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COMMONWEALTH OF
MASSACHUSETTS SUPREME JUDICIAL COURT

No. SJC-12951
No. SJC-12952

COMMONWEALTH OF
MASSACHUSETTS,
Appellee,

v.

DONTE HENLEY
JOSIAH ZACHERY,
Defendants-Appellants

BRIEF FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT (IDENTICAL BRIEF FILED IN EACH CASE)

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STATEMENT OF THE ISSUES

I. Whether Zachery's motion to suppress evidence was properly denied where police officers seized him to investigate reasonable suspicion that he was shooting at people, obtained limited information about his public movements from a public transportation pass found in his pocket, and searched his phone pursuant to a warrant supported by probable cause.

II. Whether evidence of a prior shooting, a police officer's familiarity with Henley, and gang memberships was properly admitted where it was helpful, and some of it essential, to understanding the charged crimes, and there was minimal risk of undue prejudice.

III. Whether the trial judge properly instructed the jury as to the mens rea requirement for Henley to be convicted of murder by aiding and abetting Zachery where he consistently and correctly instructed that a conviction required that Henley shared the intent for murder.

IV. Whether the prosecutor's opening statement and closing argument were proper where he accurately projected trial evidence during his opening statement and his closing argument was based on admitted ev-

idence, did not minimize the Commonwealth's burden of proof, and responded directly to the defendants' closing arguments.

V. Whether Zachery's trial counsel provided effective assistance in declining to call a witness whose only helpful testimony was cumulative of other evidence.

VI. Whether the trial judge properly declined to sever the defendants' trials where their defenses were not hostile, much less mutually antagonistic, as to inescapably implicate each other.

VII. Whether any cumulative trial error created a substantial risk of a miscarriage of justice.

VIII. Whether the defendants' passing references to each other's appellate arguments are insufficient to incorporate those claims.

STATEMENT OF THE CASE

The defendants each have appealed directly from their convictions, including convictions for second degree murder, in Suffolk Superior Court (1584CR10265; 1584CR10266). While their appeals are sep-

arate, this Court has permitted the Commonwealth to file a single brief addressing the claims raised by both defendants (C.A.178-79, 181-82).[1]

On April 2, 2015, the defendants, Josiah Zachery ("Zachery") and Donte Henley ("Henley") were indicted for murdering Kenny Lamour ("Lamour"), in violation of G.L. c. 265, §1 ("Lamour") (1584CR10265; 1584CR10266; Henley-A.19; Zachery-A.1). Zachery also was indicted for armed assault with intent to murder ("count two"), in violation of G.L. c. 265, §18(b); and carrying a firearm without a license ("count three"), in violation of G.L. c. 269, §10(a) (Zachery-A.2-3). On November 14, 2016, Zachery filed a motion to suppress evidence (Zachery-A.9, 23-25), and Henley moved to join the motion on that same date (Henley-A.9). On November 29, 2016, Henley's motion to join the motion was allowed (Tr.11-29-16:26), and an evidentiary hearing on the motions was held on November 29, 2016, March 3, 2017, and March 16, 2017, with the Honorable Mary K. Ames ("motion judge") presiding (Zachery-A.7;

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[1] References to the Commonwealth's appendix will be cited as (C.A.[page]), the defendants' briefs will be cited as (Henley Br.[page] and Zachery Br.[page]), their appendices will be cited as (Henley-A.[page]) and (Zachery-A.[page]). Trial transcripts will be cited as (Tr.[volume]:[page]), and other transcripts will be cited as (Tr.[hearing date]:[page]).

Tr.11-29-16; 3-3-17; 3-16-17). On May 4, 2017, the parties argued the suppression motion (Tr.5-4-17; Zachery-A.10). The motion was denied in full in a written order on October 2, 2017 (Zachery-A.11, 90-127).

On October 11, 2017, Zachery moved to sever his trial from Henley's (Zachery-A.12). He argued at an October 17, 2017 hearing that Henley's predicted defense that he requested Zachery to bring him a firearm for protection was antagonistic to his own challenge to the sufficiency of the evidence as to his identity (Tr.10-17-17:6-7; Zachery-A.12). On October 23, 2017, Zachery's motion for severance was denied (Zachery-A.13).

