SJC-12381

COMMONWEALTH vs. TIMOTHY KOSTKA.

Suffolk. October 8, 2021. - March 31, 2022.

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

Homicide. Home Invasion. Evidence, Disclosure of evidence. Cellular Telephone. Practice, Criminal, Disclosure of evidence, Discovery, Argument by prosecutor, Capital case.

Indictments found and returned in the Superior Court Department on June 26, 2012.

The cases were tried before Mitchell H. Kaplan, J., and a motion for a new trial, filed on November 9, 2018, was heard by him.

Dana Alan Curhan for the defendant.
Ian MacLean, Assistant District Attorney (Ursula A. Knight, Assistant District Attorney, also present) for the Commonwealth.

GEORGES, J. This case arises from the April 16, 2012 stabbing death of sixty-seven year old Barbara Coyne in the bedroom of her first-floor apartment in a three-family house in the South Boston section of Boston. On October 9, 2015, a jury

convicted the defendant of murder in the first degree and home invasion in connection with Coyne's death.

In this consolidated appeal from his conviction and the denial of his motion for a new trial, the defendant argues that a new trial is required because of a number of erroneous evidentiary rulings, as well as the Commonwealth's asserted failure to comply with its discovery obligations. In addition, the defendant asks that we order a new trial or reduce the degree of guilt using our authority under G. L. c. 278, § 33E, because, even if there was sufficient evidence to sustain the conviction, the verdict was against the weight of the evidence.

After a careful review of the record, we affirm the convictions and discern no reason to exercise our authority to grant relief pursuant to G. L. c. 278, § 33E.

1. Background. We recite the facts the jury could have found, in the light most favorable to the Commonwealth, reserving certain details for later discussion. See Commonwealth v. Tavares, 484 Mass. 650, 651 (2020).

a. Commonwealth's case. i. Day of the stabbing. Barbara Coyne lived with her granddaughter, Sinead Coyne,[1] in the first-floor apartment of a three-family home in South Boston. Barbara's adult son, Richard Coyne, lived with a roommate in the

[1] Because they share a last name, we refer to Barbara, Sinead, and Richard Coyne by their first names.

third-floor apartment, and a niece and her family occupied the second-floor apartment. Richard was an avid runner, and had planned to run the Boston Marathon on Monday, April 16, 2012. On Sunday evening, however, he decided not to run due to the forecast of extreme heat the following day. Instead, he decided to spend the day working on his boat.

After having coffee with his mother at around 6:30 A.M, as was his routine, Richard ran an errand, returned home at around 8 A.M., and left again to go for a short run. According to Richard, the front door to the three-family house was almost always unlocked, and his mother tended to unlock the door to her own apartment every morning so that Richard could come in for coffee. At about 9:30 A.M., after returning from his run, Richard went to the basement of the building to look for a power saw. When he was unable to find the saw, he walked through his mother's kitchen to return to his apartment on the third floor. He spoke to his mother at that time, which he estimated to be around 9:47 or 9:48 A.M. He ultimately found the saw in a closet in his apartment, spent ten to fifteen minutes cleaning the closet, and headed back downstairs to put the saw in his truck. While walking downstairs, he noticed that the door to his mother's apartment was ajar, which he thought was odd.

Richard went into the apartment and found his mother lying on the floor of her bedroom. She was on her stomach, with a

pool of blood underneath her head. She was bleeding profusely from a wound that ran across her neck in a zig-zag pattern.[2] Richard woke up Sinead, who had been sleeping, and called 911. While Barbara was struggling to breathe, she managed to tell Richard that she had been stabbed by someone wearing a white shirt and a hat. She went into cardiac arrest and passed away while being transported to a hospital in an ambulance.

The defendant lived with his family near the Coyne residence. As of the date of trial, the defendant and Richard had known each other for about twenty years. Richard's close friend married the defendant's cousin, and the two would see each other at family gatherings and social events at local yacht clubs. When the defendant was younger, Richard, who is about thirteen years older than the defendant, took the defendant and his brother fishing on Richard's boat. Occasionally, the defendant would help Richard clean the boat after fishing trips, and in 2006, Richard sold his boat to the defendant.

Several witnesses testified that the defendant suffered from a heroin addiction and had relapsed shortly before the day of the stabbing. These witnesses, some of whom had consumed drugs with the defendant, explained that the defendant told them

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[2] The autopsy also disclosed that the victim had cuts on her hands that might have been defensive wounds, and abrasions on her shins.

he regularly committed crimes of breaking and entering, as he was unemployed. The defendant told one witness that if anyone caught the defendant breaking into a house, he would "slice their throat." The defendant then showed the witness a kitchen knife that he had hidden in the sleeve of his sweatshirt.

On the date of the stabbing, at around 9:30 A.M., the defendant called several individuals to ask if they knew where or how he could sell high-end fishing equipment. The defendant's telephone records revealed that around that time, he placed a call to a pawn shop. At 10:04 A.M. -- minutes after Richard discovered his mother with her neck cut -- the defendant's image was captured on surveillance video footage at a convenience store located two blocks from the Coyne residence. The defendant appeared to be in front of a lottery machine. Surveillance video footage from that same store, taken at 11:49 A.M., showed the defendant again at the store, wearing a white tank top with a second white shirt wrapped around his hand. At 12:21 P.M., video footage from the store showed the defendant standing in the area of the beer cooler.

