

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRreporter@sjc.state.ma.us

SJC-13063

COMMONWEALTH vs. DARIUS GAMBOA.

Bristol. April 8, 2022. - July 20, 2022.

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

Homicide. Identification. Evidence, Identification, Relevancy and materiality, Polygraph test. Practice, Criminal, Mistrial, Instructions to jury, Capital case.

Indictments found and returned in the Superior Court Department on September 28, 2012.

The cases were tried before Renee P. Dupuis, J.

Jennifer H. O'Brien for the defendant.
Julianne Campbell, Assistant District Attorney, for the Commonwealth.

LOWY, J. Following a jury trial, the defendant, Darius Gamboa, was convicted of murder in the first degree on a theory of deliberate premeditation.¹ He appeals, arguing that (1) the

¹ The defendant also was convicted of unlawful possession of a firearm while not at home or work, unlawful possession of a loaded firearm, and two counts of intimidation of a witness.

judge improperly denied his motion for a mistrial, (2) the judge improperly permitted the Commonwealth to introduce testimony relating to polygraph evidence, (3) the judge improperly denied the defendant's request for a manslaughter instruction, and (4) this court should exercise its powers under G. L. c. 278, § 33E, to grant the defendant relief. We affirm.

Background. We summarize the evidence presented at trial, reserving certain details for later discussion.

On the evening of July 6, 2012, Julio Barbosa (victim) was killed by a single gunshot outside a convenience store in New Bedford. Shortly before he was killed, the defendant had driven to the convenience store with his father, Ryan Gamboa; after the two parked, they encountered the defendant's cousin Tyrell Gamboa nearby on the street, and Tyrell waited by the car while the defendant and Ryan walked toward the store.^{2,3}

Manuel Pina, a friend of Ryan's, "bumped into" Ryan on the way to the store, went toward the store with Ryan, and then stayed outside while Ryan entered the store alone. At around

² Because the defendant, the defendant's father, and the defendant's cousin share the same surname, we refer to each by his first name.

³ Tyrell was given a grant of immunity prior to testifying. At trial, Tyrell claimed to have trouble remembering the events surrounding the shooting. The judge found that Tyrell was feigning memory loss and permitted much of Tyrell's grand jury testimony to be admitted substantively.

that same time, Pina saw the victim in front of the store. The victim entered the store soon thereafter. Pina also described passing another man standing by the convenience store, whom Pina described as "tall" with "brown skin, curly hair," and "a wider nose."⁴

Meanwhile, inside the store, a store clerk witnessed Ryan and the victim get into an "aggressive" verbal argument. Moments later, the clerk saw the victim punch Ryan, and Ryan attempted to punch back. The clerk watched as the two men ran out of the store, with Ryan following the victim. What happened next was out of the clerk's vision, but he heard a loud crack.

Pina, who was still outside the store, saw the victim and Ryan run out of the store at nearly the same time. The two men ran past Pina, and Pina saw the victim fall and get back up. While watching the victim, Pina heard "fireworks or something" or a "pop" come from "behind the store" or "from like right around the corner." Pina saw the victim "grab[] himself" and heard him say that he had been shot as he fell back to the ground.

Another patron of the convenience store was sitting right outside when he saw two male figures near the store's entrance.

⁴ Pina also testified that he recognized this man as the defendant. As discussed infra, this statement should not have been admitted, and the trial judge forcefully instructed the jury to disregard it.

This witness saw Ryan "flip something," resembling a pocketknife, and then watched as the victim ran toward the street.⁵ Moments later, the witness saw a "flash" from the corner of the store, heard a "really loud noise," and then saw the victim "drop[]." This witness testified that he saw a hand and something that "resembled a gun" "on the corner [outside] of the [convenience store]," the same place he saw the flash and heard the noise. He also placed a man resembling the defendant outside of the store at the time of the shooting, describing a "tall, dark" man who was "a little bit on the heavyside side." He was able to point out the man in a still image from a surveillance video recording.

Another eyewitness likewise reported seeing a man resembling the defendant walking back and forth outside the store. This witness described the man as having a "big nose"

⁵ At trial, the store clerk likewise testified that Ryan was wielding a knife when he chased after the victim. However, on cross-examination, the store clerk confirmed that he originally had told the police that it was the victim who had carried a knife. Even if the clerk's prior statement to the police were admissible for the truth of the matter -- there having been no objection to the admission of that statement by the Commonwealth -- the clerk's conflicting testimony would not change the outcome here.

