SJC-13324

COMMONWEALTH vs. LUIS GOMEZ.

Hampden. January 10, 2025. - April 17, 2025.

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

Homicide. Evidence, Identification, Videotape, Motive, Opinion, Relevancy and materiality, Hearsay, Rebuttal, Intent, Argument by prosecutor, Inference. Constitutional Law, Fair trial, Assistance of counsel. Due Process of Law, Fair trial. Practice, Criminal, Verdict, Assistance of counsel, Argument by prosecutor, Opening statement, Capital case. Intent.

Indictment found and returned in the Superior Court Department on March 8, 2019.

The case was tried before Douglas H. Wilkins, J., and a motion to reduce the verdict, filed on February 1, 2023, was heard by him.

Jillise McDonough for the defendant.
Travis H. Lynch, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. A Superior Court jury convicted the defendant, Luis Gomez, of deliberately premeditated murder in the first degree in connection with the shooting death of Jesus Flores at

the entrance to a Springfield nightclub. At trial, the primary issue for the jury's determination was the defendant's identification as the shooter. To prove identification, the Commonwealth relied on surveillance video footage from several cameras inside and outside the nightclub. The defendant argued, in part, that the Commonwealth was unable to prove identification beyond a reasonable doubt due to the poor quality of the surveillance footage. After the conviction, the trial judge reduced the verdict to murder in the second degree pursuant to Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995) (rule 25 [b] [2]), based on a lack of evidence of deliberate premeditation and lethal intent.

The defendant raises three arguments in this direct appeal. First, the evidence introduced at trial was insufficient to support a conviction. Second, the judge erred in allowing a compilation videotape (compilation video) in evidence that stitched together portions of surveillance footage from multiple cameras. Third, the judge improperly allowed a police officer to testify to a hearsay statement made by the fatally wounded victim to rebut a challenge to the adequacy of the police investigation. Additionally, the Commonwealth appeals from the reduction of the verdict to murder in the second degree.

After a thorough review of the record under G. L. c. 278, § 33E (§ 33E), and for the following reasons, we affirm the

conviction of murder in the first degree, reverse the reduction of the verdict as an abuse of discretion, reinstate the jury's verdict, and remand the matter to the Superior Court for resentencing.

1. Background. a. Facts. We recite the facts that the jury could have found, viewed in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979), reserving some facts for later discussion of particular issues.

On November 3, 2018, the victim's cousin, Fernando Garcia, hosted a birthday celebration at a Waltham Avenue nightclub in Springfield. He posted details about the event, which featured performances by local musicians, on a social media site. The victim, a chef by trade, provided security as a doorman. Among his duties, the victim pat frisked individuals entering the nightclub for weapons.

The nightclub was within a warehouse occupying most of Waltham Avenue. A large portion of the evidence at trial was corroborated through video surveillance recordings from the interior and exterior of the nightclub, and from three area businesses. In addition, the Commonwealth introduced in evidence video footage of the performers and the crowd filmed by a Springfield-based photographer.

The defendant conceded that he attended the birthday party. He was dressed in a blue pullover hooded sweatshirt with short, thick, white ties on the neckline tied in a bow. He also wore a blue Oklahoma Thunder baseball cap with a reflective sticker visible in the middle of the brim and white-soled shoes. The defendant has an owl tattoo on the left side of his neck, a feature displayed to the jury at trial. He was accompanied by a taller man dressed in a distinctive multicolored red, white, and blue "USA" windbreaker, and a Chicago Blackhawks baseball cap. Other partygoers were attired similarly in sweatshirts, jeans, sneakers, and baseball caps associated with various sports teams.

Prior to the fatal shooting, an altercation of unknown origin broke out inside the nightclub involving many partygoers, including the defendant. Thereafter, the defendant left the nightclub and hurriedly walked along Waltham Avenue to a white van parked across the street in front of a four-bay garage. He opened the driver's side door of the van and reached inside to retrieve an item, by inference a firearm, and walked back to the nightclub at the same fast pace.

The nightclub's exterior surveillance camera recorded the defendant outside the club. He stood next to his taller companion at the front entrance. Holding a handgun in his right hand, he "racked" the slide to chamber a round of ammunition.

He had been yelling at the victim, who was positioned at the door blocking entry into the club. During the exchange, the victim spoke to the defendant with his hands raised in a conciliatory posture. The defendant pointed the firearm at the victim and fired. After the victim ran away clutching his abdomen, the defendant and his companion fled on foot, entered the white van, drove away from the nightclub, and turned onto Wilbraham Avenue, an adjacent street.

Nelson Nieves, who was scheduled to perform that night, witnessed the shooting.[1] He observed the defendant and his taller companion, who was dressed in a "white, red, and blue windbreaker," outside the front door entrance. The victim (whom Nieves identified as the doorman) closed the door, preventing the two men, who were screaming at patrons inside the club, from gaining entry. In addition, the victim attempted to calm the defendant and his companion to "defuse whatever [the] situation was." Next, the defendant, brandishing a handgun, twice repeated the phrase, "What's up?" According to Nieves, the defendant was "pissed" and "bugging the fuck out." The defendant yelled, "What the fuck?" and "What the fuck is up?" and insisted on fighting. At some point in the altercation, the

[1] Nieves testified that he was unable to recall the events of November 3, 2018, or his subsequent videotaped police interview. The recorded interview was entered in evidence without objection. See Mass. G. Evid. § 803(5)(A) (2024).

defendant "racked the gun." Again, the victim attempted to defuse the situation, telling the gunman, "Hey man, calm down." The defendant asked the victim, "Which car is yours?" The victim replied, "None of these cars are mine." The defendant opened fire.