Shortly after 1 P.M., the defendant was picked up by a friend who drove him to the Mission Hill section of Boston, where they jointly purchased heroin, then returned to South Boston to consume it. Two carpenters who had worked at the defendant's family home that day, between the hours of 8 A.M.

and 4 P.M., testified that they had not seen the defendant at any point.

ii. Investigation. Police found the victim's bedroom in a state of disarray. Sinead testified that the room usually was tidy, but several items were out of place, including two jewelry boxes on which fingerprints matching the defendant's were found. Police also found a bloody fingerprint on an envelope in the living room that later was "individualized" to the defendant's right thumb print. Water appeared to have been sprayed around the kitchen sink, and there was what looked like blood mixed with water in the sink; no evidence was introduced with respect to any testing of this blood. Deoxyribonucleic acid (DNA) from underneath the victim's fingernails was a mixture of DNA profiles. The victim's DNA profile was "fully included" in the mixture, and the defendant's DNA profile was partially included. One in 40,000 Caucasians also would be included.

Police found lottery tickets in the living room, the kitchen, and inside the victim's vehicle ; the tickets in the living room were stained with what appeared to be blood. Sinead testified that her grandmother frequently played scratch lottery tickets and tended to keep ten to fifteen in the apartment at any one time, on a footstool in her living room.

iii. Lottery evidence. Records from the Lottery Commission revealed that one hundred dollars' worth of winning

tickets that were cashed at the convenience store at 10:02 to 10:03 A.M. and at 11:52 A.M. -- times when surveillance video footage showed the defendant at the store -- bore ticket numbers that were in sequence with the ticket numbers on losing tickets found in the victim's home.

Kevin Carroll, a security investigator for the Lottery Commission, testified to the practices and procedures of the Lottery Commission. He also answered specific questions concerning the tickets cashed at the two particular times on April 16, 2012, and the tickets found in the victim's home. According to Carroll, the Lottery Commission does not manufacture the tickets for the lottery games; it designs the games and contracts with a private company to print and ship the tickets. The Lottery Commission distributes the books of tickets it receives from the manufacturer to individual "agents"[3] upon their request. A book may contain fifty, one hundred, 150, or 300 tickets, depending on the game.

[3] The stores, restaurants, bars, and other businesses that contract with the lottery to sell lottery tickets are known as "agents." Individual agents contact the Lottery Commission when they are ready for a new shipment of tickets, and may choose to be provided a "cash drawer" as a means of having sufficient cash available on hand to pay out winners. If an agent does not have sufficient cash in its own registers to pay a particular winner, the agent may cancel the transaction and direct the winner to a different store to redeem a winning ticket.

The tickets in each book are numbered sequentially, beginning with 000 and ending in 049, 099, 149, or 299, respectively. Each ticket has a unique number that consists of a two-digit number corresponding to the specific game, a six-digit number, also known as the serial number, identifying the particular book of tickets, and the three-digit ticket number. The game number and book number are the same for every ticket in a book. Each ticket also has a unique, randomly assigned "void if removed number"(VIRN).

At the time of manufacture, all of the tickets in a book are physically attached, with perforations between each ticket. The tickets are shipped to the agents shrink wrapped together with a separate bar code that the agent must scan in order to activate the book. No ticket can be sold until the book is activated by the proper agent. When an individual ticket is sold to a customer, it is torn off at the perforations from the rest of the tickets in the book. The Lottery Commission does not track individual ticket sales.

To redeem a winning ticket, a customer presents the ticket, and the agent scans its bar code at a lottery terminal; if the customer presents multiple tickets, generally they all are scanned, and then the cashier presses a button to calculate the total winnings due the customer. When a bar code is scanned, the Lottery Commission records the date, time, and location of

the transaction; the game number, book number, and individual ticket number; the VIRN; and the amount of the winnings. This information is stored in the Lottery Commission's electronic database, which the Lottery Commission can access at any time. Agents are instructed to tear up or mark the winning tickets that have been redeemed and to discard them.

b. Defendant's case. The defendant called his own fingerprint expert to challenge his identification as the person who left the bloody fingerprint found on an envelope in the victim's living room. The expert testified that the bloody fingerprint was too distorted to conclude that it matched the defendant's known exemplar. As to the fingerprints on the jewelry boxes in the victim's bedroom, the defendant's brother testified that the defendant had been inside the Coyne residence in 2007 to pick up a part for the boat Richard sold him.

The defendant's mother testified that she believed the defendant was at home on April 16, 2012, at least until 12 or 12:30 P.M. The defendant's brother testified that he and the defendant had purchased a substantial amount of high-end fishing equipment in 2007 and 2008, which they still owned. The defendant's mother, brother, and cousin all testified to the friendly relationship between the Coyne family and the defendant's family, both of whom had lived in the area for many years.

c. Prior proceedings. On June 26, 2012, a grand jury returned indictments charging the defendant with murder in the first degree, G. L. c. 265, § 1, and home invasion, G. L. c. 265, § 18C. On October 9, 2015, a jury found the defendant guilty of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty, and of home invasion. The defendant filed a timely notice of appeal.