Although the defendant sought a manslaughter instruction and now challenges the trial judge's denial of his request, see infra, he did not request an instruction on defense of another, and the evidence -- even with the clerk's statement to the police -- would not have supported such an instruction.

and "carrying a white towel." The surveillance video also depicted a man with a white towel outside the store. When the police interviewed the defendant weeks later, he was carrying a towel or rag and told police that "he sweats a lot," "[s]o he uses a rag to wipe his face."

Tyrell testified that he still was waiting by the car when he heard a "bang" come from the vicinity of the store. A few minutes after the "bang," Tyrell saw the defendant and Ryan walking toward him. Tyrell, Ryan, and the defendant then left the scene.

Karissa Oliveira, the defendant's girlfriend, testified that she talked to the defendant the morning after the murder. The defendant told Oliveira that he was at the convenience store with Ryan the previous night. According to Oliveira's grand jury testimony, which was admitted substantively,⁶ the defendant

⁶ At trial, Oliveira's testimony was inconsistent with her sworn grand jury testimony. Instead, she claimed that she testified falsely before the grand jury. The trial judge allowed the grand jury testimony to be admitted substantively and as impeachment evidence under Mass. G. Evid. § 801 (d) (1) (2022).

Evidence at trial showed that when Oliveira first testified before the grand jury, she provided the defendant with a false alibi. After the defendant was arrested, Oliveira again was called before the grand jury, and prosecutors asked her to correct her prior testimony. She refused to do so. Consequently, she was arrested for misleading the police. A few days later, with her attorney present, Oliveira told law enforcement that she wanted to amend her grand jury testimony and then testified before the grand jury as recounted supra.

told Oliveira that he saw Ryan chase the victim, and that when the victim crossed the defendant's path, the defendant shot him one time.

Police and firefighters responded to the scene after multiple 911 calls from bystanders and a "shots fired" dispatch. An ambulance arrived and transported the victim to St. Luke's Hospital, where he was pronounced dead.

About a month after the shooting, the defendant voluntarily spoke to the New Bedford police. The defendant was indicted the following month, and after a jury trial, he was convicted of murder in the first degree, among other charges. See note 1, supra.

Discussion. 1. Motion for a mistrial. The defendant first contends that the trial judge erred in denying his motion for a mistrial. We disagree. The defendant had sought a mistrial after a witness, Pina, improperly testified about recognizing the defendant at the scene of the shooting, after

As discussed in more detail infra, defense counsel's primary trial strategy was to cast doubt on the credibility of the Commonwealth's witnesses by suggesting that the witnesses had been coerced into making certain statements. As part of this strategy, defense counsel emphasized this series of events, especially the fact that Oliveira was in custody during her interviews with police, to suggest that Oliveira's amended grand jury testimony was untrue and the result of police pressure.

the defendant's motion to suppress Pina's identification of the defendant previously had been allowed.

"We review the decision to deny a motion for a mistrial for an abuse of discretion." Commonwealth v. Bryant, 482 Mass. 731, 739 (2019). "Where a party seeks a mistrial in response to the jury's exposure to inadmissible evidence, the judge may correctly rely on curative instructions as an adequate means to correct any error and to remedy any prejudice to the defendant" (citations and quotations omitted). Id. at 740. Accordingly, although Pina's testimony constituted inadmissible evidence, given the judge's extensive and emphatic curative measures, we conclude that there was no abuse of discretion in denying the defendant's motion for a mistrial.

There is no question that Pina's testimony positively identifying the defendant was inadmissible. Pina previously had told investigators that he saw a man, whom he did not know, outside the convenience store at the time of the shooting. Pina had then identified this man as the defendant in a photographic array prepared by police. Prior to trial, the defendant successfully had moved to suppress this identification based on infirmities in the process by which police prepared the array and obtained the identification. However, at trial, when the Commonwealth sought to elicit a description of the man Pina had seen outside the store, Pina testified that the man's name was

"Darius" (i.e., the defendant's first name).⁷ The defense objected immediately and moved for a mistrial.

Despite the clearly improper testimony, the judge did not abuse her discretion in denying the mistrial motion. First, the judge provided timely and forceful curative instructions to the jury. After a brief sidebar conversation, and before any other evidence was presented, the judge told the jury:

"Jurors, with respect to the last statement made by this witness, you are to completely strike that. It's stricken from the testimony. If you wrote any notes along those lines, cross it out. It is to be stricken from your minds as best as you are able.

"I cannot emphasize that instruction to you enough. The statement just made by this witness is completely contrary to any other statement he gave prior to coming into this courtroom, so completely strike it from your minds."