Focused on the gun, Nieves was unable to identify the shooter when later interviewed by the police. He nonetheless described the shooter as a short man wearing a dark gray sweatshirt. One of the officers interviewing Nieves pressed him on this description, asking, "[A]re you sure about the clothing?" Nieves responded, "It's dark gray."

The wounded victim, clutching his abdomen, ran across Waltham Avenue and through a yard to Wilbraham Avenue. There, he knocked on the passenger's side window of a car parked on the side of the road. The victim, who was clutching his midsection, asked the driver for help. Before she could assist, the victim walked across the street. "After a while," a white van sped down Wilbraham Avenue and struck the car's side mirror.

At 10:27 P.M., Springfield police officers responded to gunfire in the vicinity of Waltham Avenue. The officers found the victim on a walkway in front of a Wilbraham Avenue residence. He was suffering from two gunshot wounds: one to his abdomen and the other to his right knee. He died ten days later due to complications from the abdominal gunshot wound.

The fatal round entered his abdomen two inches right of the midline at the level of the umbilicus. It exited on the left side of the body five and one-half inches from the midline. The wound path was right to left and slightly upward. The gunshot wound to the victim's knee fractured his patella (kneecap).

Police attempted to enter the nightclub after the shooting. Blocked by uncooperative patrons, the officers pepper sprayed the crowd and forced their way inside. The officers systematically identified each of the approximately fifty attendees by checking identifications and verifying biographical information through a police database. The defendant was not present.[2]

Investigators recovered eight expended .40 caliber cartridge casings outside the nightclub near the front door, and a .40 caliber live round on top of the doormat. A ballistics expert testified that moving the slide to the rear to rack a pistol will eject a previously chambered live round. Police also found a projectile within the victim's clothing. All the expended casings, as well as the projectile, were fired from the same .40 caliber firearm. Police never recovered the murder weapon.

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[2] The front door was the only means of entry and egress at the nightclub.

b. Prior proceedings. A grand jury returned an indictment charging the defendant with murder in the first degree of Jesus Flores, in violation G. L. c. 265, § 1. After a nine-day trial, the jury on September 3, 2021, found the defendant guilty of murder in the first degree by deliberate premeditation. The trial judge sentenced the defendant to a mandatory life term in State prison without the possibility of parole. The defendant timely noticed his appeal, and the case was entered in this court on September 14, 2022.

On December 16, 2022, the trial judge issued a "procedural order" directing the parties to brief whether he had the authority, on his own motion, to consider reduction of the verdict from murder in the first degree to murder in the second degree, and whether there was sufficient evidence of intent to kill. In response, the defendant filed, pursuant to rule 25 (b) (2), a motion to set aside the verdict or, in the alternative, reduce the verdict to murder in the second degree or manslaughter. We remanded the case to allow the trial judge to address the issue. The judge determined that there was evidence sufficient to support a verdict of murder in the first degree. He also determined that the weight of the evidence, although sufficient to support the jury's verdict, pointed to the lesser crime of murder in the second degree. The judge reduced the jury's verdict accordingly and resentenced the

defendant to life with the possibility of parole. The Commonwealth timely noticed its appeal from the postconviction order.

2. Discussion. a. Sufficiency of the evidence. The defendant moved for a required finding of not guilty at the close of the Commonwealth's case and at the close of all evidence. After trial, he moved to set aside the verdict as against the weight of the evidence. At each turn, and now on appeal, he has argued that the Commonwealth failed to introduce sufficient evidence to permit the jury to find beyond a reasonable doubt that he was the shooter.

In determining whether the evidence was sufficient to sustain a conviction, we consider the evidence in the light most favorable to the Commonwealth. Latimore, 378 Mass. at 677. "A conviction may rest exclusively on circumstantial evidence, and, in evaluating that evidence, we draw all reasonable inferences in favor of the Commonwealth." Commonwealth v. Jones, 477 Mass. 307, 316 (2017). Inferences "need only be reasonable and possible and need not be necessary or inescapable." Commonwealth v. Lao, 443 Mass. 770, 779 (2005), S.C., 450 Mass. 215 (2007) and 460 Mass. 12 (2011), quoting Commonwealth v. Longo, 402 Mass. 482, 487 (1988). "A conviction may not, however, be based on conjecture or on inference piled upon inference." Jones, supra.

Applying these standards, we conclude that the evidence was sufficient to permit a rational jury to find, beyond a reasonable doubt, that the defendant was the shooter. See Commonwealth v. Coates, 89 Mass. App. Ct. 728, 732 (2016) ("It is not necessary that any one witness should distinctly swear that the defendant was the [perpetrator], if the result of all the testimony, on comparison of all its details and particulars, should identify [the defendant] as the offender" [citation omitted]). There was no dispute that the defendant attended the event prior to the shooting. Clear color video footage recorded inside the nightclub, as well as still photographs taken from that footage, depicted the defendant dressed in a blue pullover hooded sweatshirt with short, thick, white ties on the neckline tied in a bow. He also wore a blue Oklahoma Thunder baseball cap with a reflective sticker visible in the middle of the brim, and white-soled shoes. Accompanying the defendant inside the nightclub was a tall man wearing a distinctive multicolored red, white, and blue "USA" windbreaker, and a Chicago Blackhawks baseball cap. The video images also depicted the defendant's physical features, such as a stocky build and shorter height relative to his taller companion. This evidence, as the judge found, provided "a solid reference point for comparison with video of the shooter before and during the shooting." See Commonwealth v. Phillips, 495 Mass. 491, 495 (2025) (jury able

to observe defendant sitting in court room and assess points of similarity to videotaped image of shooter, such as build, posture, and height).