On November 9, 2018, while his appeal was pending in this court, the defendant filed a motion for a new trial in this court, which we remanded to the Superior Court for resolution. The defendant also filed a motion in the Superior Court for posttrial discovery. Following a nonevidentiary hearing, the trial judge denied both motions. The defendant appealed from the denial of his motion for a new trial, and we subsequently consolidated that appeal with the defendant's direct appeal of his convictions.

2. Discussion. In his motion for a new trial, the defendant argued that he was prejudiced because his trial "was substantially affected by numerous and substantial discovery errors, by multiple Brady violations, and by demonstratively unwarranted representations to the court in legal argument and to the jury in closing argument." See Brady v. Maryland, 373 U.S. 83 (1963). In particular, the defendant maintained that the discovery provided in the multiple Lottery Commission

reports was "incomplete and fabricated," and that the Commonwealth had not disclosed anything about data on the reports being encrypted. The defendant also challenged the introduction of a Lottery Commission report that was not disclosed to him until four days into trial, and a Lottery Commission investigator's testimony about that report. The defendant pointed out that data in the report differed from lottery records that had been produced by the Commonwealth during pretrial discovery, and argued that testimony by the investigator that some of the reports contained encrypted data was speculative hearsay. In addition, the defendant argued that the Commonwealth violated its discovery obligations in not providing him with cell service location information (CSLI) evidence concerning the location of his cellular telephone at or near the time the victim was attacked. The defendant also argued that, in her closing, the prosecutor inappropriately asserted that, by challenging the lottery records, defense counsel had engaged in "gamesmanship," and improperly relied substantively on hearsay testimony by Carroll that certain data on the reports was encrypted.

The judge did not directly address the issues of fabricated or incomplete testimony about the Lottery Commission reports, or make any rulings on them. Nor did he address the issue of encryption. Instead, he summarized the defendant's arguments in

his motion for a new trial as consisting of two broad categories, (1) "the admission of evidence concerning winning lottery tickets that the defendant cashed at a convenience store near [the victim's] apartment a few hours after the murder," and (2) "the failure to provide certain cell location evidence concerning the location of the defendant's cell phone at or near the time of the murder." Without stating explicitly that he found Carroll's testimony credible, by adopting that testimony, including the hearsay, as established fact, the judge did so implicitly in his summary of the facts and in his discussion.

The judge addressed the defendant's argument concerning the Lottery Commission reports and the investigator's testimony in one sentence: "[t]he defendant's argument is based upon his misunderstanding of the VIRN numbers that appear on each ticket." Even accepting that all of Carroll's testimony about the VIRNs was credible, however, does not resolve the issues the defendant raised. First, regardless of whether the Lottery Commission's systems could generate a new report from the 2012 ticket information that contained all of the disputed or missing ticket numbers along with the VIRNs, that would have no bearing on the sources for the ticket numbers in the obviously different font and color on the printed daily business report from 2012. Second, accepting that Carroll honestly believed everything his "computer people" told him about the purportedly encrypted

VIRNs, he had no basis on which to confirm that the actual reasons for the differences in the VIRNs was a result of encryption. Accordingly, we consider those claims directly, along with the other arguments in the defendant's direct appeal.

In his direct appeal, the defendant pursues the arguments about the midtrial disclosure of a Lottery Commission report and Carroll's testimony concerning that report, as well as improper statements in the prosecutor's closing argument. He also seeks relief under G. L. c. 278, § 33E. We consider each issue in turn.

a. Lottery records and midtrial disclosure. In 2012, the defendant filed a motion for discovery of all exhibits the Commonwealth intended to introduce at trial, all documents related to the case or that referred to evidence to be introduced at trial, and numerous categories of exculpatory evidence. The motion was allowed in its entirety. In response, the Commonwealth produced two sets of records concerning the lottery tickets: a printed list of the lottery transactions that took place at the convenience store on the day the victim was stabbed (daily business report) and ticket reconstruction reports from the manufacturer who produced the lottery tickets. Although the Lottery Commission is a third party and not part of the prosecution team, the prosecution had obtained certain documents from the Lottery Commission by subpoena, and the

documents thus were in the prosecutor's case file. The defendant then filed a motion in limine to exclude these documents at trial on the ground that they did not qualify as business records. The trial judge ruled that the documents would be subject to a voir dire hearing before they could be introduced at trial.

On the fourth day of trial, before the planned voir dire, the Commonwealth provided the defendant with a new set of lottery records, the so-called JFI report. While the JFI report contains much of the same information as the daily business report, it differs in notable ways. Among other things, both reports indicate, for each winning ticket redeemed on a given date, the game number, the book number, and the VIRN. The JFI report also contains the individual ticket number for each winning ticket, which, as Carroll described, represents the ticket's numerical location within the sequence of tickets that form one book, and were physically attached to each other prior to sale.

The daily business report for April 16, 2012, contains individual ticket numbers for winning tickets cashed at 11:52 A.M. -- the second of three times that day when the defendant appeared on surveillance video footage at the convenience store -- but does not include individual ticket numbers for the tickets that were cashed between 10:02 and

10:03 A.M., the first time that day when the defendant appeared on the video surveillance footage. The daily business report and the JFI report also contain different VIRNs for the same ticket. At the voir dire hearing, Carroll testified that the JFI report was a version of the daily business report that was rarely used by the Lottery Commission, but could be created on request.

