boston police headquarters, where they asked him about the robbery and what he had been doing that night; Kimani falsely denied any involvement in the robbery and shootings.

After Kimani left the police station, he contacted the defendant and arranged to meet with the defendant the following day. When they spoke, Kimani said, "Tell me you didn't shoot the girl and the baby." The defendant responded, "I didn't mean to kill the baby. I shot the girl. Maybe the bullets went through her and hit the baby." Kimani fled to New Hampshire, where he was apprehended and arrested a few days later.

At first, Kimani continued to deny his involvement. After

the detectives told Kimani that a two year old had been killed, and that they had found a weapon in his mother's apartment that had been fired on the scene,[15] Kimani admitted his participation, and said, "It was only supposed to be a robbery." He identified the defendant as a coventurer but did not mention the involvement of his cousin, Edward, because he "didn't want him to get in trouble." Police officers retrieved the defendant's telephone number from Kimani's cell phone. A month after his arrest, Kimani signed a proffer agreement that ultimately became a cooperation agreement; thereafter, he named Edward as a coventurer.

Police officers interviewed the defendant twice. In the first interview, which occurred several days after Kimani first offered the defendant's name, the defendant denied involvement in the shootings; instead, he claimed that he was at his home on nearby Morton Street. In the second interview, which occurred nearly two months after the killings, the defendant first maintained he had learned of the killings on the news the morning after the shootings. During this second interview, however, the defendant admitted that he left his apartment and

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[15] Pursuant to a warrant, police officers had searched Kimani's mother's home on the day after the shootings and had found a bag of guns and drugs in Charles's bedroom. Police also found a magazine, additional ammunition, and a safe that was later determined to have been taken from Martin's home.

went to Martin's home on the night of the shootings. The defendant said that he saw the front door to Martin's home was open, and that he heard yelling. He said he saw people inside Martin's apartment "tussling or whatever," so he walked away from the apartment; he also said that he heard shots outside Martin's apartment.

b. Prior proceedings. The defendant was indicted on four counts of murder in the first degree, G. L. c. 265, § 1; home invasion, G. L. c. 265, § 18C; armed robbery, G. L. c. 265, § 17; assault with intent to murder, G. L. c. 265, § 18 (b); aggravated assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (c) (i); carrying a firearm without a license, G. L. c. 269, § 10 (a); and trafficking in cocaine, G. L. c. 94C, § 32E (b). Following a jury trial in February and March of 2012, he was found not guilty of trafficking in cocaine, but the jury were unable to reach a verdict with respect to the remaining indictments against him.[16]

Following a second jury trial, the defendant was found guilty of four counts of felony-murder in the first degree, one

[16] His codefendant, Edward, was acquitted on all charges, including four counts of murder in the first degree, home invasion, armed robbery, assault with intent to murder, aggravated assault and battery by means of a dangerous weapon, and unlawful possession of a firearm.

count of home invasion, and one count of armed robbery.[17] He was sentenced to two consecutive life sentences without the possibility of parole. The defendant filed a notice of appeal.[18]

In December 2016, the defendant filed a motion for postconviction relief, seeking a new trial. The defendant argued that the prosecutor and his own trial counsel failed to correct false testimony, and that withheld and newly discovered evidence suggested that Kimani planned and executed the crimes on behalf of a street gang. The judge ordered postconviction discovery. Following a six-day evidentiary hearing, he denied the defendant's motion. The defendant appealed from the denial of his motion for a new trial, and the two appeals were consolidated.

2. Discussion. The defendant maintains that his

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[17] The jury found the defendant not guilty of the charges of armed assault with intent to murder, aggravated assault and battery by means of a dangerous weapon, and unlawful possession of a firearm. The judge dismissed the convictions of home invasion and armed robbery as duplicative.