We also agree with the judge's determination that a rational jury could have found that the shooter (shown on the front door video footage), like the defendant, "was wearing a hat of the same size and style with a sticker on the brim; a pull-over hoodie with visible white ties; and shoes with white soles." The shooter's white ties, we note, were thick and tied in a bow at the neckline. In addition, the front door video footage depicted the shooter's companion -- a taller man relative to the shooter -- wearing a distinctive multicolored windbreaker.

These points of comparison, together with Nieves's testimony, permitted the jury to track the defendant's movements inside and outside the nightclub and determine a motive for the killing. In sum, the defendant and his companion entered the nightclub after parking the white van on Waltham Avenue. The defendant appeared to be enjoying himself; he filmed a performance on his cell phone and spoke to other partygoers. Then, he abruptly left the nightclub following an altercation. On leaving, the defendant hurriedly retrieved a firearm from the white van and returned to the nightclub. "[T]he shooter," as the judge observed, "probably had to leave the club and retrieve

the gun from somewhere outside the venue" because the doormen were patting down the guests for weapons prior to entry. At the front door, the defendant and his companion yelled at the victim, who prevented the two men from reentering the nightclub. The judge found that the defendant's hostility was "consistent with the emotions that appeared to arise from the earlier commotion inside the club." After the shooting, the defendant and his companion fled in the white van parked down the street from the nightclub. When police arrived and secured the nightclub, the defendant was not among the many remaining patrons.

The defendant points to weaknesses in the Commonwealth's evidence. For example, almost every male in the nightclub was wearing a baseball hat bearing a sports team logo, with a sticker affixed to the brim, and a sweatshirt. In addition, although the shooter held the gun in his right hand, the defendant is left-handed. These discrepancies in the evidence were for the jury to resolve. See Commonwealth v. Clary, 388 Mass. 583, 588-589 (1983).

b. Compilation video. Michael Riggins, a Springfield police department civilian employee, created a thirteen-minute compilation video from surveillance footage introduced in evidence. To do so, he examined footage recorded before and after the shooting from the interior and exterior of the

nightclub, the photographer, and three area businesses. Riggins testified that he focused on "certain items of clothing," without elaboration. He then placed a location marker (a red circle) in several portions of the compilation video around the entire body of "individuals that we were looking at."[3] In addition, Riggins decreased the playback speed of the footage depicting the shooting and enlarged the images of the shooting.

The defendant objected to the introduction of the compilation video. Before trial, he filed a motion in limine to preclude the introduction of lay opinion identification testimony, contending that "[t]he Commonwealth now seeks to elicit testimony from [the lead detective] and/or Mr. Riggins relating to their opinions and conclusions about the person they opine is the defendant in the gray scale surveillance videos." This testimony, the defendant maintained, "would usurp the role of the jury" to determine whether the defendant appeared to be the same person depicted in the video recordings. Prior to

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[3] The red circles appear in seven brief segments (ranging from a few seconds to less than one minute) of the thirteen-minute compilation video. The red circle drew focus on (1) the defendant and his companion exiting the white van parked on Waltham Avenue; (2) the defendant moving the white van to the opposite side of the street; (3) the confrontation inside the nightclub; (4) the defendant leaving the club headed in the direction of the white van; (5) the defendant's walk toward the white van on Waltham Avenue; (6) the shooting; and (7) the defendant and his companion fleeing the crime scene in the white van.

Riggins's testimony, the defendant asked the judge to exclude the compilation video. He asserted that this court, in Commonwealth v. Wardsworth, 482 Mass. 454, 476 (2019), and Commonwealth v. Davis, 487 Mass. 448, 469 (2021), S.C., 491 Mass. 1011 (2023), "made it quite clear that opinion evidence is not admissible in these circumstances when the [j]ury has the video themselves, and they can make their own judgments."[4]

After confirming that the Commonwealth's witnesses would not testify to a "match" and stressing that "the jury will have to draw its own conclusion," the judge overruled the defendant's objection to the introduction of the compilation video. It was permissible, he ruled, to invite the jury to compare the defendant to the individual in the video, "but not [to] draw[] the conclusion that it's a match." The judge further determined that the overlayed red circles in portions of the compilation video were permissible, observing that the red circles function as "the electronic version" of a witness wielding an old-fashioned wooden pointing stick. He determined that the

[4] In Davis, 487 Mass. at 469, we held that it was unreasonable for the Commonwealth to ask the jury to identify the defendant where the video "is not high enough resolution and is taken from too far away to be able to discern any features of the shooter's face." This was not an issue in this case. The Commonwealth did not argue that the jury could identify the defendant in images of the shooting from the exterior video of the front door.

prosecutor was entitled to ask the jury to focus on relevant images in the video recordings.

On appeal, the defendant contends that the judge abused his discretion in admitting the compilation video because it "usurped the function of the jury" in violation of his Federal and State constitutionally protected due process and fair trial rights. Because the defendant objected to the admission of the compilation video as impermissible lay opinion evidence, we review the judge's evidentiary ruling for prejudicial error resulting from an abuse of discretion. See Commonwealth v. Pina, 481 Mass. 413, 429 (2019); L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

The identification of an individual from a photograph or video image is an expression of lay opinion. Pina, 481 Mass. at 429, citing Commonwealth v. Pleas, 49 Mass. App. Ct. 321, 323-324 (2000). A witness may offer an opinion concerning the identity of someone on a video recording "when the witness possesses sufficiently relevant familiarity with the defendant that the jury cannot also possess" (citation omitted). Commonwealth v. Vacher, 469 Mass. 425, 441 (2014). See Mass. G. Evid. § 701 note (2024) (witness's opinion concerning identity of person depicted on videotape admissible only where witness is more likely than jury to identify person correctly from videotape). Without such a foundation, lay opinion

identification is improper, as it usurps the jury's ability to draw their own conclusions regarding the identity of the individual depicted on videotape. Wardsworth, 482 Mass. at 475.