The ticket reconstruction reports from the ticket manufacturer pertain only to the transactions at 11:52 A.M. These reports indicate the game number, book number, ticket number, and VIRN for each ticket that was redeemed at that time. Notably, however, the VIRNs listed on the ticket reconstruction reports for a given ticket differ both from the VIRNs printed on the daily business report and the VIRNs on the JFI report.

Following the voir dire hearing, the judge allowed the daily business report and the JFI report to be introduced as business records,[4] and allowed the defendant also to introduce

[4] The judge ruled that the JFI report was admissible as a business record, as was the daily business report produced during pretrial discovery, because both were produced by the Lottery Commission and could be "rerun" at will, but the reconstruction reports produced by the ticket manufacturer could not. On appeal, the defendant does not challenge these rulings, but rather argues that, regardless of whether the documents were business records, they should not have been admitted because they were not produced prior to trial. Nonetheless, in its brief, the Commonwealth argues at some length that the judge's ruling as to the JFI report was correct.

the ticket reconstruction reports. The defendant was allowed a standing objection to Carroll's testimony regarding the JFI report.

i. Fabricated disclosures. In his motion for a new trial, the defendant argued that the Commonwealth violated its discovery obligations by disclosing "incomplete and fabricated documentary evidence." The records the defendant challenged as misleading and fabricated were the daily business report and the ticket reconstruction reports. The defendant pointed out that, on the daily business report, the column for individual ticket numbers for transactions during the period from 10:02 to 10:03 A.M. on April 16, 2012, was blank for each ticket cashed, while the individual ticket numbers were listed for transactions that occurred at 11:52 A.M. Those individual ticket numbers, however, appeared in a font and color that was different from

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Hearsay contained in a business record is admissible where the record was (1) made in good faith, (2) in the regular course of business, (3) before the beginning of the criminal proceeding in which it is offered, and (4) it was the regular course of business to make such a record at the time or within a reasonable time of the recorded event. Commonwealth v. Zeininger, 459 Mass. 775, 782, cert. denied, 565 U.S. 967 (2011), citing G. L. c. 233, § 78. Although the daily business report the Commonwealth sought to introduce had been produced in September 2015, the judge found, based on Carroll's testimony, that it was printed from data created in 2012 that had been available in the Lottery Commission's database since then. See Commonwealth v. Andre, 484 Mass. 403, 410-411 (2020) (electronic records were created when data was captured, not day that printout of data was generated).

the font and color used elsewhere in the document. In addition, the VIRNs listed on the daily business report differed from the VIRNs listed on the ticket reconstruction report for the same ticket.

Ultimately, the Commonwealth did not introduce either set of records at trial, because it chose to rely on the JFI report that it obtained midtrial, which contained individual ticket numbers and VIRNs for each transaction. The defendant, however, introduced both sets of documents during cross-examination of Carroll.[5] He argued essentially that all of the lottery records were unreliable, because of the differences in the VIRNs for any given transaction on all three documents; he did not at that point argue that any of the reports were fraudulent or false. In his motion for a new trial, however, the defendant maintained that the Commonwealth's decision to disclose the three sets of records in itself constituted a discovery violation, where the VIRNs on all three sets of documents did not match, and the daily business report contained missing and manually appended individual ticket numbers. While the evidence concerning the

[5] At the voir dire hearing, the judge ruled that, unless it called one of the ticket manufacturer's employees to testify, the Commonwealth could not introduce the reconstruction reports as business records; the defendant, however, could introduce them on cross-examination, and the jury could consider them for all purposes ("Whatever purposes [defense counsel] uses it for is up to him, and the jury can decide what value to assign to the document").

ticket numbers might not have been clearly presented, nothing in the record suggests that the JFI report that the Commonwealth produced, or any of the other reports, were fraudulent. Carroll testified that, in 2012, the daily business reports the Lottery Commission generated did not include individual ticket numbers. The Lottery Commission had the ability at that time to generate JFI reports, which included individual ticket numbers, but those reports were rarely used. In 2012, when the Lottery Commission generated a daily business report, it would request the individual ticket numbers from the ticket manufacturer, using the VIRNs listed on the report. Here, when asked about ticket numbers for two time periods, the manufacturer responded only with the individual ticket numbers for the 11:52 A.M. transactions, and provided that information in the form of the ticket reconstruction reports. Those numbers were then manually entered onto a copy of the daily business report, and appear in a different font and color than the rest of the document.

We address the inconsistencies in the VIRNs in the next section.

ii. Encryption testimony. During cross-examination, after having introduced the two sets of lottery reports produced during pretrial discovery, the defendant asked Carroll to explain why the VIRN on any given transaction was listed as a different number in each of those reports and why both of those

numbers differed from the VIRN in the JFI report. Carroll responded:

> "[F]rom what my computer people have told me that generate these reports . . . for security purposes some numbers are deleted on the [Lottery Commission's records] than what is actually the VIRN number on the ticket. . . . I believe [these numbers] from what was explained to me [are] encrypted by the computer somehow, and that's how they figure it out."

In his motion for a new trial, the defendant argued that the Commonwealth violated its discovery obligations by failing to disclose any evidence of encryption pretrial. As stated, in his decision the motion judge did not rule on this claim. Because the defendant was allowed a standing objection to Carroll's testimony regarding the JFI report and the VIRNs, we treat his objection to the introduction of the encryption testimony as preserved.