[18] In 2015, the defendant's appellate counsel sent a letter to the discharged jurors asking about their jury service, pursuant to the revised Mass. R. Prof. C. 3.5, as appearing in 471 Mass. 1428 (2015). Commonwealth v. Moore, 474 Mass. 541, 543 (2016). The Commonwealth filed an emergency motion for judicial intervention to prohibit postconviction inquiry of the jury. Id. The trial judge reported a number of questions of law regarding the revised rule 3.5 to the Appeals Court, and we transferred the matter to this court on our own motion to answer the five certified questions. Id. at 544, 553. None of those issues is relevant to the present appeal.

convictions must be overturned because the prosecutor and defense counsel failed to correct allegedly false testimony, the failure of defense counsel to use Martin's cell phone records constituted ineffective assistance, newly discovered evidence from Martin's cell phone records warrants a new trial, the prosecution team withheld additional exculpatory evidence that would have suggested that Kimani committed the shootings with Columbia Point Dawgs (CPD) gang members, the prosecutor's closing argument was improper and prejudicial, and the judge erred in declining to strike a juror for cause after the juror stated during empanelment that he had been exposed to media about the shootings. The defendant also requests that we exercise our authority under G. L. c. 278, § 33E, to reduce the degree of guilt. We address each contention in turn.

a. Purportedly false testimony. i. Martin's cell phone records. The defendant contends that the judge erred in denying his motion for a new trial because the prosecutor violated his due process rights and because the defendant's trial counsel provided constitutionally ineffective assistance, each by failing to correct false testimony. Specifically, he contends that Martin's cell phone records, which were available to defense counsel at the time of his trial but were not introduced in evidence, showed that it was factually impossible for him to have been at Martin's house at the moment that Kimani testified

that Kimani and the defendant approached Hurd's vehicle to commence the robbery.

Martin's cell phone records reflect a call from Hurd at 12:40 A.M. Hurd testified that he called Martin "right before [he] got to [Martin's] street," and that Martin was waiting on the porch outside his home when Hurd arrived. Kimani testified that Martin approached Hurd's car, and "they was talking for so long [that Martin] got inside the car on the passenger side." Kimani also testified that he waited "minutes" before approaching Hurd's car. Based on this testimony, the defendant posits that the robbery must have begun precisely between 12:42 A.M. and 12:43 A.M. The defendant's cell phone data, which was introduced at the trial, showed that the defendant's last call to Martin occurred at 12:52 A.M., twelve minutes after Hurd called Martin and then arrived at Martin's home, and nine minutes after the robbery must have begun if Kimani's timeline was to be believed. Accordingly, he contends that Kimani's testimony regarding the defendant's involvement must have been false, that his counsel was ineffective in failing to use Martin's cell phone records to establish the falsity of Kimani's testimony, and that the prosecutor violated due process by presenting known false testimony.

Because the motion judge was also the trial judge, we extend "'special deference' to the judge's findings of fact and

the ultimate decision on the motion" for a new trial. Commonwealth v. Kolenovic, 471 Mass. 664, 672-673 (2015), S.C., 478 Mass. 189 (2017), quoting Commonwealth v. Lane, 462 Mass. 591, 597 (2012). Because the "statutory standard of § 33E is more favorable to a defendant than is the constitutional standard for determining the ineffectiveness of counsel," Commonwealth v. Martin, 467 Mass. 291, 316 (2014), quoting Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014), we analyze this claim "under the rubric of § 33E 'to determine whether there exists a substantial likelihood of a miscarriage of justice,'" Commonwealth v. Facella, 478 Mass. 393, 409 (2017), quoting Commonwealth v. Frank, 433 Mass. 185, 187 (2001). Under this standard, the court considers whether trial counsel erred and, if so, "whether that error was likely to have influenced the jury's conclusion." Commonwealth v. Seino, 479 Mass. 463, 472-473 (2018), quoting Wright, supra. A strategic decision constitutes ineffective assistance of counsel if it was "manifestly unreasonable when made" (quotation and citation omitted). Kolenovic, supra at 674. "[O]nly 'strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent' are manifestly unreasonable." Id., quoting Commonwealth v. Pillai, 445 Mass. 175, 186-187 (2005). "The manifestly unreasonable test, therefore, is essentially a search

for rationality in counsel's strategic decisions, taking into account all the circumstances known or that should have been known to counsel in the exercise of his duty to provide effective representation to the client and not whether counsel could have made alternative choices." Kolenovic, supra at 674-675.

Applying these standards, the judge did not abuse his discretion in denying the motion. Contrary to the defendant's argument, Martin's cell phone records do not establish a different timeline from that developed at trial. As the judge concluded, the robbery did not unfold with the precision of a military operation suggested by the defendant's assertion that the robbery must have started at 12:42 A.M. or 12:43 A.M. Instead, testimony was less exact. Hurd called Martin "right before [he] got to [Martin's] street," and spoke with Martin for "so long [that Martin] got inside the car." "[M]inutes" then passed before Kimani approached with his firearm.[19] Even with the additional detail that Hurd called Martin at 12:40 A.M., the testimony was consistent with the robbery beginning after 12:52

[19] Additionally, when asked whether Martin picked up any telephone calls during their conversation in Hurd's car, Hurd testified that he did not remember: "He talked briefly. He answered the phone for a quick second and told somebody he can call them back. I don't recall. I don't remember none of that stuff. . . . If he did, I do not remember. If he didn't, I do not remember."