Here, there was no error because no witness identified the defendant as the shooter depicted in the compilation video. Riggins explained that he compiled surveillance footage from different cameras and then placed location markers on "individuals that we were looking at" based on "certain items of clothing." Importantly, he neither described these items of clothing to the jury nor used the compilation video to compare items of clothing in the images of the shooter to those undisputably worn by the defendant. This testimony stands in contrast to the evidence before the court in Wardsworth, 482 Mass. at 474. In Wardsworth, a detective opined that a person shown in the surveillance video was dressed "similar[ly]" to the defendant, and a second detective not only opined that the defendant's attire "was a definitive match to that of what [he] saw in the video earlier in the evening," but also concluded that the defendant "appeared to be the same person from the video." Id. at 474-475. The Commonwealth also introduced "photographs of the defendant, with arrows pointing to the 'points of comparison [a detective] used when looking at the video." Id. See Commonwealth v. Robertson, 489 Mass. 226, 236-237, cert. denied, 143 S. Ct. 498 (2022) (witness arguably

strayed "too close to the line" of improper lay opinion by testifying to "looking for similar features," such as tattoos when comparing defendant's photograph to image of suspect).

Moreover, before the compilation video was played for the jury, the judge provided a thorough limiting instruction on its proper use:

> "It's up to you to figure out whether this is helpful to you, not helpful to you, whether it is a different way to put it together, and you're going to be asked to look at things for comparison purposes. The witness has no idea what happened that night. He has no personal knowledge, no ability better than you to decide. So it's up to you, ultimately, to decide. . . . [A]re the comparisons worthwhile? Are they not worthwhile? Are they wrong? Are they right? It's completely your decision, and you should not defer in any way to this witness on that. He's just drawing your attention to certain things."

Accordingly, the judge did not abuse his discretion in denying the defendant's challenge to the compilation video as inadmissible lay opinion evidence.

The defendant also challenges the admissibility of the compilation video on the grounds that the manner in which the video was presented "created an unfair cognitive bias that would have improperly influenced the jury and usurped their function." He raises three related arguments. First, the prosecutor's opening statement "primed the jury" to identify the defendant by drawing their attention to the similarities in the articles of clothing worn by the defendant and the shooter. Second, the prosecutor's description of the video images in his closing

argument "was essentially an additional lay opinion that [the defendant] was the shooter." Third, the Commonwealth unfairly added its own "gloss" to the compilation video by inserting red circles around the person claimed to be the defendant. Because the defendant raises these arguments for the first time on appeal, we review under the substantial likelihood of a miscarriage of justice standard. See Commonwealth v. Morales, 483 Mass. 676, 677 (2019).

The prosecutor's opening statement and closing argument did not exceed the bounds of propriety. In the opening statement, the prosecutor stated that Riggins

> "was able to stitch together a compilation of film footage that follows the shooter by the use of various markers. Markers from head to toe, literally, side to side. Markers that include on the shooter a distinctive hat, a bright reflective sticker on the brim of that hat, of a hoodie[,] to the soles of his shoes[,] to the laces tied tight at the neck of that hoodie."

Further, the prosecutor urged the jury, in summation, to identify the defendant as the shooter by following the "footprints on the screen." Referring to the compilation video, he argued:

> "Michael Riggins . . . compiled it. The markers are front and center. The footsteps are plain and easy to follow. I suggest to you again that if you follow the [ties] on the sweatshirt, you follow the sticker on the hat, you follow the shoes, you follow the sidekick, and follow the van, . . . they are going to take you directly to this man, [the defendant], before you."

The defendant, as mentioned, did not object to the prosecutor's opening statement or this portion of the closing argument.

The lack of an objection to either is understandable. A prosecutor, in an opening statement, is entitled to state what he or she "expects to be able to prove or support by evidence" (citation omitted). Commonwealth v. Kapaia, 490 Mass. 787, 794 (2022). That is precisely what the prosecutor did here; the evidence previewed by the prosecutor in his opening statement mirrored the actual evidence at trial. A prosecutor in a closing argument may argue forcefully for a conviction based on the facts in evidence and the reasonable inferences drawn from those facts. Commonwealth v. Rutherford, 476 Mass. 639, 643 (2017). In this case, the prosecutor did not stray over the line by asking the jury to draw a reasonable inference of the defendant's identity from the video images introduced in evidence.

Further, the opening statement and closing arguments did not constitute impermissible lay opinion evidence because the arguments of counsel are not evidence. See Commonwealth v. Silanskas, 433 Mass. 678, 691 (2001). Indeed, prior to opening statements, the judge instructed the jury that opening statements and closing arguments are not a substitute for evidence. Likewise, in the final charge, the judge reminded the jury that the statements and arguments of counsel are not

evidence. He also informed the jury: "You must determine the facts solely and entirely on the evidence as you've heard it and seen it in this court room and nothing else." The jury are presumed to follow the judge's instructions. Commonwealth v. Lora, 494 Mass. 235, 254 (2024).