Rule 14 (a) of the Rules of Criminal Procedure, as amended, 444 Mass. 1501 (2005), mandates the provision to a defendant of certain items[6] in the Commonwealth's possession or control,

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[6] Items which must be provided under Rule 14 (a) (1) include (i) written or recorded statements and the substance of oral statements; (ii) grand jury minutes and testimony before a grand jury; "(iii) [a]ny facts of an exculpatory nature"; "(iv) [t]he names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses . . . "; "(v) [t]he names and business addresses of prospective law enforcement witnesses"; (vi) [i]ntended expert opinion evidence . . ."; "(vii) [m]aterial and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the party intends to call

without a defendant having to request them. Rule 14 was adopted to facilitate automatic provision of the discovery mandated by the constitutional principles set forth in Brady, 373 U.S. at 87, "without the need for motions or argument." Commonwealth v. Taylor, 469 Mass. 516, 521 (2014), quoting Reporter's Notes (Revised, 2004) to Rule 14, Massachusetts Rules of Court, Rules of Criminal Procedure, at 179 (Thomson Reuters 2014). The rule "promote[s] judicial efficiency and encourage[s] full pretrial disclosure" (quotation and citation omitted). Taylor, supra.

Rule 14 (a) (1) requires mandatory production of discovery to a defendant, however, only where the items are "in the possession, custody, or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in this case." Both the Commonwealth and the defendant also may "move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case" to preserve that item for a set period of time, so that it may be available for subpoena. Mass. R. Crim. P. 14 (a) (1) (E). A

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as witnesses"; "(viii) [a] summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures"; and "(ix) [d]isclosure of all promises, rewards or inducements made to witnesses the party intends to present at trial."

defendant also may move, as the defendant did here, "for discovery of other material and relevant evidence not required by subdivision (a) (1)." Mass. R. Crim. P. 14 (a) (2).

In this case, both the defendant and the Commonwealth had the daily business report and the reconstruction reports in their possession for more than two years before trial,[7] each of which themselves showed differing VIRNs for the same transaction. Indeed, at the voir dire hearing on the JFI report, the judge commented that he "wish[ed]" the matter had been addressed "weeks ago" (prior to trial), rather than at a voir dire midtrial. Nonetheless, there is no indication that the Commonwealth was aware, prior to Carroll's testimony, that the Lottery Commission or its manufacturer used encryption. Carroll testified that the reason for the encrypted VIRN was to prevent Lottery Commission employees from searching for uncashed winning tickets, not to track sales or winners.

Regardless of whether the Commonwealth violated its discovery obligations by failing to disclose evidence of encryption pretrial, we are convinced "that the error did not influence the jury, or had but very slight effect" (citation omitted). See Commonwealth v. Peno, 485 Mass. 378, 399 (2020)

[7] More than two years prior to trial, the Commonwealth apparently obtained from the Lottery Commission, and then disclosed to the defendant, the daily business report and the reconstruction reports.

(where objection is preserved and issue is not constitutional, review is for prejudicial error). As the judge noted in his order denying the defendant's motion for a new trial, "the VIRN numbers are only a 'red herring' as they may relate to the evidence presented in this case." The relevant information contained in the JFI report is not the VIRNs on the redeemed tickets, but the game, book, and individual ticket numbers. That data, not the randomly generated VIRNs, demonstrated a physical relationship between the winning tickets cashed (which had been destroyed, per protocol) and tickets found in the victim's home. Whether the VIRNs on some Lottery Commission records were, in fact, encrypted thus was of little relevance to the Commonwealth's case. Cf. Peno, supra at 399-400 (to decide whether errors at trial amounted to prejudicial error, we consider whether "the errors . . . went to the heart of the issues at trial or concerned collateral matters" [citation omitted]).

The defendant also argued, in his motion for a new trial, that Carroll's testimony about the VIRNs being encrypted constituted impermissible hearsay and speculation. See part 2.c, infra.

iii. Midtrial disclosures. The defendant contends that the JFI report and Carroll's testimony about it should not have been introduced, due to the Commonwealth's failure to produce

the report until after trial had begun, in violation of its discovery obligations. Although the Commonwealth specifically sought out the JFI report, it did not obtain the report itself until midtrial, and disclosed the report shortly thereafter.

Except in extraordinary circumstances, see Commonwealth v. Cotto, 471 Mass. 97, 115 (2015), the Commonwealth's discovery obligations extend only to documents or information that is within the prosecutor's "possession, custody or control." Commonwealth v. Dwyer, 448 Mass. 122, 139 & n.20 (2006). See Mass. R. Crim. P. 14 (a). This limitation applies both to the Commonwealth's mandatory discovery obligations under rule 14 (a) (1), and to its obligations to disclose evidence requested by the defendant in a motion pursuant to rule 14 (a) (2). See Dwyer, supra at 140 n.22. As discussed, records that are only in the possession of third parties need not be disclosed by the Commonwealth pursuant to rule 14 (a) (2). Once a third-party record is obtained by the Commonwealth, however, it becomes part of the prosecutor's case file, triggering discovery obligations.

The JFI report is a third-party record, created by the Lottery Commission, that the Commonwealth did not possess until midtrial. The report was generated by the Lottery Commission on September 23, 2015 -- two days into trial -- and disclosed to the defendant two days later. As such, the Commonwealth's

production of the JFI report did not constitute an improper late disclosure. Notwithstanding that the Commonwealth could have obtained the report by a subpoena prior to trial, see rule 14 (a) (1) (E), the Commonwealth had no obligation to turn over the report until receiving it. While earlier access to the JFI report by both parties would have been preferable, the Commonwealth did not violate its discovery obligations in this case.