A.M., when Martin's cell phone records show a call from the defendant's cell phone to Martin's cell phone.[20]

At best, the cell phone records potentially present additional impeachment evidence as to the precise timeline of the events on the evening of the shootings. "In general, failure to impeach a witness does not prejudice the defendant or constitute ineffective assistance." Commonwealth v. Hudson, 446 Mass. 709, 715 (2006), quoting Commonwealth v. Bart B., 424 Mass. 911, 916 (1997). This is true even when reviewing the claim under G. L. c. 278, § 33E. Hudson, supra. "[A]bsent counsel's failure to pursue some obviously powerful form of impeachment available at trial, it is speculative to conclude that a different approach to impeachment would likely have affected the jury's conclusion." Commonwealth v. Garvin, 456 Mass. 778, 792 (2010), quoting Commonwealth v. Fisher, 433 Mass. 340, 357 (2001).[21] Especially where a witness, like Kimani, "was

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[20] The defendant's trial counsel was aware of Martin's cell phone records and reviewed them before trial. At the evidentiary hearing on the motion for a new trial, defense counsel testified that he had no tactical or strategic reason to make use of the records. Indeed, Martin's cell phone records might have corroborated the Commonwealth's case in part by showing that the last call Martin received that evening was from the defendant.

[21] In fact, testimony presented at the evidentiary hearing showed the marginal value of Martin's cell phone records even as impeachment evidence. As explained by an expert witness at the hearing on the motion for a new trial, the record of a call at 12:52 A.M. from the defendant to Martin, while it was

subjected to extensive impeachment based on his criminal record and based on various changes in the different versions of events he had given," the fact that "defense counsel did not pursue additional avenues of impeachment does not constitute ineffective assistance."[22] Fisher, supra.[23]

"connected" for eighteen seconds, could have been an unintended "butt dial," making the defendant's 12:37 A.M. call the last time he actually spoke with Martin.

[22] The defendant also contends that his trial counsel was ineffective for failing to marshal arguments using the defendant's own cell phone records, which were in evidence, to impeach three additional witnesses. Specifically, Sergeant John Brown testified that he found two telephone calls between the defendant and Martin in September 2010; however, the defendant's cell phone records show dozens of calls between Martin and the defendant during that month. Counsel was not ineffective for not highlighting the extensive connection between the two. Dedrick Cole testified that the defendant called him, possibly the day before the killings occurred, seeking access to a car to commit a robbery. The defendant's cell phone records do not show a call between Cole and the defendant in the relevant time frame. Counsel was not ineffective for not highlighting the absence of a record of such a call; indeed, Cole had previously explained to police that the defendant called from a restricted telephone number. Charlene Washington testified that Kimani introduced her to someone, inferably the defendant, at her Fowler Street home in the early morning after the shootings; however, the defendant's cell phone records showed two calls from the defendant to Kimani during the relevant time frame, suggesting the two were not together. Although trial counsel could have impeached Charlene with the defendant's cell phone records, Charlene was not a key witness, and impeaching her likely would not have affected the jury's verdict. Counsel was not ineffective for not highlighting the defendant's cell phone records, which were in evidence and available to the jury.

[23] The defendant's contention that the prosecutor improperly allowed known false testimony in violation of his due process also fails. The Commonwealth may not "allow [false evidence] to go uncorrected when it appears." Commonwealth v. Ware, 482

ii. CSLI data. The defendant additionally contends that his trial counsel failed to use the defendant's CSLI data to cast doubt on Kimani's testimony that the defendant was present for the killings. First, the defendant relies on a twenty-one-minute call starting at 12:07 A.M. on the night of the killings; the call began connected to a cell tower near Kimani's mother's home on Fowler Street and ended connected to a cell tower near Martin's home. Second, the defendant highlights three calls from his cell phone to Martin. The first call connected to a cell tower more than one-half mile south of Martin's home, and the second and third calls connected to a cell tower closer to but still south of Martin's home. Lastly, the defendant points