The parties were tried jointly before a jury from November 1, 2017, through November 30, 2017, the Honorable Peter M. Lauriat ("trial judge") presiding (Zachery-A.14-17). Both defendants were found guilty of second degree murder, and Zachery also was convicted of so much of count two as alleged assault with a dangerous weapon, and count three (Zachery-A.17; Henley-A.16). Zachery was sentenced on count one to life imprisonment with the possibility of parole after twenty years; on count two, four to five years in state prison to be served on and after count one; and on count three, three to four years in state

prison, to be served on and after count one, and concurrent with count two (Tr.12-4-17:19-20; Zachery-A.17-18). Henley, meanwhile, was sentenced to life imprisonment with the possibility of parole after twenty years (Tr.12-4-17:20-21).

Defendants timely appealed (Zachery-A.153; Henley-A.38).

STATEMENT OF FACTS

1. Motion to Suppress

a. Findings of fact from evidentiary hearing[2]

> February 11, 2015 was a bitterly cold day. A fresh snow had fallen overnight . . . . A group of young men, including Henley and Kenny Lamour, were in the area of Centre Street, Jamaica Plain, close to the monument side of the street. They arrived with other young people in a white van as part of a work crew organized by a nonprofit to shovel snow. The work crew was moving to various locations to shovel. . . . Lamour was shot in the head and died from his injuries. Several witnesses observed the shooter run from the scene with a gun in hand.
>
> On February 11, 2015 at approximately 10:30 A.M. Boston Police Officer William Louberry was in his marked police SUV cruiser driving on Centre Street when he heard multiple gun shots coming from the location of a white van about fifty feet from his cruiser. As he pulled his cruiser over he saw a man running toward him pointing a gun at his wind-

[2] The suppression facts are taken from the motion judge's written findings of fact and the hearing testimony, which the motion judge found "credible in all respects" (Zachery-A.92). *See Commonwealth v. Jones-Pannell*, 472 Mass. 429, 431 (2015).

shield. The man was about ten yards away running on the sidewalk. As he ran past the cruiser he fired one shot at the officer and kept running. The officer gave chase broadcasting the route of chase and a description of the suspect over the radio. He described a six foot to six foot one inch black male, black pants, black jacket, gray hoodie over his head, age eighteen to twenty four. After the suspect took a sharp left at Aldworth Street the officer lost sight of him.

Officer Oller was on patrol in Eggleston Square, minutes from Centre Street, in a two person rapid response car with Officer Angel Figeroa. Hearing a radio report of gunshots fired and a description of the shooter they immediately responded to Centre Street [approaching on Dunster Street (Tr.11-29-16:90). Officer Oller first saw officers cuffing a man on Centre Street at the intersection with Dunster (Tr.11-29-16:46, 91)]. [Officer Oller] then began to walk toward the rotary on Centre Street when she noticed the officer was now alone with the handcuffed male and walked back to assist that officer. It was then that she noticed a young black male, later identified as the defendant, Josiah Zachery, walking on Centre Street, [just] past Dunster Street heading toward the monument area, away from the rotary on Centre Street [(Tr.11-29-16:44)]. [Oller did not see how he had arrived there (Tr.11-29-16:45-46) even though she had been on scene for several minutes (*see* Tr.11-29-16:38, 56-57)]. He was wearing a gray hooded sweatshirt and black pants carrying a snow shovel. Zachery was coming from the location where Officer Louberry last saw the suspect. He was two blocks from the scene of the shooting. Five to six minutes had elapsed since Officer Oller heard Officer Louberry's transmissions. Zachery's hood was up and he had fresh snow on the back of his pants and sweater. He appeared to act actively disinterested in all of the events around him including the saturation of police and cruisers in the area. He appeared overly calm and seemed to actively avoid looking at or in the direction of the officers or the man on the ground. On this very cold and snowy day he was

dressed in sneakers, low cut socks and was not wearing a jacket or gloves. Other than the absence of a black jacket his clothing fit the description, given over the air, just moments before, of the shooter. She approached Zachery with Officer Cullen by crossing over a snow bank onto the sidewalk. Her purpose was to conduct a threshold inquiry. She asked where he was coming from. Zachery said he was shoveling snow for old ladies for free but did not respond when asked why he was not wearing gloves. He admitted to hearing shots but said he was far away. The officers conducted a pat frisk for weapons and found but did not seize the defendant's cell phone. No weapons were discovered on Zachery. He was not placed under arrest but was handcuffed and placed into a cruiser on Centre Street, for his safety, and to keep warm, in the area of Dunster Street, pending further investigation. This court finds that although he was not placed under arrest, here the moment of seizure occurred when Zachery was placed in handcuffs.

While Zachery was in the cruiser and still on Centre Street, at the direction of the homicide detectives, a series of five individual show up identification procedures were conducted.