In addition, defense counsel could have requested a continuance to investigate the discrepancies between the JFI report and the lottery records received during discovery. Such information might have allowed the defense to mount a more effective cross-examination of Carroll.[8] See Commonwealth v. Baldwin, 385 Mass. 165, 177 (1982), quoting Commonwealth v. Cundriff, 382 Mass. 137, 150 (1980) ("defense counsel should, when faced with delayed disclosure situations, seek 'additional time for investigative purposes'"). Ultimately, however, it is unlikely that this information would have undermined the validity of the JFI report, a duly adjudged business record, and therefore it is unlikely that such information would have affected the outcome of the case.

[8] Although the judge suggested it at voir dire, neither side called an employee of the ticket manufacturer to testify.

b. CSLI data. In his motion for a new trial, the defendant challenged as a discovery violation the Commonwealth's purported failure to provide "complete cell phone technical data" (e.g., a CSLI report or a map of the CSLI data showing the probable locations of the defendant's cellular telephone on the morning of April 16, 2012, and reports of the results of a detective's investigation of the raw CLSI data). The Commonwealth did provide the defendant with the lists of raw data showing the cellular tower numbers (not locations) that the defendant's telephone had connected to within the relevant times, which police investigators had obtained from the defendant's cellular service provider, but did not provide any of the analysis it typically would have obtained from an expert, such as a technical expert employed by a cellular service provider. In addition, the tower number for the time period from 9:44 A.M., the closest to the critical period between 9:48 to 10:02 A.M., was listed as all zeros.

At trial, in response to the prosecutor's question whether he had done anything further with the CSLI data after receiving it from the provider, the detective who had conducted the CSLI investigation responded, "No." On cross-examination, when asked if he had included the results of his review in a police report, the detective again answered "No." When asked why he had not done so, the detective explained that, after talking to a

representative of the cellular service provider, he was of the opinion that the data was "unreliable" and had no "investigative value." On further questioning, the detective explained that

> "the information on the cell towers, they jumped around from minute to minute, one minute he's . . . in one part of the city, the next minute he's . . . in another part of the city. Two minutes later he's . . . back in another -- into a completely different part of the city."

As the detective described, a subscriber will be connected through a cell tower that is not necessarily the closest to the location of the telephone. The raw data showed that between 9 and 10:02 A.M. on April 16, 2012, the defendant's telephone connected to towers in Quincy and the South Boston, Dorchester, and Charlestown sections of Boston as well as at Logan Airport. Between 9:50 and 10:02 A.M., it was connected to a tower in Quincy.

On redirect examination, the detective testified that, in the course of his investigation, he had contacted the defendant's cellular service provider and had been told that cell towers near the ocean, such as in South Boston, can connect with other cell towers that are near an ocean, even at some distance away. In other words, the device could be connecting to a tower nowhere close to its location. Because the detective was not an expert in how the provider's equipment operated, the judge instructed the jury, immediately after the detective's testimony, that if they believed the detective's testimony, they

could use it only as evidence concerning why the information "might have caused the police to do something or not do to something with respect to their investigation."

The motion judge (who was also the trial judge) concluded that there was no discovery violation because the results of the detective's investigation were not exculpatory; the connection of the defendant's telephone to towers in multiple areas of Boston and a neighboring city, within minutes, tended to call into question the reliability of the CSLI data, whereas, evidently, if the data only showed that the defendant had been in Quincy, that would have been highly exculpatory. Given the detective's testimony, there was no error in the judge's conclusion that the CSLI data was not exculpatory, and thus that there was no Brady violation in the decision not to disclose the results of the detective's investigation.

As the defendant points out, however, in his motion for pretrial discovery, he specifically requested "[t]he results, including notes, reports, and summaries of . . . all scientific, forensic, or field tests regardless of whether the Commonwealth intends to introduce such evidence at trial," and his motion was allowed in full.[9] While the Commonwealth was not obliged to

[9] Because the detective concluded that the information was unreliable and not exculpatory, the Commonwealth also was under no obligation to provide the defendant with information about the existence of the service provider's statement, and the

create a report or a map from the raw data, the results of the detective's investigation appear to fall within the ambit of the allowed motion for nonmandatory discovery of the results of investigations and scientific tests, and thus should have been provided. See Mass. R. Crim. P. 14 (a) (2) ("The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery of other material and relevant evidence not required by subdivision (a) (1)").