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Mass. 717, 721 (2019), quoting Commonwealth v. Hurst, 364 Mass. 604, 608 (1974). However, "[m]inor inconsistencies do not constitute falsities." Commonwealth v. Forte, 469 Mass. 469, 491 (2014). Here, as described supra, the cell phone records suggested minor discrepancies in some witness testimony (specifically, that the defendant and Martin shared dozens of calls in the month prior to the killings) and offered additional avenues for possible impeachment (in particular, the timeline of the robbery based on Hurd's last call to Martin at 12:40 A.M., the reliability of Charlene's purported identification of the defendant in the early morning after the shootings, and the location of the defendant throughout the night as suggested by CSLI data). However, the cell phone records did not establish any "blatantly false" testimony. See Ware, supra at 725-726. "It was not the prosecutor's duty to try the defendant's case for him by attempting to impeach the testimony of the Commonwealth's own witnesses with cryptic and inconclusive documents in the defense counsel's possession." Commonwealth v. Jewett, 442 Mass. 356, 363 (2004). Thus, the prosecutor did not violate due process; nor were any inconsistencies likely to have influenced the jury's conclusion. See Ware, supra at 726.

to calls from his cell phone to Kimani after the killings, which he contends connected to cell towers disproving his presence: first, at 1:32 A.M., his call to Kimani connected to a cell tower just south of Martin's home (the same tower as the last two calls to Martin);[24] and his next call, at 1:50 A.M., connected to a cell tower near Kingsdale Street. The defendant contends that, collectively, this data show he was not present either at Kimani's mother's home or Martin's home before the robbery began, or at Kimani's mother's home afterwards.

The defendant's trial counsel was not ineffective. To begin, before trial, trial counsel filed a motion in limine to exclude the CSLI data from the trial, arguing that it was unreliable. The data purportedly showed the cell tower(s) to which the defendant's cell phone connected for each call that was made, indicating which tower had the strongest signal from the cell phone; as multiple witnesses testified at trial, however, this is usually but not necessarily the geographically closest tower.

The motion was denied; accordingly, the defendant's CSLI data were in evidence, and his trial counsel cross-examined multiple witnesses concerning the CSLI location data. Further, in his closing argument, trial counsel argued that the CSLI data

[24] This cell tower was also the closest one to the defendant's home.

did not support the defendant's guilt. Significantly, the defendant's CSLI data generally supported the prosecution's theory that the defendant traveled from the vicinity of Kimani's mother's house on Fowler Street to the area around Martin's home on the evening of the shootings. Trial counsel was not ineffective for failing to highlight further these arguably inculpatory records.[25]

b. Newly discovered evidence. The defendant next argues that newly discovered evidence, namely additional call record details that were revealed by a new analysis in 2018, warrant a new trial. The new records resulted from an analysis of Martin's call records using a new software system. The new records show calls received by Martin's cell phone between 1:17 A.M. and 6:43 A.M., after the shootings, that did not appear in Martin's 2010 cell phone records available at trial. The data for these calls included a code, [CFNR:VM], which indicates that the calls did not go through but were forwarded to voicemail. The defendant contends that the new evidence shows that Martin's

[25] The defendant's argument that his counsel provided ineffective assistance because he failed to highlight for the jury the text messages that the defendant exchanged with a female friend throughout the night is similarly unavailing. The timing of the text messages arguably supported the prosecution's theory, because the defendant sent one text message at 12:51 A.M. (just a minute before his final call to Martin's cell phone) and did not respond to his friend's text message until over three hours later, long after the robbery and killings.

cell phone went "off network" at around 1:18 A.M. and came back "on-line" sometime between 3:27 A.M. and 6:43 A.M., after the shootings. The defendant speculates that Kimani, who admitted taking three cell phones from the victims, may have turned Martin's cell phone off after the murders, turned it back on, found the defendant's name in Martin's call log, and hatched a plan to incriminate the defendant.

To be entitled to a new trial based on newly discovered evidence, a defendant must establish that evidence is, in fact, newly discovered, and must show that the new evidence is "material and credible" and that "there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial." Commonwealth v. Santiago, 458 Mass. 405, 415 (2010), quoting Commonwealth v. Grace, 397 Mass. 303, 305-306 (1986). Evidence is newly discovered if it "was unknown to the defendant or trial counsel and not reasonably discoverable at the time of trial." Commonwealth v. Ellis, 475 Mass. 459, 472 (2016), quoting Commonwealth v. Cowels, 470 Mass. 607, 616 (2015).