Thus, not only did the judge instruct the jury to disregard Pina's improper testimony, but she also made clear that this testimony was inconsistent with all Pina's prior statements. Second, we presume that jurors follow curative instructions, see Commonwealth v. Hernandez, 473 Mass. 379, 392 (2015), and here the trial judge noted for the record that she saw several jurors crossing out writing in their notebooks during her instructions. Third, the judge spoke to Pina after Pina's testimony identifying the defendant, with the Commonwealth and defense

⁷ The judge accepted the Commonwealth's representation that Pina's improper testimony "was a complete surprise."

counsel present, instructing Pina not to identify the defendant again. While speaking with Pina, the judge determined that Pina had learned the name "Darius" from the court paperwork. Fourth, based on this information, the judge encouraged defense counsel to elicit testimony from Pina that he did not recognize the man at the time of the shooting and had called him "Darius" at trial based only on subsequent court paperwork. Defense counsel did so. Fifth, defense counsel read to the jury a stipulation that stated: "Manuel Pina was shown a photo array and did not make an identification of Darius Gamboa when the photo array contained a photograph of Darius Gamboa." Given these timely, thoughtful, and extensive curative measures, the judge did not abuse her discretion in denying the defendant's motion for a mistrial.

2. Testimony relating to polygraph testing. The defendant next contends that there were three instances at trial in which admitted polygraph evidence constituted reversible error. In particular, the defendant takes issue with (1) testimony from Oliveira about the fact that, when she was interviewed by the police, she was willing to undergo polygraph testing and was, in fact, connected to a polygraph; (2) testimony from Lieutenant David Domingos, a former police polygraph examiner, about polygraph testing generally and specifically as it was used in the instant case; and (3) a video recording of the interview

between Oliveira and Domingos, during which Oliveira was connected to a polygraph. We disagree and conclude that in no instance did the admission of the contested evidence constitute reversible error.⁸

Based on our existing case law, we reason that evidence that relies solely on the supposition that polygraph tests are reliable for its relevance or significance is inadmissible polygraph evidence. See Commonwealth v. Martinez, 437 Mass. 84, 88 (2002); Commonwealth v. Mendes, 406 Mass. 201, 201 (1989); Commonwealth v. Fatalo, 346 Mass. 266, 267-270 (1963). Evidence that refers to polygraph testing but is admitted for a purpose that does not depend on the reliability of polygraph tests is not inadmissible polygraph evidence but rather evidence that merely refers to polygraph testing. See Commonwealth v. Corcione, 364 Mass. 611, 620 (1974) ("this court has not held that otherwise admissible evidence must necessarily be excluded because it contains mention of lie detector test results").

⁸ Defense counsel objected to some but not all of the evidence at issue here. Thus, the defendant's argument involves preserved and unpreserved claims of error. Where the claims are preserved, "we review for prejudicial error." Commonwealth v. Niemic, 483 Mass. 571, 580 n.14 (2019). "An error is not prejudicial if it did not influence the jury, or had but very slight effect" (quotation omitted). Id., quoting Commonwealth v. Canty, 466 Mass. 535, 545 (2013). Where the claims are unpreserved, "we review any error for a substantial likelihood of a miscarriage of justice." Commonwealth v. Moffat, 486 Mass. 193, 201 (2020). The former standard of review is more favorable to the defendant than the latter.

Such evidence may, in certain circumstances, be admissible, assuming its probative value is not substantially outweighed by any risk of unfair prejudice. See Mass. G. Evid. § 403 (2022). "The effectiveness of limiting instructions in minimizing the risk of unfair prejudice should be considered in balancing [unfair] prejudice and probative value." Bryant, 482 Mass. at 735 (judge did not abuse discretion in admitting evidence of defendant's prior bad acts where, among other things, judge instructed jury on limited purpose of evidence during jury charge). Compare Commonwealth v. Jackson, 486 Mass. 763, 781-784 (2021) (despite graphic content, photographs properly were admitted where they were probative of "highly contested issue," and where judge twice instructed jury to consider photographs "dispassionately"); Commonwealth v. Dunn, 407 Mass. 798, 807 (1990) ("Because the evidence admitted was highly probative on the issue of motive, and the chance of prejudice was minimized by a specific limiting instruction," evidence of victim's pregnancy was not admitted in error), with Commonwealth v. Denton, 477 Mass. 248, 252 (2017) ("the limiting instruction to the jury was insufficient to mitigate the error given the inherent dangers in admitting evidence of predisposition"); Commonwealth v. Adams, 416 Mass. 55, 59 n.3 (1993) (judge's limiting instruction "to consider each confession only against its maker" was clearly insufficient to protect codefendant's

rights, as held in Bruton v. United States, 391 U.S. 123, 126 [1968]).