. . .

[Zachery was transported to police headquarters where he was questioned (Tr.11-29-16:65-66, 68-69), and e]ventually Zachery invoked his right to counsel. . . . After the interview Zachery was placed under arrest and his belongings were seized incident to that arrest. They included a chap stick and an MBTA Charlie Card. . . .

. . .

Sergeant Detective Richard Lewis was the first officer from the homicide division to arrive on scene. While in Forest Hills he heard a transmission of shots fired, person shot and approached the scene coming in from the monument side.

The block was already secured and he was directed to the victim. . . . Sergeant Detective Lewis received information from Officer Louberry including the movements, route and description of the shooter. Sergeant Lewis and other officers on scene were securing the witnesses preparing to take them to be interviewed at homicide when he recognized Henley, who was part of the work crew, and still with the rest of the group at the van. . . . [Police established a perimeter that included the opposite side of Aldworth Street from where the shooter disappeared, but Lewis was not made aware of anyone else fitting Louberry's description of the shooter (Tr.3-3-17:37).]

Sergeant Lewis conducted identification procedures with the four civilian witnesses. Both Sheleton and Zachery were individually and independently displayed to each witness by different officers. . . . . Prior to the identification procedure each witness gave a description of the shooter to police. At 12:40 pm, Kathy Russo was the first witness to participate in the show up identification procedure. She said she recognized Sheleton but he had deadlocks [sic] and the shooter did not. When she saw Zachery she said she did not recognize him. At 12:45 pm Ben Spear was shown Sheleton stating doesn't [sic] really look like the guy but he was running. When shown Zachery he said, this guy more so, same gray hoodie, height, slight build, body type. He felt Zachery's appearance, clothes, build, and complexion, fit his memory more closely. He said he could make a positive match on everything except the face because he did not get a good enough look at the face. At 12:53 pm Attorney Steve Abreu said Sheleton's clothes were consistent with the man he saw running, the second one man he saw running up the street closest to his house, but he did not see the person's face. When he saw Zachery he said I don't recognize the clothes, he had on a black jacket but he felt Zachery looked thin like the man he had seen running. He was, however, unable to make an identification. At 1:02 pm Beth Grampetro said she recognized Sheleton as the man running down the street af-

ter the one with the gun. When she saw Zachery she said ["I definitely know the one running with the gun had a hood like that but was wearing a black jacket. He was slender like him" (Tr.3-3-17:28).] . . .

Sergeant Detective Doogan, also assigned to the Homicide Division, was in Roxbury when he heard the radio call and immediately responded to Centre Street. Monitoring the transmissions as he drove he learned that a man was shot at the rotary and that a shot was fired at Officer Louberry as the suspect fled. At the scene he spoke directly to Officer Louberry and obtained the description of the suspect and direction of flight. He learned Officer Louberry last saw the suspect taking a left from Centre Street onto Aldworth Street. Sergeant Detective Doogan conducted the show up identification procedure [with officer Louberry] . . . . He first viewed Sheleton stating he was not the man. He next viewed Zachery . . . . He told Sergeant Detective Doogan that Zachery's appearance was consistent with the overall appearance of the person he saw running and who shot at him. He further explained Zachery appearance [sic] was consistent in height, weight, and clothing including pants and hoodie but that earlier he was wearing a black jacket. Officer Louberry stated if you put a black jacket on him that could be the guy, the hoodie and the pant matched. After the black jacket was found it was displayed to Louberry who said it was consistent with the jacket he observed on the shooter.

Learning that Zachery was seen carrying a shovel, but was not dressed for the weather, Sergeant Detective Doogan decided to retrace the route described by Officer Louberry hoping to determine where the shovel came from. Recalling that Officer Louberry said that as soon as the shooter rounded the corner he was gone, Doogan concentrated his efforts on the first house on the right. He saw a foot path to the right of the garage, and followed the path ultimately stopping at a blue house behind a brown house. He immediately noticed a

slot that looked like it had been made by a shovel blade and a shovel impression. Continuing his investigation he observed footwear impressions that appeared to be from sneakers. He was aware that Zachery was wearing sneakers. He knocked on the door and spoke to the owner of the property, Mr. Dorion, asking if he owned a shovel. Looking outside Mr. Dorian exclaimed "it's gone". Sergeant Detective Doogan was joined by another officer who pointed out a black jacket stuffed under the porch of the house. . . . He then followed the foot path as it wound its way from the porch . . . to an area only one hundred and fifty yards from where Officer Oller first saw Zachery.