A new trial may be awarded where the newly discovered evidence "casts real doubt on the justice of the conviction," in that "the new evidence would probably have been a real factor in the jury's deliberations" (citation omitted). Ellis, 475 Mass. at 476-477. See Commonwealth v. Teixeira, 486 Mass. 617, 640

(2021). Our review of a denial of a motion for a new trial based on newly discovered evidence is for abuse of discretion or other error of law. Commonwealth v. Gibson, 489 Mass. 37, 51 (2022), citing Commonwealth v. Brown, 470 Mass. 595, 602 (2015). "In reviewing an order granting or denying a motion for a new trial, we accord deference to the views of a motion judge who was also the trial judge," as was the case here. Commonwealth v. LeFave, 430 Mass. 169, 176 (1999). See Kolenovic, 471 Mass. at 672-673.

At best, the new records would have provided an alternate ground to try to impeach Kimani's testimony. See Gibson, 489 Mass. at 52 (concluding that where witness was already thoroughly impeached, newly available evidence that would have provided additional impeachment grounds would have been cumulative and likely would not have had real impact in jury's deliberations); Commonwealth v. Sullivan, 469 Mass. 340, 352 (2014) (noting that impeachment evidence alone "is usually insufficient to warrant a new trial"); Commonwealth v. Sleeper, 435 Mass. 581, 607 (2002) ("Newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial" [citation omitted]).

Beyond mere speculation, the new details from Martin's cell phone records do not suggest that Kimani was in fact able to unlock Martin's cell phone, or that he saw anything on Martin's

cell phone, let alone that he specifically saw the defendant's cell phone number.[26] As the judge found based on testimony at the evidentiary hearing, a cell phone can be "off-line" for a variety of reasons, including a dead battery, being outside of the network, being placed in airplane mode, or an obstructed signal.

Thus, the new details available from Martin's cell phone records would likely not have been "a real factor in the jury's deliberations" (citation omitted). Ellis, 475 Mass. at 472. See Teixeira, 486 Mass. at 640. The judge did not abuse his discretion in denying the defendant's motion for a new trial on this ground.

c. Exculpatory evidence. The defendant argues that a combination of withheld evidence, newly discovered evidence, and evidence known at the time of the trial supports the exculpatory argument that Kimani committed the crimes with members of a gang, and not with the defendant. "To secure a new trial on the basis of exculpatory evidence, the defendant must establish three elements": (1) that the evidence was "in the possession, custody, or control of the prosecutor or a person subject to the prosecutor's control"; (2) that "the evidence is exculpatory"; and (3) that the defendant was prejudiced, in that "there is a

[26] At trial, Kimani admitted that "he attempted to use . . . at least one of them but was unable to bypass the code."

substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial" (citation omitted). Commonwealth v. Murray, 461 Mass. 10, 19-21 (2011).

i. Evidence of gang affiliation. During the robbery, Kimani announced, "[M]y name is Point, I'm from the Point. If they wanted to find me or get some get-back on the person that got them, they know where to find me." Kimani also testified that he went by the nickname "Point" or "Point God." The defendant claims that Boston police officers were aware of the existence of the CPD gang and knew that "The Point" was a nickname for the group, as well as that the group was known for committing armed break-ins. The defendant argues that the failure to disclose this information violated the prosecution's obligations under Brady v. Maryland, 373 U.S. 83, 87 (1963). The defendant also argues that he could have used this information to strengthen his defense under Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980), by showing detectives had abandoned prematurely their investigation of Kimani's involvement with CPD.

The judge held a six-day evidentiary hearing on the defendant's motion for a new trial. "We accept . . . findings that were based on testimony at the evidentiary hearing and do not disturb them where they are not clearly erroneous." Commonwealth v. Melo, 472 Mass. 278, 293 (2015), quoting

Commonwealth v. Thomas, 469 Mass. 531, 539 (2014). The judge found that "despite an exhaustive federal-state investigation culminating in numerous indictments aimed at dismantling CPD . . . the defendant fail[ed] to identify any source identifying Kimani as a member, affiliate, or in any other way connected with those involved with CPD." The judge credited the testimony of the Boston police officers who said they investigated Kimani's ties to CPD in the days following the shootings but did not find any information linking Kimani to CPD.[27] Additionally, Kimani did not have a bulldog tattoo, an insignia prevalent among CPD members.