We conclude also that the Commonwealth's introduction of the compilation video with red circles directing the jury to focus on the alleged assailant did not create a substantial likelihood of a miscarriage of justice. There is no dispute that the compilation video was authenticated properly as a subset of surveillance video footage "that had already been admitted in evidence." Commonwealth v. Sosa, 493 Mass. 104, 114-115 (2023), cert. denied, 145 S. Ct. 306 (2024). See Commonwealth v. Souza, 494 Mass. 705, 720 (2024) (defendant not prejudiced where component parts of compilation exhibit were already admitted in evidence); Commonwealth v. Chin, 97 Mass. App. Ct. 188, 201-205 (2020) (requiring authentication as condition precedent to admissibility of compilation video). Nor did the brief enlargement of images and slow-motion playback (lasting approximately thirty seconds) appear to be "digitally altered to depict events that were different from those depicted in the complete footage." Sosa, supra at 115. Moreover, any risk of prejudice to the defendant from the "gloss" added by the overlayed red circle markers was mitigated by the judge's

exemplary instruction to the jury. See Commonwealth v. Francis, 104 Mass. App. Ct. 593, 605 (2024) (risk of prejudice from argumentative captions in compilation video mitigated by judge's limiting instruction).

Finally, we reject the defendant's comparison of the compilation video to the exhibit found unduly prejudicial in Commonwealth v. Wood, 90 Mass. App. Ct. 271, 276-277 (2016). The exhibit in Wood, a "PowerPoint" digital slide presentation, functioned as a mini-closing argument by including cell phone records, condensed versions of text messages among the defendant, victim, and third party, call logs, and maps depicting the victim's movements based on global positioning system tracking data. Id. at 275-276. In this case, the red circles appeared on screen for a relatively brief portion of the thirteen-minute video. There were no side-by-side comparisons of the defendant's cap, sweatshirt ties, or soles of shoes, or the companion's multicolored windbreaker.

c. Victim's statement. The wounded victim told a responding police officer that he was shot by a man "wearing a blue shirt and blue hat." Ten days later, the victim died of complications from the gunshot wound to the abdomen. Before trial, the Commonwealth filed a motion in limine to admit the victim's statement to the officer as a dying declaration. After conducting a voir dire examination of the officer and

considering medical testimony, the judge ruled that the statement was not admissible as a dying declaration. He found that the Commonwealth failed to establish that the victim believed his death imminent when he made the statement. See Commonwealth v. Middlemiss, 465 Mass. 627, 632 (2013); Mass. G. Evid. § 804(b)(2).

In the alternative, the Commonwealth argued that the statement was admissible to rebut the defendant's challenge to the adequacy of the police investigation (Bowden defense). See Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980). According to the prosecutor, the defendant raised the issue in his opening statement when counsel claimed that the police "ignored" Nieves's description of the shooter as wearing a dark gray sweatshirt, and instead focused on a suspect dressed in a blue sweatshirt. The judge allowed the Commonwealth's motion. He explained that it would be "unfair for the Commonwealth to be hamstrung and not explain[] why it was reasonable for them to proceed against a suspect who was allegedly wearing a royal blue sweatshirt."

The judge also declined to exclude the statement after balancing the probative value of the evidence against its potential prejudicial effect. See Mass. G. Evid. § 403. He reasoned that the probative value "is important because there has been a question raised about whether the Springfield

[p]olice had information from Mr. Nieves that they should have followed up on, and explains why they may not have followed up on that in the way the defense argues they should have." The comparative prejudice was minimal, he found, "given that the [j]ury ultimately is going to have to resolve the issue [of identification] based on the video."

On appeal, the defendant raises two claims. He argues, as he did at trial, that the judge erred in admitting the victim's statement because there was no Bowden challenge to the police investigation for the Commonwealth to rebut, given that an opening statement is not evidence. We review this issue for prejudicial error. See Pina, 481 Mass. at 429. Next, he contends that, if trial counsel opened the door to such rebuttable evidence, counsel rendered constitutionally ineffective assistance. We review this issue, raised for the first time on appeal, for a substantial likelihood of a miscarriage of justice. See Commonwealth v. Brown, 462 Mass. 620, 629 (2012).

In his opening statement, defense counsel stated that the police ignored evidence from the only eyewitness, Nieves, who was standing "a few feet away." "Mr. Nieves told the Springfield [p]olice that the shooter was wearing a dark gray sweatshirt. Dark gray sweatshirt. He said it repeatedly. The detectives repeatedly tried to get Mr. Nieves to change his

description . . . and he wouldn't budge." The Commonwealth introduced Nieves's police interview in evidence. Thereafter, on cross-examination of Nieves, the defendant emphasized Nieves's description of the shooter as wearing a gray sweatshirt by introducing two photographs in evidence. The first photograph depicted the defendant inside the nightclub accompanied by his companion, labeled by Nieves as the "[y]elling" man. The second photograph depicted Nieves standing a few feet away from the person Nieves labeled as man number one (the shooter) and the person Nieves labeled as man number two (yelling man). Both men, numbered one and two, were positioned at the entrance to the nightclub prior to the shooting. The exhibits emphasize the point made by defense counsel in the opening statement -- that Nieves had the opportunity to observe the shooting from a few feet away and, despite his proximity to the shooter, told police that the shooter wore a dark gray sweatshirt.