While on scene and after gathering information from many sources, including Officer Oller and Sergeant Detective Doogan, Sergeant Detective Lewis took Zachery's cellphone. Sergeant Detective Lewis explained the factors he considered in making the decision to seize the cell. This Court credits those factors. They included: the observations of Officer Oller, Zachery's unusual disinterest in all of the events going on around him and the large police presence on Centre Street, the location where she first saw Zachery relative to the last location Louberry saw him, the inappropriate manner of dress in four degree weather[3], the unlikely explanation given of shoveling snow for old ladies for free without gloves or boots on, the location by Sergeant Detective Doogan of the home from which a shovel had been recently taken, the footprint path from Aldworth Street to the house where the shovel was taken, footprints on that porch resem-

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[3] The finding of four degrees is supported by hearing testimony (Tr.3-3-17:30). But it seems the actual temperature was closer to twenty degrees. *See* https://www.wunderground.com/history/daily/us/ma/boston/KBOS/date/2015-2-11 (accessed, February 22, 2020).

bling the sneaker pattern of Zachery's sneakers[4], the identification by the civilian witness, the discovery of the discarded black jacket, the concerns that the phone could be broken, erased or thrown away, or erased remotely. Sergeant Detective Lewis also identified as a factor the nature of the crime which appeared to have been an ambush in a location that could not have been predetermined. This factor led to the concern and reasonable inference that the shooter must have been in contact with some other person to learn the location of the victim. He specifically had reason to believe Zachery's cell phone would have been used because the snow shoveling crew was moving from place to place and the attack appeared to have been an ambush. [Lewis specifically knew that cell phones can "be manipulated to erase all data" and that someone who is handcuffed can use a cell phone (Tr.3-3-17:48-49).] . . .

As discussed, Detective Bliss took possession of the Charlie Card seized pursuant to the arrest of Zachery. Detective Bliss noted the Charlie Card had serial numbers that can lead to the discovery of where the card had been used. . . . The Card information was accessed and information concerning the card's use was obtained for February 11, 2015. As a result of information accessed video of the defendant, depicting his clothing was obtained for both February 11, 2015 and January 26, 2015. The clothing was consistent with the description by Officer Louberry including the black jacket.

Keenan Grogan, the supervisor of the MBTA Fraud Detection Unit gave a detailed explanation of how the Charlie Card works and the information it contains. The Charlie card is a plastic stored value card. Each has a unique num-

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[4] Doogan clarified that the prints appeared to be from sneakers, not boots, but that he had not actually compared the tread of Zachery's shoes to any prints (Tr.3-3-17:118, 121).

> ber but the holder of the card is unknown unless they take steps to register it. The card in Zachery's possession was an M-7 card issued to junior high school and high school students. [M-7 Charlie Cards are reduced fair monthly passes issued by the MBTA to schools, which independently then provide them to students (Tr.3-3-17:159, 162-63, 192-93)]. It was not registered. It records information each time it is used to pay the fare to board a bus, trolley or train. The information is stored on a central computer system. MBTA police have access to the data base. The MBTA will also provide the information when requested by law enforcement. . . .

(Zachery-A.93-102). Surveillance cameras are ubiquitous at MBTA stations and on buses (Tr.3-3-17:186), and almost all MBTA stations employ cameras that are not hidden or secret (Tr.3-3-17:173-74). Moreover, the MBTA's privacy policy manual is available online for anyone to view (Tr.3-3-17:175, 191). The manual states that Charlie Card information may be shared with police for the detection and prevention of crime (Tr.3-3-17:182). A person with physical possession of a Charlie Card may check past transactions at fare vending machines, and with MBTA personnel if they identify themselves as the card's owner (Tr.3-3-17:180-81).

b. Search warrant affidavit

Philip Bliss, a homicide detective with extensive police experience, applied for a search warrant to search Zachery's cell phone supported

by an affidavit (Zachery-A.66-78). He specifically sought eight types of evidence: ownership of the cell phone, contacts with persons at the homicide, discussion or knowledge of the homicide, familiarity with persons involved in the homicide, communications that led Zachery to arrive at the scene of the shooting, gang activity, and discussion of firearms (Zachery-A.66).

Bliss presented extensive evidence that, on the morning of February 11, 2015, Zachery shot and killed Lamour at the intersection of Centre Street and Orchards Street in the Jamaica Plain neighborhood of Boston, and then shot toward a Boston police officer as he ran from the scene (Zachery-A.69-71). Lamour was shoveling snow in the area as part of a work crew with seven coworkers (Zachery-A.69). None of the other workers in the immediate area saw the shooting (Zachery-A.71).