This court first considered "[t]he question of the admissibility of the results of a 'lie-detector' test" in Fatalo, 346 Mass. at 267-270. Based on the doubtful reliability of polygraph testing, given the scientific consensus at the time, we determined in that case that polygraph results were inadmissible. Id. at 270. Twenty-six years later, in Mendes, 406 Mass. at 201, we reexamined "the admissibility of polygraphic evidence in criminal trials in this Commonwealth," "conclud[ing] that polygraphic evidence is inadmissible in criminal trials in this Commonwealth either as substantive proof of guilt or innocence or as corroboration or impeachment of testimony." This holding was likewise based upon the lack of reliability of polygraph tests. Id. at 208 ("there remains no consensus among experts as to the accuracy of polygraph testing to detect deceit").

Relying and expanding on Mendes, in Martinez, 437 Mass. at 88, we held that "a defendant's offer to submit to a polygraph examination as evidence of consciousness of innocence is [also] not admissible." Specifically, we determined that the trial judge correctly had excluded evidence of the defendant's willingness to undergo a polygraph examination when "[t]he defendant [had] sought to have the evidence admitted in order to

show his state of mind, a consciousness of innocence." Id. We reasoned that the defendant's offer to undergo a polygraph examination was "a self-serving act undertaken with no possibility of any risk," since the polygraph results themselves could not be "used in evidence whether favorable or unfavorable," so "any inference of innocence [based on the defendant's offer was] wholly unreliable." Id. As in Mendes, we determined that evidence was inadmissible polygraph evidence when the purpose for which the evidence was admitted depended on the supposition that polygraph tests were reliable.

Specifically, our reasoning can be rearticulated as follows: the defendant's offer to undergo a polygraph test tended to show the defendant's consciousness of innocence only insofar as such an offer was meaningful; the offer was meaningful only insofar as the defendant would face consequences for making the offer under false pretenses; and the defendant would face such consequences only insofar as the results of the polygraph test itself were meaningful and admissible -- that is, reliable.

The instant case differs importantly from Martinez. During trial, defense counsel's primary strategy was to cast doubt on the credibility of the prosecution's witnesses by suggesting that the police had improperly coerced information from them. In his opening statement, for example, defense counsel stated: "I submit what you are going to hear is that information was

extracted from witnesses and that in that extraction process can you believe the finished product, can you believe what you are now being told is supposed to be the truth." The circumstances in which witnesses, including Oliveira and Tyrell, had been interviewed by police was an area of focus for both the Commonwealth and defense counsel.⁹ As a result, the contested evidence here could have been offered for one or both of two different, relevant purposes: either to show something about the internal experience of a witness (e.g., state of mind or truthfulness) or to show something about an external experience of a witness (e.g., conditions under which the witness was interviewed by police). Although evidence that could be used solely for the former purpose would constitute per se inadmissible polygraph evidence, evidence that could be used at least for the latter purpose would not. Where evidence can be

⁹ In his brief, the defendant argues that Oliveira claimed that her mistreatment by law enforcement occurred exclusively during an interview with an assistant district attorney and that, consequently, "how one polygraph examiner subsequently treated Oliveira during a single interview was irrelevant to her claims of intimidation." This argument misrepresents the trial record: while Oliveira did testify specifically about purported mistreatment by an assistant district attorney, she also agreed with defense counsel that she had been misled by the polygraph examiner, and more broadly, defense counsel repeatedly argued that law enforcement coerced prosecution witnesses, such as Oliveira, throughout the entire investigation. Thus, we consider the conditions under which Oliveira was "hooked up" to a polygraph machine to be extremely relevant to the claims made by defense counsel during trial.

for both purposes, such evidence would be admissible unless any risk of unfair prejudice -- arising from the fact that the evidence could be used for an impermissible purpose -- substantially outweighed the probative value of the evidence -- arising from the use of the evidence for a relevant and permissible purpose. See Mass. G. Evid. § 403.