The judge found that Kimani's statement, "I'm from the Point," without more, combined with the fact that Kimani grew up in a Columbia Point housing development, made any gang affiliation "woefully speculative." Indeed, Kimani testified that his statement meant he was "from the Point," and the defendant's trial counsel cross-examined him about this declaration at trial. Even if we assume arguendo that evidence concerning the CPD gang supported exculpatory inferences, the jury were not likely to have reached a different conclusion had

[27] When police asked Kimani if he was "down with Columbia Point," Kimani answered, "Well, I'm just from there." Similarly, at trial, Kimani testified that he grew up in Columbia Point.

the evidence been admitted. See Commonwealth v. Tucceri, 412 Mass. 401, 413 (1992).[28]

Moreover, the judge specifically credited the detectives' testimony that they reviewed any potential connection between Kimani and CPD in the days following the killings, including interviewing a detective assigned to a task force specifically investigating CPD. Thus, any support for the defendant's Bowden defense would likely have been minimal at best.

ii. Other withheld evidence. The defendant contends that a new trial is warranted because the prosecution team withheld additional evidence. Specifically, a 2010 alert issued by the Boston regional intelligence center (BRIC), an arm of the Boston police department, stated that following the arrest of Kimani, "individuals with ties to Rosewood/Thetford may seek retribution against Columbia Pt. associates or individuals with ties to that area." The alert was issued after Flonory's brothers, who were both incarcerated, were recorded discussing Kimani's arrest and speculating about his connection to the shootings on a telephone call. One of the brothers stated, "I don't know who the fuck the [shooter] was. Anybody from the Point, take 'em out." The

[28] For this reason, we also reject the defendant's contention that an affidavit filed in connection with a 2015 Federal indictment against CPD members, which mentioned that CPD is known as "the Point," constitutes newly discovered evidence warranting a new trial. See Tucceri, 412 Mass. at 413.

defendant, who accessed this report during postconviction discovery, argues that it suggests that Kimani had ties to the CPD gang, suggesting further that the gang may have been responsible for the shootings.

At best, the BRIC alert and recorded telephone call might have provided nominal support for the defendant's Bowden defense. As discussed supra, the judge credited the police officers' testimony that they investigated the link between Kimani and CPD and found nothing credible. Thus, the judge did not abuse his discretion in denying the motion for a new trial on this ground.

d. Prosecutor's closing arguments. The defendant next argues that the prosecutor made multiple errors in his closing argument. Closing arguments must be limited to the facts in evidence and the reasonable inferences that may be drawn from them. Commonwealth v. Wilson, 427 Mass. 336, 350 (1998). Referring to facts not in evidence or playing on the jury's sympathy or emotions is improper rhetoric. Commonwealth v. Kozec, 399 Mass. 514, 516-517 (1987). "In analyzing a claim of improper argument, a prosecutor's remarks must be viewed in light of the entire argument, as well as in light of the judge's instruction to the jury and the evidence at trial" (quotation omitted). Commonwealth v. Lamrini, 392 Mass. 427, 432 (1984). The court considers (i) whether the defendant objected; (ii)

whether the error was limited to collateral issues or went to the heart of the case; (iii) what specific or general instructions the judge gave to the jury to mitigate the mistake; and (iv) whether the error possibly made a difference in the jury's conclusion. See Commonwealth v. Lewis, 465 Mass. 119, 130-131 (2013); Commonwealth v. Santiago, 425 Mass. 491, 500 (1997), S.C., 427 Mass. 298 and 428 Mass. 39, cert. denied, 525 U.S. 1003 (1998).

i. Order of killings. The defendant first claims that the prosecutor improperly asserted that Flonory saw the other victims get shot.[29] Hurd testified that he was shot first, and

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[29] Referring to the jury's visit to the crime scene, the prosecutor said:

> "You walked to the intersection of Wildwood and Woolson Street. You peered down into those bushes, just as Marcus Hurd did before that gunman, that assassin, put a gun to the back of his head and pulled the trigger. You walked two at a time up the steps of [the building on] Woolson Street and looked down at the grass below, a place where Lavaughn [sic] Washum-Garrison's twisted body lay to rest after he was shot by the same gunman with that same gun. You walked to the middle of Wildwood and Woolson Street, and you stood there where Simba Martin, naked and defenseless, and staring at a man that he knew, was gunned down bullet after bullet after bullet to his face, to his chest, to his back and to his arms, an execution so vicious that it bespeaks the very personal nature of that murder. And you stood [on] Woolson Street by those gray painted steps on that sidewalk where Eyanna Flonory in her pajamas held her two-year-old baby in her arms, watching what was going on in front of her, when that same gunman with that same gun opened fire, bullets going through her hand striking her child, striking him in the chest, a bullet exiting his back, and then that same gunman with that same

he was found in the bushes near the intersection of Wildwood Street and Woolson Street. While there was no direct evidence as to the order in which the rest of the victims were shot, the other bodies were found in somewhat of a linear progression back up the street: Martin was found in the street at the intersection of Woolson and Wildwood Streets; Washum-Garrison was found behind the bushes by the steps of a building on Woolson Street; and finally, Flonory and her son were found even further up Woolson Street on the sidewalk in front of another building on Woolson Street. It was thus an "inference[] that may reasonably be drawn from the evidence" that Flonory was shot last; at the very least, she would have seen Hurd get shot first. Commonwealth v. Kater, 432 Mass. 404, 422 (2000), quoting Kozec, 399 Mass. at 516. See Commonwealth v. Semedo, 456 Mass. 1, 13 (2010) (concluding that prosecutor's reference to likelihood of contact between defendant and victim was reasonable inference based on evidence adduced at trial, so was permissible to suggest to jury).[30]

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gun executed that young mother with a bullet to the back of the head."

Later, the prosecutor also said, "Think about what Eyanna Flonory must have been thinking when she saw the shootings up in front of her and the gun turned on her."

[30] The defendant argues that the prosecutor's numerous references to Flonory being a mother (eight occasions in the opening) and Smith's age (seven occasions in the opening and

ii. Improper invocation of sympathy. We agree with the defendant, however, that the prosecutor improperly invoked the sympathy of jurors in this part of his closing argument.[31] It is improper to ask the jury to "put themselves 'in the shoes'" of the victims, or to encourage jurors to speculate about how the victims experienced their last moments. Commonwealth v. Rutherford, 476 Mass. 639, 646 (2017), quoting Commonwealth v. Bizanowicz, 459 Mass. 400, 420 (2011). See Commonwealth v. Camacho, 472 Mass. 587, 608 (2015) (concluding that comments such as, "Think about landing face down on that dirty, beer-stained barroom floor. . . . Think about the last moments of [the victim's] life . . . ," were improper); Bizanowicz, supra

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four in the closing) were improper. Repeated references to a characteristic of a victim to elicit sympathy, where the characteristic of the victim is not relevant to any material issue, is improper. Santiago, 425 Mass. at 494-495. However, those characteristics, along with argument that the victim was conscious of suffering, may be relevant to whether the murder was committed with extreme atrocity or cruelty. Commonwealth v. Raymond, 424 Mass. 382, 390 (1997), S.C., 450 Mass. 729 (2008). As the Commonwealth notes, this case was tried prior to Commonwealth v. Castillo, 485 Mass. 852, 865-66 (2020) (listing three evidentiary factors, replacing seven Cunneen factors, to determine extreme atrocity or cruelty). Accordingly, these references were not improper. See Wilson, 427 Mass. at 351 (references to gruesome nature of crime were not improper where suffering was relevant to issue of atrocity or cruelty, and prosecutor "did not gratuitously exploit or dwell on the gruesomeness, but made only a few passing references to it").

[31] The prosecutor's statements in full are reproduced in note 30, supra.

at 420 ("The jury should not be asked to put themselves 'in the shoes' of the victim, or otherwise be asked to identify with the victim").

The defendant did not object to this language as an improper appeal to sympathy;[32] accordingly, our review is limited to determining "whether there was a substantial likelihood of a miscarriage of justice." Kater, 432 Mass. at 423. See Kolenovic, 478 Mass. at 201. See also Commonwealth v. Maynard, 436 Mass. 558, 570 (2002), quoting Commonwealth v. Duguay, 430 Mass. 397, 404 (1999) ("The absence of an objection, '[a]lthough not dispositive of the issue . . . is some indication that the tone, manner, and substance of the now challenged aspect[] of the . . . argument [was] not unfairly prejudicial'"). The judge gave a specific instruction that the jury were not to be swayed by sympathy. See Kater, supra at 424 (curative instruction "eliminated any prejudice that might have been caused by the prosecutor's comment"). Finally, the sympathetic nature of these victims was well known to the jury; in this context, it is "unlikely that the prosecutor's argument had an inflammatory effect on the jury beyond that which naturally would result from the evidence presented." Kolenovic, supra, quoting Commonwealth