Nonetheless, had the information been produced, it would have made no difference. The defendant's repeated insistence that the CSLI data showed his telephone in Quincy during the crucial minutes disregards the evident impossibility of being in the numerous locations included in the CSLI data within minutes of each other, and thus the lack of relevance of the locations of the cell towers to establishing the defendant's location at the time of the stabbing. Moreover, having been provided the raw data, including the cell tower numbers, the defendant could have sought information from the cellular service provider, or an independent technical expert, about the location of the towers and the meaning of the many different tower numbers in a short time period. Given that video surveillance footage showed the defendant apparently at a convenience store in South Boston

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identity of the individual who made the statement. See Mass. R. Crim. P. 14 (a) (1) (E).

at 10:02 A.M., however, the argument that his cellular telephone was in Quincy at that time likely would have had little if any impact on the jury's thinking. See Commonwealth v. Camacho, 472 Mass. 587, 601 (2015).

c. Prosecutor's closing argument. In both his motion for a new trial and on direct appeal, the defendant challenged certain statements in the prosecutor's closing argument. In her closing, the prosecutor argued:

> "And as regards to the lottery ticket records, ask yourselves, ladies and gentlemen, whether you can rely on the records of the Massachusetts State Lottery Commission, a billion dollar business, and as you recall from the testimony, ask yourselves whether truly the numbers don't match or whether there was some gamesmanship in the numbers playing by the defense, because what you know through the testimony of Mr. Carroll is that the reasons those VIRNs don't match up is because they are encrypted."

The defendant contends that the prosecutor improperly disparaged defense counsel by suggesting that his efforts to attack the validity of the lottery records constituted "gamesmanship," and that the prosecutor misstated the evidence by relying upon Carroll's speculative testimony, based on hearsay, that the VIRNs printed on the lottery records contained encrypted data. The defendant explicitly objected to the use of the word "gamesmanship." While the defendant did not object directly to Carroll's testimony about encryption, the judge allowed the defendant, at the voir dire of Carroll and at several sidebar hearings thereafter, a continuing objection to

Carroll's testimony on the subject of the VIRNs; at one sidebar, the judge cautioned defense counsel that his objection had been preserved and that there was no need to continue to object. Accordingly, we review the challenged statements for prejudicial error. See Commonwealth v. Morales, 461 Mass. 765, 784 (2012).

In his closing argument, the defendant argued that the jury should not accept the Commonwealth's attempt "to prove . . . that somehow, someway, that the lottery tickets that [the defendant] transacted[,] like thousands of other people that day, . . . that somehow those were Barbara Coyne's." The prosecutor properly could contest this characterization of the Commonwealth's evidence and argue that the ticket numbers of the redeemed lottery tickets were in sequence with those found in the victim's home. See Commonwealth v. Fernandes, 436 Mass. 671, 674 (2002), quoting Commonwealth v. Awad, 47 Mass. App. Ct. 139, 141 (1999) ("Within reason, prosecutors may be critical of the tactics utilized by trial counsel in defending a case"). While it is improper for a prosecutor to argue that the "whole defense" is a "sham," Commonwealth v. McCravy, 430 Mass. 758, 764 (2000), a prosecutor may characterize a particular point in defense counsel's closing argument as such, Commonwealth v. Lewis, 465 Mass. 119, 130 (2013). In so doing, however, a prosecutor may not "disparage[] defense counsel personally." Fernandes, supra.

In some circumstances, we have determined that a brief reference to defense counsel's argument as a "smoke screen" or "smoking mirrors" did not create a substantial likelihood of a miscarriage of justice, and that any prejudicial effect was cured by the judge's instruction that closing arguments are not evidence. See, e.g., Commonwealth v. Maldonado, 429 Mass. 502, 508-509 & n.4 (1999); Commonwealth v. Jackson, 428 Mass. 455, 463 (1998), S.C., 468 Mass. 1009 (2014). In Commonwealth v. Raposa, 440 Mass. 684, 697 (2004), we concluded similarly as to a prosecutor's statement that defense counsel could "spin gold from straw." By contrast, in Commonwealth v. Gentile, 437 Mass. 569, 581 (2002), we held that the prosecutor improperly disparaged the defense by characterizing a defense strategy as "despicable." We concluded that such a characterization "goes beyond labeling [a defense tactic] as unworthy of belief or lacking in merit and smacks more of an ad hominem attack." Id.

Here, the core of the defense was that the defendant had not been at the scene and was mistakenly being tied to it by incomplete or unreliable lottery records, where the Commonwealth's own reports contained multiple disparities. Most significantly, the different reports showed three different VIRNs for the same transaction, while Carroll testified that that number was unique for each ticket. In addition, one report had no ticket numbers for a series of transactions, while

another contained manually added information that the Lottery Commission investigator explained had been obtained from the ticket manufacturer. Defense counsel's challenge to the differences in the reports, and the investigator's explanation about what his "computer people" informed him had created the differences on the printed reports, accurately pointed out the acknowledged differences and suggested that they were a reason the jury should not credit the reports.

The prosecutor's use of the word "gamesmanship," however, could have emphasized to the jury that these apparently valid challenges to the numbers were what the judge described as a "red herring"; while unique to each ticket, the VIRNs were randomly generated, and the VIRNs of the winning tickets were unknown. The game, book, and ticket numbers, which were sequential and which, in combination, were also unique, were the key that tied the redeemed winning tickets to the tickets found in the victim's home, with matching game and book numbers, and ticket numbers close in sequence to the redeemed tickets. Thus, this remark about gamesmanship itself was not improper.

The prosecutor's statement about the encrypted VIRNs, however, was based on inadmissible hearsay and speculation about what the Lottery Commission investigator had been told by unidentified others. The defendant argues that the prosecutor misstated the evidence by asserting as a fact, based on

Carroll's hearsay testimony, that "the reason those VIRNs don't match up is because they are encrypted." "Although prosecutors are entitled to argue 'based on evidence and on inferences that may reasonably be drawn from the evidence,' they may not 'misstate the evidence or refer to facts not in evidence.'" Commonwealth v. Imbert, 479 Mass. 575, 585 (2018), quoting Commonwealth v. Kozec, 399 Mass. 514, 516 (1987).