Zachery was detained in the area of the shooting -- underdressed for shoveling snow and carrying a shovel (Zachery-A.70). He lived in Hyde Park and was supposed to be in school at the time of the shootings (Zachery-A.72), and his cell phone and an MBTA Charlie Card were removed from his person when he was detained (Zachery-A.70).

The records associated with this Charlie Card, and surveillance video at public transportation stations, demonstrated that Zachery took public transportation during the hour before Lamour's shooting (Zachery-A.71). The surveillance video showed Zachery walking without a shovel, and wearing several layers of clothing on top of what he wore when arrested (Zachery-A.72). But when Zachery spoke with police, he claimed that he had been traveling to various places in Boston by public transportation to help people shovel snow, that he had a shovel with him as he travelled, that he had been wearing the same clothing all day, and that he did not remember how he ultimately had arrived at Forest Hills Station because he had been smoking marijuana (Zachery-A.71).

Zachery and Henley -- who was at the scene of the shooting and part of Lamour's work crew -- both were listed in the Boston Police gang database as active and primary members of Franklin Hill (Zachery-A.72). Lamour, meanwhile, was listed in the database as a primary member of the Thetford Avenue gang (Zachery-A.72). Thetford Avenue and Franklin Hill have a historic feud and Lamour's mother reported that Lamour recently had been grazed by a bullet, corroborated by a

medical examiner who identified a shoulder wound consistent with this (Zachery-A.72).

Based on these facts, Bliss opined that "[i]t is extremely likely that Zachery was directed or alerted to the work crew location, and extremely unlikely that [Zachery] arrived by coincidence" at the scene (Zachery-A.73). He opined further, based on his training and experience:

- it is "common practice for victims, witnesses or perpetrators of firearm-related or other violent incidents to make phone calls or send text messages prior to and immediately after the event" (Zachery-A.73);
- cell phones commonly are used both in furtherance of crimes and to cover up crimes after the fact (Zachery-A.73);
- cell phones frequently are used to photograph friends and associates together (Zachery-A.74); and
- people who possess firearms often photograph themselves with those firearms (Zachery-A.74).

c. Motion judge's rulings of law

The motion judge denied the motions to suppress evidence in full (Zachery-A.102-27). She specifically found the "initial stop and detention of [Zachery] was reasonable because it was based on specific and articulable facts that [Zachery] had committed, was committing or was about to commit a crime" (Zachery-A.102). She found further that the "warrantless seizure of [Zachery's] MBTA pass or 'Charlie Card' and subsequent warrantless searches of the data generated by the card do not require suppression" (Zachery-A.114). The motion judge also concluded that "[e]xigent circumstances justified the immediate seizure of [Zachery's] cellphone" (Zachery-A.121), and that a search of the contents of the telephone pursuant to a search warrant was proper because "the affidavit in support of the warrant established probable cause as there was a nexus between the crime under investigation and the digital contents of the phone" (Zachery-A.122).

2. Pretrial Motions

Prior to trial, the Commonwealth moved to admit Sergeant Detective John Ford's expert testimony regarding gangs in Boston and defendants' gang memberships (Henley-A.20-23). Henley withdrew his

previous objection to the testimony after a voir dire hearing, asked that Ford be permitted only to testify that defendants were gang associates, not members, and conceded, "obviously there is probative value to the gang evidence, we're not contesting that" (Tr.10-24-2017:42-43). The trial judge reserved the issue until trial (Tr.10-24-17:49).[5] Henley separately argued at the October 24, 2017 hearing for the admission of gang evidence as being relevant to his state of mind (Tr.10-24-17:24-33).

The prosecutor sought further to introduce evidence that the same firearm used to kill Lamour also was discharged a few months previously, and that Henley was seen leaving the scene of that incident (Tr.10-24-17:15-16). The prosecutor was clear that he was seeking to introduce only that shots were fired, not that Henley was the shooter or that someone was shot (Tr.10-24-17:16). The prosecutor also was clear that he was not seeking to introduce the evidence against Zachery (Tr.10-24-17:50). Henley objected that unfair prejudice from the evidence outweighed any probative value (Tr.10-24-17:19-23). The trial judge reserved judgment at that time (Tr.10-24-17:23), but ultimately admitted

[5] During Ford's trial testimony, before he offered an opinion as to membership, both defendants affirmatively advised the trial judge that they were not contesting the issue (Tr.V:49-50).

the evidence "highly sanitized as the Commonwealth has described" (Tr.IX:31).[6]

3. Jury Empanelment

During jury empanelment, defense attorneys broadly inquired into whether jurors would tend to believe that street gang members are any more likely to commit crimes or violent acts than others (Tr.I, II, III). Those who did not unequivocally deny such a tendency were excused for cause (Tr.I, II, III). Zachery had seven peremptory challenges remaining, and Henley eight, at the completion of jury empanelment (*See* Tr.I:5; Tr.II:202; Tr.III:100, 136).