[32] The defendant did object to the prosecutor's statements that Flonory must have been shot last as unsupported by the evidence.

v. Bois, 476 Mass. 15, 35 (2016).

iii. References to trial counsel. The prosecutor improperly referred to the defendant's trial counsel as the "man who is representing the man charged with murder."[33] See Lewis, 465 Mass. at 130 ("it is improper for an attorney in closing argument to disparage opposing counsel personally"). Trial counsel objected. Where the defendant seasonably objects to a prosecutor's error during closing argument, we determine whether the jury were "substantially swayed by the error." Semedo, 456 Mass. at 12, quoting Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). In this review, "[t]he essential question is whether the error had, or might have had, an effect on the jury and whether the error contributed or might have contributed to the verdicts." Semedo, supra, quoting Commonwealth v. Grimshaw, 412 Mass. 505, 508-509 (1992).

The remark constituted a small part of a lengthy closing

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[33] The defendant also argues that the prosecutor improperly stated that the defendant's trial counsel "spun . . . a tale" for the jury. The language was permissible hyperbole, see Wilson, 427 Mass. at 352 (jury are "presumed to know that the prosecutor is an advocate and to be able to recognize his arguments as advocacy and not statements of personal belief" [quotation and citation omitted]), and in any event not prejudicial, see Commonwealth v. Taylor, 469 Mass. 516, 529 (2014), abrogated on other grounds by Commonwealth v. Dirico, 480 Mass. 491 (2018) (concluding that prosecutor "treads on dangerous ground" when "accusing defense counsel of engaging in fabrication" through use of phrase "bald-face lie," but remark was nevertheless not prejudicial error).

argument and was made in the context of reminding the jury that the decision about Kimani's credibility was theirs. Cf. Lewis, 465 Mass. at 132 (identifying prejudice where "the tenor of the entire closing argument of the prosecutor improperly disparaged the defendant and counsel"). Importantly, the judge gave a specific curative instruction to the jury in response to these statements, instructing them, in part, that "[n]o attorney has any greater or lesser claim to the truth or to your respect or favor because of the particular side they represent." Thus, there was no prejudice warranting a new trial.

e. Declining to strike a juror. The defendant asserts that he was forced to use a peremptory challenge on juror no. 33, who had been exposed to media reporting that Hurd -- who had not been able to identify the shooter during the first trial -- was in fact able to make a positive identification of the defendant as the shooter. We review the judge's denial of the defendant's motion to strike juror no. 33 for cause for an abuse of discretion. See Commonwealth v. Stroyny, 435 Mass. 635, 639 (2002).

"[A] juror need not be 'totally ignorant of the facts and issues involved,'" as long as he or she will be able to "set aside [his or her] own opinion[], weigh the evidence (excluding matters not properly before [the jury]), and follow the instructions of the judge." Stroyny, 435 Mass. at 639, quoting

Commonwealth v. Jackson, 388 Mass. 98, 108 (1983). A "juror['s] assertions of impartiality should be accepted by the judge unless extraordinary circumstances give some reason to question such assertions." Commonwealth v. Leahy, 445 Mass. 481, 494 (2005). See Commonwealth v. Bryant, 447 Mass. 494, 500 (2006), quoting Leahy, supra at 499 ("A judge may accept each juror's representation of impartiality unless there is 'solid evidence of a distinct bias'"); Stroyny, 435 Mass. at 639 ("Whether to accept the declaration of a juror that he or she is disinterested lies within the broad discretion of the trial judge"). Here, juror no. 33 repeatedly responded that he would be able to remain impartial. Under these circumstances, the judge did not abuse his discretion.[34]

f. Review under G. L. c. 278, § 33E. After a review of the entire record, we discern no error warranting relief under G. L. c. 278, § 33E.

Judgments affirmed.

Order denying motion for a new trial affirmed.

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[34] The defendant also argues that juror no. 33 made statements suggesting a racial bias. The judge specifically asked juror no. 33 whether the defendant's race would affect his impartiality, and the juror indicated that he would not be affected by the defendant's race and would remain impartial. The judge, who was in the best position to determine credibility, decided not to strike the juror for cause, which was within his discretion. See Bryant, 447 Mass. at 500.