The permissible scope of rebuttal evidence to counter a Bowden defense "depends, in part, on the issues raised by the defense." Commonwealth v. Colon, 482 Mass. 162, 187 (2019). A statement by defense counsel in his opening, the Commonwealth acknowledges, "does not necessarily open the door to [rebuttal] evidence." Here, the judge determined that the defendant raised the Bowden defense in his opening statement and in the cross-

examination of Nieves. He found that defense counsel "delivered" on his promise to the jury "when [defense counsel] admitted the photographs that Mr. Nieves had identified in his statement." Based on this evidence, it was within the judge's discretion to allow the Commonwealth to explain why investigators focused on an individual wearing a blue sweatshirt, not a dark gray sweatshirt.

Recasting the argument as an ineffective assistance of counsel challenge fares no better. "[A]n ineffective assistance of counsel challenge made on the trial record alone is the weakest form of such a challenge because it is bereft of any explanation by trial counsel for his actions and suggestive of strategy contrived by a defendant viewing the case with hindsight." Commonwealth v. Peloquin, 437 Mass. 204, 210 n.5 (2002). See Commonwealth v. Davis, 481 Mass. 210, 222 (2019) ("The preferred method for raising claims of ineffective assistance of trial counsel is through a motion for a new trial"). It may be resolved on direct review in "exceptional" circumstances where the factual basis of the claim appears indisputably on the trial record. Commonwealth v. Zinser, 446 Mass. 807, 810-811 (2006). The defendant's disagreement with trial counsel's apparent tactical decision to argue that the police neglected to follow a lead provided by the only eyewitness does not support an ineffective assistance claim.

See Commonwealth v. Kolenovic, 471 Mass. 664, 673 (2015), S.C., 478 Mass. 189 (2017) (deference is owed to counsel's tactical decisions "to avoid characterizing as unreasonable a defense that was merely unsuccessful" [citation omitted]).

d. Reduction of the verdict. We next consider the Commonwealth's appeal from the judge's decision, pursuant to rule 25 (b) (2), to reduce the verdict from murder in the first degree on a theory of deliberate premeditation to murder in the second degree. We review for abuse of discretion or other error of law. Commonwealth v. Rogers, 494 Mass. 629, 647-648 (2024). Deference is owed to the trial judge, who had the "advantage of face to face evaluation of the witnesses and the evidence" (citation omitted). Commonwealth v. Reavis, 465 Mass. 875, 891 (2013). At the same time, the responsibility of maintaining "some measure of regulation and uniformity" in rule 25 (b) (2) decision-making lies with this court. Commonwealth v. Gaulden, 383 Mass. 543, 554 (1981).

A trial judge has the authority, under rule 25 (b) (2), to reduce a verdict to a lesser degree of guilt "despite the presence of sufficient evidence to support the jury's verdict." Commonwealth v. Chhim, 447 Mass. 370, 381 (2006). See G. L. c. 278, § 11; Commonwealth v. Sanchez, 485 Mass. 491, 504-505 (2020). A judge is not limited to viewing the evidence in the light most favorable to the Commonwealth, and instead may

consider the over-all weight of the evidence, including the defendant's version of the facts. Chhim, supra at 382-383. "[T]he purpose of the power to reduce a verdict is to ensure that the result in every criminal case is consonant with justice" (quotation and citation omitted). Id. at 381. "In deciding whether to reduce a jury verdict to a finding of guilty of a lesser offense, a trial judge, acting under rule 25 (b) (2), should be guided by the same considerations that have guided this court in the exercise of its powers and duties under § 33E to reduce a verdict." Gaulden, 383 Mass. at 555. We have repeatedly emphasized that rule 25 (b) (2) authority should be used "sparingly" in a manner that does not diminish the role of the jury in our criminal justice system. See Chhim, supra, and cases cited. See also Commonwealth v. Pfeiffer, 492 Mass. 440, 446 (2023). The judge does not sit as a second jury. See id., and cases cited.

This court, for example, upheld a trial judge's decision to reduce a verdict of murder in the first degree to murder in the second degree where the evidence of premeditation was "slim," with little evidence of motive. Commonwealth v. Ghee, 414 Mass. 313, 322 (1993). We have also upheld a judge's decision to reduce a verdict of murder in the second degree to involuntary manslaughter based on weakness in the evidence of criminal intent and the presence of cognitive limitations that impaired

the defendant's ability to comprehend the consequences of her actions. Pfeiffer, 492 Mass. at 456-457. See Chhim, 447 Mass. at 382, 384 (no abuse of discretion in reducing verdict of murder in first degree to manslaughter based on defendant's limited and passive role in joint venture); Commonwealth v. Millyan, 399 Mass. 171, 188-189 (1987) (no abuse of discretion in reducing verdict of murder in first degree to murder in second degree where evidence of intoxication undermined theory of deliberate premeditation).

On the other hand, "[a] reduction to a lesser verdict is not justified when it would be inconsistent with the weight of the evidence or is based solely on factors irrelevant to the level of offense proved" (quotations and citation omitted). Sanchez, 485 Mass. at 505. In Commonwealth v. Lyons, 444 Mass. 289, 292-293, 297 (2005), for example, we reversed a judge's decision to reduce a conviction of murder in the second degree to involuntary manslaughter where the stated reasons, including that the defendant's crime was a "momentary act of 'extraordinarily poor judgment,'" did not indicate an absence of malice. See Rogers, 494 Mass. at 649-650 (reversing reduction of murder conviction where motion judge considered defendant's sentence and change in felony-murder jurisprudence that applied only prospectively).