4. Opening Statements

Henley's opening statement promptly drew the jury's attention to evidence of gang membership (Tr.IV:27-28). He cautioned jurors to objectively evaluate the evidence without being prejudiced by gang terminology (Tr.IV:27). He then said, "[t]here's going to be evidence of gang violence. There's going to be evidence that people that there are rival-

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[6] Henley again objected to the evidence and proposed a stipulation to the prior incident (Tr.IX:32). At that point, Zachery said that he would renew his motion for severance if Henley and the Commonwealth stipulated to the prior incident because the link between Henley and the firearm directly implicated Zachery (Tr.IX:32-33).

ries between Mr. Lamour's group, which is The[t]ford and the group that Mr. Henley was allegedly part of which is Franklin." (Tr.IV:28).

Henley also framed the significance of anticipated evidence of text messages, acknowledging that he requested a gun on the morning of the shooting, but suggesting that he did so for protection from a rival gang, not to commit a murder (Tr.IV:30, 33). Henley argued that there would be no evidence that he "shared the same state of mind, the same intent as the person who carried out this crime" (Tr.IV:33). Henley's opening consistently referred to the shooter generically, neither stating nor hinting that the evidence would show Zachery was the shooter (*see* Tr.IV:28-33).

Zachery's opening statement, meanwhile, not only acknowledged but seemingly embraced the expertise of the Commonwealth's anticipated gang expert (Tr.IV:35). He also admitted that he himself was in a gang (Tr.IV:36). The focus of Zachery's opening statement was that the Commonwealth failed to meet its burden of proof because neither extensive forensic testing nor the numerous eyewitnesses to the shooting implicated him (Tr.IV:36-38).

The trial prosecutor's opening statement projected that the evidence would show that after Lamour was shot, he "went in the gutter, gasping for breath. Lungs filling up with blood as well, bleeding and dying" (Tr.IV:15). He also anticipated evidence that there were "[s]neaker prints of the exact same size, make, model and tread pattern of the sneakers of Josiah Zachery was wearing" (Tr.IV:23).

5. Trial Evidence

Ford testified as an expert in Boston gangs (Tr.V:11-73).[7] He had worked for the Boston Police Department for twenty-two years

[7] The trial judge provided a jury instruction limiting the jury's use of the gang evidence at the beginning of Ford's testimony (V:15-16). The instruction included the following:

> You cannot use this evidence of gang membership or association to conclude that anyone, whether Mr. Lamour or Mr. Zachery or Mr. Henley, or any other person, had a propensity to commit a crime or had a bad character.
>
> This so-called gang evidence is admitted in this case and is to be considered by you for only three very limited purposes. If you credit this evidence you may consider it only for the following purposes:
>
> first, as evidence of the defendants' state of mind, including whether either or both of the defendants had a motive to commit the killing of Mr. Lamour, and as evidence of any

(Tr.V:12). His experience focused on gangs and gang-related violence (*see* Tr.V:12, 14-15, 17).

Ford employed various means to learn about Boston gangs and to maintain his expertise (Tr.V:17-25). He accompanied the Department of Youth Services and probation officers on home visits, and discussed gang issues with new arrestees, Department of Corrections personnel, victims of violent crimes, and victims' families (Tr.V:17-18). He also participated in daily, regional conference calls with a broad range of law

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> hostility or fear that either of the defendants held for Mr. Lamour or his group;
>
> second, as evidence, again if you credit it, of whether there was a joint venture or common purpose or plan between the two defendants to commit the killing; and
>
> third, whether any reported gang affiliations may have influenced certain decisions or actions by members of the ROCA agency.
>
> If you conclude that either defendant is affiliated with a gang or group that in itself is no proof that either defendant committed the crimes with which he is charged in this case. . . .