After reviewing the three instances in which allegedly inadmissible polygraph evidence was admitted here, we determine that there was no reversible error. Some of the contested evidence was relevant only as it related to a permissible purpose and was therefore properly admitted. Some of the evidence was relevant as it related to both purposes -- only one of which was permissible -- but the probative value of that evidence was not substantially outweighed by any risk of unfair prejudice, and so the evidence was likewise properly admitted. Finally, one piece of evidence was admitted in error, as the risk of unfair prejudice substantially outweighed the probative value of the evidence, but we determine that this error was not prejudicial. Accordingly, none of the instances to which the defendant takes issue merits granting a new trial.

i. Oliveira's testimony. During the Commonwealth's direct examination, Oliveira stated that she had known at the time that she was to be administered a "lie detector test" and that she had been "hooked up" to a machine through "little circle things"

with wires. She also testified that she had not been in pain as a result of being "hooked up" to the polygraph.¹⁰ During cross-examination, defense counsel repeatedly emphasized that Oliveira had been "hooked up" to a polygraph and elicited from Oliveira the fact that although she believed she was being administered a polygraph test, no test had in fact been administered. In response to this testimony, defense counsel asked Oliveira: "So somebody once again was misleading somebody, right?" Finally, on the Commonwealth's redirect examination, Oliveira testified that during her interview with Domingos, she had told him that she would tell the truth and had said to him, "[j]ust hook me up to the thing"; "I wouldn't be here if I didn't plan on being truthful to get myself out of trouble"; and "[h]ook me up to the thing if you think I'm lying."

Oliveira's testimony during the Commonwealth's direct examination and the defense's cross-examination did not fundamentally rely on the supposition that polygraph tests are reliable and therefore was admissible. The relevance of this testimony did not depend on whether Oliveira passed or failed

¹⁰ Although the Commonwealth was the first party to refer explicitly to a "lie detector" or "polygraph" at trial, the Commonwealth did so with an innocuous question about Oliveira's comfort. This question was clearly in response to defense counsel's repeated suggestions, including in his opening statement, that the police had improperly "extracted" information from witnesses.

the polygraph test, or whether the test itself was reliable or not; rather, Oliveira's testimony was relevant and meaningful because it described the circumstances of her police interview. This testimony provided the jury with insight into how she was treated by police, and on cross-examination, defense counsel utilized the fact that Oliveira was misled about the polygraph as a vivid example of her mistreatment at the hands of the police. Consequently, we conclude that it properly was admitted.

Even testimony referencing the use of a polygraph carries with it the risk of unfair prejudice. Although we acknowledge that such testimony may be vital -- as it likely was here, given defense counsel's trial strategy -- we nevertheless caution against it generally. Oliveira's testimony during her redirect examination -- which included the fact that Oliveira had told Domingos, "[j]ust hook me up to the thing"; "I wouldn't be here if I didn't plan on being truthful to get myself out of trouble"; and "[h]ook me up to the thing if you think I'm lying" -- exemplifies the problems inherent in testimony referencing polygraph testing: Oliveira's testimony regarding her willingness to be "hooked up" to the machine could tend to show both the voluntariness of her encounter with police (i.e., a proper use of the testimony) and the truthfulness of her remarks to the police (i.e., an improper use of the testimony). Here,

we must weigh the probative value related to the former against the risk of unfair prejudice stemming from the latter. We determine that the risk of unfair prejudice did not substantially outweigh the significant probative value of the testimony and thus that the admission of the testimony was not in error.

The probative value of the testimony indeed was significant. The Commonwealth reasonably chose to rebut defense counsel's suggestion that the police had coerced witnesses. Defense counsel already had deployed the investigatory use of polygraph testing as part of a trial strategy to undermine prosecution witnesses by suggesting that witnesses had been coerced, rendering Oliveira's willingness -- even eagerness -- to undergo a polygraph examination relevant to a key contested issue at trial. Defense counsel had also forcefully argued that Oliveira had been made to lie on behalf of law enforcement, rendering her contemporaneous declarations of truthfulness vital rebuttal evidence for the Commonwealth. For example, during opening statement, defense counsel declared, "This case is going to hinge on credibility," and told the jury, "Ask yourselves after you have heard all of [Oliveira's] testimony whether or not you can put any stock in what it is that she has told you." During cross-examination of Oliveira, defense counsel insinuated that the police had coerced her into telling them not what she

believed to be true but rather what she believed they wanted to hear. And during his closing statement, defense counsel said, "This whole case hinges on one person: Karissa Oliveira. You decide, folks, do you believe her or do you not believe her. . . . [The police] were pressuring and manipulating and guiding her."