When the testimony about encryption was introduced, the defendant did not move to strike it and did not request a limiting instruction. Accordingly, the testimony was admitted for all purposes, and the prosecutor therefore did not err in referring to it as substantive evidence. See Commonwealth v. Roberts, 433 Mass. 45, 48 (2000) (evidence was admitted for all purposes where no request for limiting instruction was made). See also Commonwealth v. Jones, 439 Mass. 249, 261 (2003) ("Hearsay, once admitted, may be weighed with the other evidence, and given any evidentiary value which it may possess" [citation omitted]). Nonetheless, the judge's error in allowing the admission of the encryption testimony without limitation did not give rise to a substantial risk of a miscarriage of justice.

The winning lottery tickets were far from the only evidence implicating the defendant. The Commonwealth's case included fingerprint evidence tying the defendant to jewelry boxes in the victim's bedroom and a bloody envelope in her living room. He

also was a possible contributor to DNA found under the victim's fingernails. The Commonwealth introduced evidence that the defendant likely had committed other break-ins to obtain money to support his heroin addiction; the defendant had told one of his friends that he routinely committed "B&Es" and would slice the throat of anyone who caught him in the act, and then he had displayed a knife in his sleeve. Video surveillance images showed the defendant at the convenience store, near a lottery terminal, within minutes of the victim's neck being cut. In addition, early in the afternoon of the stabbing, a witness who used heroin with the defendant testified that they had driven together to their source in Mission Hill, purchased heroin, and returned to South Boston to consume it.

Considering the evidence as a whole, the lottery records were a key part of the Commonwealth's case. While the forensic evidence was critical, it alone could not have supported a conviction. The prosecutor herself acknowledged the significance of the lottery tickets, stating during her closing, "That is what connects the defendant to Barbara Coyne and her murder." Nonetheless, it is unlikely that the improper admission of the encryption testimony altered the jury's perception of the lottery records in a meaningful way. See Commonwealth v. Santiago, 425 Mass. 491, 494-495 (1997). As stated, while the randomly generated VIRNs of the winning

lottery tickets were not known and not well explained or documented, and the tickets had been destroyed, the unique combination of book number, game number, and sequential ticket number were described clearly at trial, and the winning ticket numbers at issue were very close in numbered sequence to tickets from the same game and book found in the victim's home. As such, the error did not create a substantial likelihood of a miscarriage of justice.

d. Review under G. L. c. 278, § 33E. The defendant also argues that, although barely sufficient under the Latimore standard, see Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), the verdict was against the weight of the evidence, and therefore he should be granted relief under G. L. c. 278, § 33E. The defendant argues that "the verdict rested on a questionable foundation" because "the Commonwealth's evidence for the time of [the victim's] death left only a brief window between 9:48 and 10 A.M. -- a mere [twelve] minutes -- for the perpetrator to commit a bloody murder" and then "travel several blocks to the convenience store . . . with no visible trace of blood on his clothing." The defendant also points out that none of the video surveillance along the route from the Coyne residence to the convenience store captured any images of him during that time.

"[O]ur duty pursuant to [G. L. c. 278,] § 33E, is to determine whether the verdict returned is consonant with

justice." Commonwealth v. Berry, 466 Mass. 763, 770 (2014), citing Commonwealth v. Gould, 380 Mass. 672, 680 (1980). In this case, notwithstanding the brief window of time the defendant points out, we conclude that there is no reason to reduce the defendant's sentence or order a new trial. The defendant allegedly redeemed lottery tickets for the first time that day at 10:02 A.M., and he was not captured on video surveillance footage until 10:04 A.M.[10] That leaves, at a minimum, fourteen minutes (9:48 to 10:02 A.M.) for the defendant to slice the victim's neck, steal lottery tickets, rinse off in the victim's kitchen sink, and travel the short distance to the convenience store.

Although certainly the timeline is tight, it was not impossible for the defendant to have accomplished all of these action in the span of twelve to fourteen minutes. His own house was close to the Coyne residence, and he kept his boat at a yacht club a block from the convenience store and the victim's house. He was familiar with the neighborhood, where he had lived from childhood, and would have been able to navigate it quickly. With respect to the fact that the defendant was not captured on any surveillance cameras along the route from the

[10] The surveillance video inside the convenience store did not capture the winning lottery tickets actually being redeemed. Nor did the system capture the defendant entering the store.

Coyne residence to the convenience store, the Commonwealth presented evidence that a number of these cameras either were turned off or were inoperable during the relevant period.

Additionally, it is the function of the jury to determine the persuasiveness of the Commonwealth's evidence. On the fourth day of trial, the jury took a view of the Coyne and Kostka residences, the corner store, and the two nearby yacht clubs. In particular, the jury walked the few blocks from the Coyne residence to the convenience store. They thus were well positioned to evaluate the Commonwealth's version of events. We defer to their decision. Moreover, the nature of the killing, the possible defensive wounds on the victim, and the signs of a search of the house for valuables suggest no reason to reduce the conviction of murder to a lesser degree of guilt.

Judgments affirmed.

Order denying motion for a new trial affirmed.