(Tr.V:15-16). Henley asked that the instruction also allow use of the evidence to evaluate his state of mind, but said that he had no objection to including this language only in the final jury charge if it was supported by the evidence (Tr.V:11). Both defendants briefly and without explanation objected to the use of the evidence to establish a joint venture (Tr.III:174).

enforcement partners, listened to thousands of hours gang member jail calls, and received gang information from jails (Tr.V:20-21). Ford also participated in reentry panels at the Department of Youth Services and the county jail for eight years, during which he would meet with gang-involved or "at risk" individuals being released from custody to encourage them toward participation in education assistance and jobs programs (Tr.V:22). Ford also participated in "cease fire meetings," involving direct contact with gangs to resolve conflicts between them (Tr.V:23). His expertise also relied on information internal to the police department -- other members of the police department, police reports, and other department records (Tr.V:24-25).[8]

Ford provided general insight into the characteristics of Boston gangs (Tr.V:26-34). He defined a gang as a "group of individuals that represent a street or a housing development or an area that would wear a common clothing indicator like a sports team," and are "involved in

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[8] At his voir dire hearing prior to trial Ford said that he had interviewed over one hundred gang members -- arrestees, shooting victims, and people with whom he had relationships (Tr.9-14-17:27-28). He also testified at the hearing that he had many relevant conversations just from walking in neighborhoods and having contact with people (Tr.9-14-17:29).

committing crimes, committing violent crimes and have ongoing conflicts with other gangs" (Tr.V:26).[9] Boston gangs generally represent one street or housing development (Tr.V:26-27). A gang member's status is tied to one's level of violence and sometimes seniority (Tr.V:31). Gang members may be as young as twelve years old and members typically "age out" in their thirties or so (Tr.V:31-32). Younger members may be tasked with a violent act -- referred to as a "crash" -- to gain status in the gang (Tr.V:33).[10] Ford had "heard a lot of young gang" members referred to as "crashes," and had heard individuals say they had "crashed out" after being arrested for an offense (Tr.V:34).

Ford also defined other phrases used in the gang context. He testified, over defendants' objections, that to "hold somebody down" and "punch somebody up" referred to showing loyalty and shooting someone, respectively (Tr.V:55-56). These conclusions were based on his experience reviewing gang information, talking to people on the street and lis-

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[9] Ford readily acknowledged that not all gang members or associates have committed violent acts (Tr.V:63).

[10] Zachery's overruled objection to the term "crash" was the only objection by either defendant to this testimony (Tr.V:33).

tening to jail calls (Tr.V:20-25, 53, 55). Ford also specifically had heard "steel" used to refer to a firearm (Tr.V:56).[11]

Ford also testified to the existence and functioning of a Boston Police Department database of people who are gang members or gang-associated (Tr.V:41-44). Ford then testified over Zachery's objection, to the "kind of information" input into the database -- individuals deemed to be members or associates of gangs, incidents involving gangs, feuds, gang collaborations, and insignias (Tr.V:41). Someone assigned more than six but fewer than ten points in the database is categorized as an associate while those who are assigned ten or more points are categorized as members (Tr.V:41-42, 61). Ford then testified over both defendants' objections to "examples of things that have different point values" in the database (Tr.V:42). He listed "one of the big ones" as "self-admission which has happened to me on the street," as well as who someone is seen with, wearing certain clothing in a particular area, photographs, and representations of another law enforcement agency

[11] During his voir dire testimony prior to trial, Ford also said that he learned gang terminology from telephones he had inspected pursuant to search warrants and social media (Tr.9-14-17:37, 50).

(Tr.V:42).[12] Ford also considers his review of social media accounts and conversations with people on the sources in making membership assessments (Tr.V:43). With this foundation, Ford offered his opinions that Lamour was a member of the Thetford Avenue gang and that both Zachery and Henley were members of Franklin Hill (Tr.V:44, 51). He also established a history of violence between Thetford Avenue and Franklin Hill (Tr.V:63).[13]

At the time Lamour's death, Henley and Lamour, members of rival, feuding gangs (Tr.V:44, 51, 52; XI:159), both participated in Roca, a nonprofit organization that provides job opportunities and training to young men in Boston (Tr.IV:95-97, 170; V:137-38). Roca participants sometimes work in the community as part of a larger team (Tr.IV:111). Roca personnel had no knowledge of specific conflicts between Henley and Lamour (Tr.IV:207), and Henley affirmatively reported that he was

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[12] Self-admission can count for as many as eight points (Tr.V:61). Being seen with a known gang member is worth two points (Tr.V:62). Certain jail events also can be factors (Tr.V:64). Any combination of factors can be used to reach the ten point threshold, and an act of violence is not required (Tr.V:63).