Although Oliveira's redirect testimony presented a risk of unfair prejudice, as noted supra, we do not think this risk substantially outweighed the significant probative value of the testimony in the face of defense counsel's trial strategy. The risk of unfair prejudice was mitigated by the fact that the jury already were aware, due to properly admitted evidence, that Oliveira had been connected to a polygraph machine during a voluntary encounter with the police. However, the trial judge provided relevant limiting instructions multiple times as the trial progressed. Although it would have been best had the trial judge given a contemporaneous instruction, we note that defense counsel did not ask for a limiting instruction at the time of Oliveira's testimony. Later during the trial, the judge repeatedly provided the jury with cogent and compelling instructions limiting the usage of the evidence related to Oliveira's interview with Domingos and cautioning the jury about the unreliability of polygraph testing. In addition to the limiting instructions given both during Domingos's testimony and

prior to the playing of the video recording, as discussed infra, the trial judge addressed Oliveira's testimony during her jury charge, telling the jury:

"[T]he prosecution did not know whether Ms. Oliveira was telling the truth. . . . Prosecutors, like the police, have no special methods of determining who is truthful or not. The credibility of this witness, as with all witnesses, is a matter for you alone to decide. The jury decides whether or not a witness is telling the truth in whole, in part, or not at all."

We may consider all these subsequent instructions when weighing the risk of unfair prejudice stemming from Oliveira's testimony. See Bryant, 482 Mass. at 737 (considering judge's final jury charge when weighing probative value against risk of unfair prejudice). Consequently, we conclude that, although it would have been better had the Commonwealth refrained from eliciting the testimony in a way that simultaneously could have bolstered Oliveira's credibility and had the trial judge provided contemporaneous limiting instructions, the admission of Oliveira's redirect testimony was not in error.

ii. Domingos's testimony. Domingos's testimony, elicited by the Commonwealth on direct examination, contained (1) information about his training in polygraphy, (2) an explanation of the process involved in administering polygraph tests, (3) statements that Oliveira had been willing to undergo a polygraph test and had believed she would do well, and (4) a statement that Tyrell had been willing to undergo a polygraph test. Of

note, after Domingos had testified as to his training and general process, but before he offered the relevant testimony about Oliveira, the judge provided the following limiting instruction to the jury:

"Jurors, before the witness goes any further with the testimony, I would like to make it very clear to you that the question that [the Commonwealth] is now going to put the witness about the conversation between this witness and Ms. Oliveira, you're not to consider that conversation between Ms. Oliveira and Lieutenant Domingos for the truth of anything that was contained in the conversation. You're only to consider the evidence that will be elicited by [the Commonwealth] from Lieutenant Domingos about the conversation as it bears on how the statement of Ms. Oliveira was made."

Defense counsel did not cross-examine Domingos.

Domingos's testimony about polygraphy generally, as well as the limited testimony about his background, did not constitute inadmissible polygraph evidence. He never testified as to whether he considered Oliveira to be telling the truth. Accordingly, his testimony regarding his expertise could not have been used to bolster the credibility of his assessment of Oliveira's truthfulness -- he never offered such an assessment or an assessment of the accuracy of polygraph testing. Instead, Domingos's training in and knowledge of polygraphy was relevant only as it related to the circumstances in which he interviewed Oliveira.¹¹ For example, he testified as to the importance of

¹¹ We note that some subset of Domingos's general testimony about polygraphy was not relevant; therefore, it was admitted in

maintaining a "calm" environment when administering a polygraph test, offering some rebuttal to defense counsel's assertion that Oliveira had been coerced or threatened in her interactions with the police. The purpose of this part of Domingos's testimony did not require any supposition about the reliability of polygraph testing, and so it was not inadmissible polygraph evidence.

Likewise, the admission of Domingos's testimony about Oliveira's willingness to undergo a polygraph test and her assertions of truthfulness did not constitute error. For the reasons discussed in relation to Oliveira's own testimony, this testimony had significant probative value, and any risk of unfair prejudice was mitigated by the instructions offered by the trial judge immediately prior to this testimony and repeated throughout the trial, limiting the use of this testimony to showing the context in which Oliveira's statements were made and the conduct of the police.

error. For example, he testified as to how polygraph machines work at a mechanical and physiological level. This testimony was not "of consequence in determining the action" and should not have been admitted. Mass. G. Evid. § 401. However, as discussed supra, this piece of Domingos's testimony had no bearing on his or Oliveira's credibility and was in no way premised on the supposition that polygraph tests are reliable. Consequently, although it was admitted in error, the error was harmless.