Here, the judge reduced the verdict to murder in the second degree because, in his view, "the weight of the evidence did not prove that [the defendant] acted with premeditation and intended to kill [the victim]."[5] Rather, he determined that the evidence supported an inference of "unfocused rage or an intent to scare or injure" the victim. In support of that determination, he first pointed out that although the defendant fired eight rounds at the victim from close range, only two hit their mark. Moreover, one of the two rounds struck the victim in the knee, which reflected an intent to aim "away from the parts of the body associated with fatal wounds." And the other round, he stated, "entered the victim's abdomen at an extreme angle . . . most consistent with haphazard shooting." The judge concluded that "[t]he physical evidence . . . thus fails to support the notion that apart from [the] simple fact of using a gun, the shooter, with premeditation, intended to kill [the victim]."

Second, the judge emphasized that the sequence of events failed to support the Commonwealth's argument that the defendant's retrieval of a firearm from the white van and subsequent return to the nightclub demonstrated premeditation or

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[5] In assessing whether the verdict was consonant with justice, under rule 25 (b) (2), the judge noted that the defendant contested his identification as the shooter, and as a result, the jury "did not have the benefit of a developed presentation on the appropriate degree of murder if [they] found that [the defendant] was the shooter."

an intent to kill the victim. "Those preparatory actions warranted an inference that [the defendant] intended to use the gun to threaten, harm or kill someone in the group inside the club that [he] opposed." As a result, the judge stated, "[the defendant's] intent to use the gun on opponents inside the club actually supports the conclusion that he was trying to scare the doorman and others outside the club. . . . He simply needed them to get out of his way so that he could confront his true opponents."[6]

On our careful review of the evidence, we disagree with the judge's conclusion that the weight of the evidence pointed to "unfocused rage or an intent to scare or injure" the victim. As a threshold matter, the judge drew an unreasonable inference about the defendant's intent from the angle of the entrance wound. He acknowledged that the defendant stood "almost

[6] The judge also found that the defendant's flight from the scene "reduce[d] the possibility that [he] intended to kill [the victim]." The front door video, he noted, "does not show that, after [the victim] ran away, the shooter pursued him." Also, the white van sped away on Wilbraham Avenue but did not "slow[] or stop[] to attack the victim further." Under this reasoning, the Commonwealth's evidence of intent to kill was diminished because the defendant did not track the wounded victim down and finish him off. We disagree with this speculative conclusion. The judge discounted the possibility that the defendant prioritized his escape after having shot the victim in front of several witnesses. In addition, there is no evidence that the defendant observed the victim, who was dressed in dark clothing and collapsed on the ground in front of a residence, as he recklessly sped away on Wilbraham Avenue.

directly in front of [the victim]," but found that the "extreme" angle of the fatal gunshot wound was "most consistent with haphazard shooting" (emphasis added). Notably, the victim was positioned at an angle relative to the defendant during the shooting, the victim visibly jerked away from the volley of gunfire, and there is no evidence sequencing the eight gunshots and two gunshot wounds. As such, the angle of the fatal entrance wound provides a shaky foundation for drawing an inference of haphazard shooting.

Moreover, firing eight rounds at a person at close range ordinarily warrants an inference in the other direction: namely, of an intent to kill. In Commonwealth v. Colas, 486 Mass. 831, 842-843 (2021), quoting Model Jury Instructions on Homicide 105 (2018), we observed that the reasonableness of an inference of intent to kill from the use of a dangerous weapon depends upon "the nature of the dangerous weapon and the manner of its use." "'[T]he manner of its use' logically implies that a defendant used the dangerous weapon to attack another person, i.e., fired a gun, stabbed with a knife, or clubbed someone with a baseball bat." Colas, supra at 843. An inference of intent to kill, we held, did not apply where the defendant pointed a handgun at a rival without firing. Id. By contrast, in Commonwealth v. Reaves, 434 Mass. 383, 390 (2001), we concluded that the Commonwealth established the defendant's intent to kill

from inaccurate gunshots fired in the direction of a hostile group at "reasonably close range." See Commonwealth v. Tejada, 484 Mass. 1, 5, cert. denied, 141 S. Ct. 441 (2020) ("the use of a firearm at close range provides strong evidence of an intent to kill"); Commonwealth v. Sylvester, 35 Mass. App. Ct. 906, 906-907 (1993) (firing "burst" of four to five rounds, resulting in hit to victim's knee, supported inference of intended "mortal harm"). In this case, the defendant shot the victim two times from a few feet away. One shot blew off the victim's kneecap; the other shot struck the victim in the center mass of his body. The facts, therefore, suggest "strong evidence" of intent to kill. Tejada, supra.

We also disagree with the conclusion that the weight of the evidence -- including evidence that the victim may not have been the defendant's original target -- points away from deliberate premeditation. It is true that many of our decisions relating to retrieval of a weapon involve settling a score, and the defendant here had no dispute with the victim until after he returned from the van. See, e.g., Commonwealth v. Yat Fung Ng, 491 Mass. 247, 277 (2023); Commonwealth v. Whipple, 377 Mass. 709, 715 (1979). In any event, the defendant brought the firearm to the nightclub "with a violent or vengeful purpose" as opposed to the weapon being "present fortuitously, an instrument not of design but of opportunity." Commonwealth v. King, 374

Mass. 501, 506-507 (1978). See, e.g., Commonwealth v. Keough, 385 Mass. 314, 320 (1982) (defendant stabbed victim with knife he carried to use at work). The difference in this case is that the defendant redirected his anger toward an innocent, unarmed person. See Commonwealth v. Rodriquez, 461 Mass. 100, 111-112 (2011) (deadly confrontation fueled by animus). That he newly decided to kill the individual blocking entrance to the nightclub does not support the judge's finding that the weight of the evidence demonstrated "unfocused rage" or an intent merely to scare or injure.