Finally, the admission of Domingos's testimony about Tyrell's willingness to undergo a polygraph test did not constitute prejudicial error.¹² The Commonwealth concedes that this testimony should not have been admitted at trial under Martinez, 437 Mass. at 88. However, we conclude that no prejudice inured to the defendant, as this admission would not have influenced the jury or would have had but very slight effect. Commonwealth v. Niemic, 483 Mass. 571, 580 n.14 (2019). The Commonwealth did not refer to Tyrell's willingness to undergo a polygraph test in its closing argument, and the trial judge later instructed the jury on the unreliability of polygraph tests. Moreover, Tyrell's testimony, which could have been bolstered by his willingness to undergo a polygraph test, was already corroborated by multiple other witnesses. Tyrell's testimony served to place the defendant at the scene; this testimony was cumulative of the testimony of at least two eyewitnesses who described a man resembling the defendant outside the convenience store, and of Oliveira, who testified that the defendant told her that he had been there.

iii. Video recording of Oliveira's interview. Finally, the jury were shown a video recording of Oliveira's interview, during which she was "hooked up" to a polygraph and interviewed

¹² Defense counsel timely objected to this testimony from Domingos.

by Domingos. As it relates to polygraph testing, the video recording was largely cumulative of Oliveira's and Domingos's testimony about the circumstances surrounding Oliveira's interview with the police. For example, Oliveira could be heard making statements indicating her willingness to undergo a polygraph and asserting that she would be truthful. For the reasons discussed supra, we determine that this recording had significant permissible probative value, as it tended to show the manner in which Oliveira was treated by the police. Mitigating the risk of unfair prejudice, the trial judge provided a strong limiting instruction to the jury immediately prior to playing the video, telling the jury:

"The Commonwealth at this point is offering the recording of the interview between Lieutenant Domingos and Karissa Oliveira for a limited purpose. I have very particular and very important instructions regarding how you may use this evidence.

"As an initial matter, polygraph examinations are not admissible at trial in the courts of the Commonwealth of Massachusetts. Our Supreme Judicial Court has deemed the science underlying polygraph procedures is too unreliable to be admissible in court. . . . The Commonwealth is now offering the recording of the interview on the limited issue of the manner in which the interview was conducted and the interactions between Lieutenant Domingos and Ms. Oliveira.

"You are not to consider the statements that are made during the course of this interview either by Ms. Oliveira or by Lieutenant Domingos for the truth contained in those statements. You may only consider the recording as it bears on your determination of the circumstances under which the statements by Ms. Oliveira were made and on whether the police used coercive or bullying tactics to

obtain that statement. Your consideration must be limited to that one issue and that one issue, alone, and nothing else. . . ."

In addition, the judge reminded the jury of these instructions during her jury charge. Given the forceful limiting instructions from the trial judge, as well as the fact that the jury were already properly made aware of Oliveira's willingness to undergo polygraph testing, we conclude that the admission of the video was not in error on the grounds that the video was inadmissible polygraph evidence.

The defendant offers a second argument regarding the video's inadmissibility, contending that the admission of the video constituted error because it contained inadmissible hearsay and statements revealing prior bad acts by the defendant. We note, first and foremost, that the video was not admitted for the truth of the matter asserted, and the jury was instructed as such. By definition, no improper hearsay was introduced through the admission of the video. See Mass. G. Evid. § 801 (2022) (hearsay is out-of-court statement that "a party offers in evidence to prove the truth of the matter asserted in the statement"). Furthermore, we reason that the probative value of the video was not outweighed by the risk of unfair prejudice related to the defendant's prior bad acts. See Mass. G. Evid. § 404 (b) (2). See also Commonwealth v. Crayton, 470 Mass. 228, 249 & n.27 (2014) (where admitted substantively,

"'other bad acts' evidence is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk"). As discussed supra, the video allowed the jury to assess the conditions under which Oliveira spoke to police -- a contested issue that went to the heart of defense counsel's primary trial strategy. The video's probative value was significant. The risk of unfair prejudice from the defendant's prior bad acts, however, was not. The defendant takes issue with recorded statements that the defendant illegally possessed marijuana, that the defendant asked Oliveira to lie for him about the marijuana, and that Oliveira's parents disliked the defendant. Defense counsel had already elicited testimony from Oliveira about her arrest for possession of marijuana and the fact that she was with the defendant at the time; likewise, Oliveira had already testified that the defendant had asked her to provide him a false alibi and that her parents became upset with her continued involvement with him.

The defendant lastly argues that the video contained prejudicial remarks from the police to Oliveira. The defendant objects to remarks from Domingos to Oliveira that she "seem[ed] like a nice girl," "seem[ed] like a normal kid growing up," that he knew what kind of person she was, and that she was "very brave." Although these remarks would constitute inadmissible

opinion testimony if offered for the truth of the matter asserted, they were not so offered here, and the judge gave limiting instructions to that effect. Given these instructions, we again reason that any risk of unfair prejudice did not substantially outweigh the probative value of these remarks: the police's treatment of Oliveira -- which includes the manner in which the police spoke to her -- was a significant and contested issue at trial, and the video was admitted precisely because it showed the conditions under which Oliveira interacted with the police.

3. Manslaughter instruction. Finally, the defendant argues that the trial judge erred in denying his request for a voluntary manslaughter instruction. We disagree.

"A manslaughter instruction is required if the evidence, considered in the light most favorable to a defendant, would permit a verdict of manslaughter and not murder." Commonwealth v. Pina, 481 Mass. 413, 422 (2019). "Voluntary manslaughter is an unlawful killing arising not from malice, but from . . . sudden passion induced by reasonable provocation, sudden combat, or excessive force in self-defense." Commonwealth v. Yat Fung Ng, 489 Mass. 242, 257 (2021), quoting Commonwealth v. Acevedo, 446 Mass. 435, 443 (2006).

The defendant's argument focuses on the first of these theories of voluntary manslaughter: reasonable provocation.

"Reasonable provocation is provocation by the person killed . . . that would be likely to produce such a state of passion, anger, fear, fright, or nervous excitement in a reasonable person as would overwhelm his capacity for reflection or restraint and did actually produce such a state of mind in the defendant." Commonwealth v. Brea, 488 Mass. 150, 156 (2021). That is, "[a] jury instruction on reasonable provocation is warranted only if there is sufficient evidence 'to create a reasonable doubt in the minds of a rational jury that a defendant's actions were both objectively and subjectively reasonable.'" Yat Fung Ng, 489 Mass. at 257, quoting Brea, supra.

"[I]t is well established that the provocation must 'come from the victim' and [crucially, in the instant case] be directed at the defendant." Yat Fung Ng, 489 Mass. at 258, quoting Commonwealth v. LeClair, 445 Mass. 734, 741-743 (2006). We have held, for example, that there can be no reasonable provocation as a matter of law where "[n]o threatening action was directed toward the defendant," and "[a]t most, [the defendant] witnessed a casual acquaintance being punched before [the defendant] joined in and fired." Brea, 488 Mass. at 156-157. Likewise, we have concluded that there was no reasonable provocation -- although the defendant had witnessed the victim assault a third party and had himself been attacked by the

victim's associates -- because "there was no evidence that the victim had directly threatened or assaulted the defendant."

Commonwealth v. Medina, 430 Mass. 800, 809-810 (2000).

Here, too, there is no evidence that any of the victim's actions were directed at the defendant. Indeed, even the defendant's argument about the existence of reasonable provocation centers on the altercation between Ryan and the victim; the defendant makes no claim that he himself was engaged with the victim at all. Although we acknowledge the unique circumstance of witnessing an altercation involving one's own father, there is nothing in the record to suggest that the victim's conduct, even secondarily, was directed at the defendant. Moreover, at the time the victim was shot, he was fleeing Ryan, who was chasing after him. Where no threatening action had been directed at the defendant, and the defendant's father was in the process of chasing or even assaulting the victim, "no rational jury, considering the situation objectively, could have believed on this record that a reasonable person in the defendant's position would be provoked to act as he did." Brea, 488 Mass. at 156. Consequently, the trial judge did not err in denying the defendant's request for an instruction on voluntary manslaughter.

4. Review under G. L. c. 278, § 33E. Having conducted a careful review of the record, we decline to exercise our

authority under G. L. c. 278, § 33E, to order a new trial or reduce the degree of guilt.¹³

Judgment affirmed.

¹³ The defendant has asked us to reduce the verdict in consideration of the fact that he was twenty years old at the time of the shooting, arguing that "the ever evolving science . . . supports that the [twenty] year old brain is still immature." However, we have never held that a defendant over the age of eighteen could not be convicted of murder in the first degree, and the defendant has provided nothing on the record to support his scientific contentions. See Commonwealth v. Denson, 489 Mass. 138, 154 (2022) (rejecting similar argument). Cf. Commonwealth v. Watt, 484 Mass. 742, 756 (2020) ("We . . . remand this case to the Superior Court for development of the record with regard to research on brain development after the age of seventeen. This will allow us to come to an informed decision as to the constitutionality of sentencing young adults to life without the possibility of parole").