Finally, we examine "whether the jury verdict is markedly inconsistent with verdicts returned in similar cases." Gaulden, 383 Mass. at 556. See Pfeiffer, 492 Mass. at 446 (trial judge guided by same considerations as those that drive § 33E review). In Commonwealth v. Colleran, 452 Mass. 417, 431-432 (2008), we set forth a number of factors to determine whether a defendant's conviction of murder in the first degree based on deliberate premeditation should be reduced in the interests of justice pursuant to § 33E. See Yat Fung Ng, 491 Mass. at 272-273; Commonwealth v. Fernandez, 480 Mass. 334, 345 (2018). The list is not exhaustive, and each case depends on its particular facts. Yat Fung Ng, supra at 273. Colleran, supra at 432. Specifically, the court considers (1) "whether the intent to kill was formed in the heat of a sudden affray or combat";

(2) "whether the homicide occurred in the course of a senseless brawl"; (3) "whether a minor controversy exploded into the killing of a human being"; (4) "whether the entire sequence reflects spontaneity rather than premeditation"; (5) "whether the defendant carried a weapon to the scene or left the scene after an initial confrontation and returned with a weapon to kill the victim"; (6) "whether the victim was the first aggressor"; (7) "whether the defendant and the victim were strangers"; (8) whether drugs, alcohol, or mental illness were involved; and (9) "the personal characteristics of the defendant" (quotations, citations, and alterations omitted). Id. at 431-432.

Weighing in the defendant's favor, this case is an example of a senseless act of violence where a (seemingly) "minor controversy between strangers exploded into the killing of a human being." Keough, 385 Mass. at 320. See Commonwealth v. Tavares, 385 Mass. 140, 157-159, cert. denied, 457 U.S. 1137 (1982). In addition, the fact that the defendant and victim were strangers also weighs in the defendant's favor. Colleran, 452 Mass. at 431. There are many countervailing factors in the present case, however, that point toward murder in the first degree. This is not a case of "uncontrolled anger and violent action on the part of both the defendant and the decedent" (citation omitted). Commonwealth v. Anderson, 396 Mass. 306,

317 (1985). See Commonwealth v. Gonsalves, 488 Mass. 827, 845-846 (2022); Fernandez, 480 Mass. at 345. There was no senseless brawl or sudden combat, because the victim attempted to defuse a volatile situation with an armed gunman without resort to violence. Cf. Keough, supra at 320-321 (victim initiated fight); Commonwealth v. Jones, 366 Mass. 805, 806, 809 (1975) (victim struck defendant and pulled out razor).

We also conclude that deficiencies in the evidence of deliberate premeditation do not merit reduction of the verdict in the interests of justice. To be sure, this was not the strongest case of deliberate premeditation. The defendant's intent to kill the person blocking entrance to the nightclub occurred in a few seconds, "after only momentary thought." See Commonwealth v. Gomes, 443 Mass. 502, 510 (2005). See also Fernandez, 480 Mass. at 344 ("The law recognizes that a plan to murder may be formed within a few seconds" [citation omitted]). The incident, however, did not "reflect[] spontaneity rather than premeditation" (citation omitted). Colleran, 452 Mass. at 431. In Colleran, the court exercised § 33E authority to reduce a conviction of murder in the first degree to murder in the second degree, concluding that a mother's strangulation and suffocation of her two and one-half year old daughter was an inexplicably impulsive act brought about by the defendant's mental illness. Id. at 433-434. By contrast, here, the

Commonwealth established that the defendant was angered by the victim's refusal to allow entry into the nightclub, racked his pistol to ensure that his handgun was ready to shoot, argued with the victim, rebuffed the victim's repeated attempts to deescalate the situation, and finally fired multiple gunshots at the victim from close range, striking him twice. See Commonwealth v. Chipman, 418 Mass. 262, 269 (1994) (sequence of thought process rather than amount of time is "key to determining whether someone acted with deliberate premeditation").

Furthermore, there was nothing to suggest that evidence of premeditation was diminished by mental illness, intoxication, or other mitigating circumstances. See Commonwealth v. Salazar, 481 Mass. 105, 119-120 (2018) (reducing verdict of murder in first degree to murder in second degree under § 33E where evidence of deliberate premeditation was "far from compelling" and issue of intoxication was "incompletely presented as a defense"); Commonwealth v. Pagan, 471 Mass. 537, 543-546, cert. denied, 577 U.S. 1013 (2015) (affirming trial judge's decision to reduce verdict of murder in first degree to murder in second degree as more consonant with justice given "weak" evidence of premeditation in combination with "compelling and uncontroverted testimony regarding the defendant's youth, adolescent brain, untreated [mental impairment], and troubled childhood");

Millyan, 399 Mass. at 189-190 (affirming trial judge's decision to reduce verdict to murder in second degree where "judge seemed satisfied that Millyan was sufficiently intoxicated that he was unable to premeditate and deliberate"); Commonwealth v. Lanoue, 392 Mass. 583, 591-592 (1984) (reducing verdict to murder in second degree under § 33E where evidence of premeditation was "thin" and "judge's charge concerning the effect of intoxication on the defendant's capacity for deliberate premeditation was somewhat deficient in light of the substantial evidence of intoxication").

It was, therefore, an abuse of discretion to reduce the verdict, in the circumstances presented in this case, as against the weight of the evidence of a deliberately premeditated murder.

3. Conclusion. We affirm the defendant's conviction of murder in the first degree. The order allowing the defendant's motion to reduce the verdict is reversed, and the conviction of murder in the first degree is reinstated. The matter is remanded to the Superior Court for resentencing.

So ordered.