[13] Henley elicited his own gang association from his own witnesses (Tr.XI:159; XII:52-53), and he elicited the violent relationship between Franklin Hill and Thetford Avenue during cross-examination of Ford (Tr.V:63-64).

comfortable working with someone from a rival gang (Tr.IV:210; VI:112-13).[14]

On the "very cold" morning of February 11, 2015, following a major overnight snowstorm (Tr.IV:54, 147-48, 176; VIII:100), Roca's Boston site director planned to send Henley and Lamour on two separate snow-shoveling work crews (Tr.IV:176-78). But she ultimately dispatched just one group when Henley did not report to Roca and there were too few participants to send two crews (Tr.IV:176-78). Henley then joined the work crew after it left Roca (Tr.VI:123). The Roca van parked near a rotary on Centre Street in Boston, and the workers began shoveling snow in the area (Tr.VI:148-49).

Henley soon contacted Zachery, a fellow Franklin Hill gang member (Tr.V:51; C.A.21), and they developed an evolving plan of attack through text messages and telephone calls (C.A.21-71). Henley asked Zachery for his loyalty and support and for him to bring Henley's fire-

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[14] Henley himself presented additional gang evidence regarding another Roca participant, Ritchie Williams, who was friends with Lamour and a fellow Thetford Avenue member (Tr.IV:127). Williams was suspected at one point of bringing a firearm to Roca on November 3, 2014, and Henley and Williams saw each other on that date (Tr.IV:196-99; XI:160-61). In December, 2014, Henley told his mother that he had safety concerns at Roca because of someone there from Thetford Avenue (Tr.XII:53-54, 56).

arm to him so that he could shoot someone (Tr.V:55-56; C.A.21-26, 58).[15] But when Zachery offered to "clean up" (C.A.59), Henley provided a description of Lamour and a proposed escape (C.A.72-82).

Zachery then took several means of public transportation to the area, as evidenced by video surveillance, records associated with the Charlie Card found on his person, and his own admission during his police interview (Tr.IX:108-10, 126, 145-61; C.A.140-41). A shooter, inferentially Zachery, wearing a gray hooded sweatshirt and a dark jacket, then approached Lamour as he stood behind the Roca van, shot him, and ran from the shooting on Centre Street away from the rotary (Tr.IV:43-45; VI:82; Tr.VIII:92). Lamour suffered three gunshot wounds -- two graze wounds in addition to a fatal head-wound (Tr.VIII:37, 39-40, 50). Zachery used "hollow point" ammunition, designed to cause more damage than other ammunition by expanding on impact (*see* Tr.X:148-50, 152). Lamour inhaled blood into his lungs and could be heard gurgling blood before he died (Tr.IV:156-57; VIII:47). As he ran from the scene, Zachery pointed the firearm toward a police of-

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[15] Henley specifically used the phrases "hold me down," which meant to show loyalty, and "punch him up," which meant to shoot him (C.A.23, 51; Tr.V:55).

ficer twice, firing the weapon the second time he did so (Tr.IV:57, 58, 60-61; VI:43, 45). He then ran behind a house at the corner of Aldworth Street and Centre Street (Tr.IV:62-63; VII:151, 176-77; *see* C.A.16, 18). There he threw the firearm onto a garage roof (Tr.VII:207; IX:66-68; XI:26-29), hid his jacket under a porch (Tr.IV:86-87, 89; VIII:145), and then removed a snow shovel from the porch and carried it onto Centre Street where he was detained as he continued to walk away from the rotary (Tr.VII:65-68, 189, 198, 204; VIII:142-43; X:67-69[16], 97). Wearing no gloves and low socks, Zachery reported that he was simply volunteering his time to shovel snow for elderly people in the area (Tr.VII:67-68, 73).[17,18]

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[16] A Commonwealth expert witness identified a shoeprint near where the shovel was removed and the jacket stashed as a Nike Air Force One of the same size as Zachery's sneaker, but she identified Zachery's sneaker only as a possible source of the print (Tr.X:67-69). Sole patterns are a significant part of the comparison process and sneaker characteristics change over time as a sneaker is worn (*see* Tr.X:54-57).

[17] There were no direct eyewitnesses to the disposal of the jacket or the firearm.

[18] Stephen Dyball reported that he saw a white male running from the scene with a gun (Tr.VIII:156-59). This evidence was introduced through a police witness without limitation on its use (Tr.VIII:156-59). Zachery's counsel noted before this testimony that Dyball might testify himself (Tr.VIII:18), but he ultimately did not (*see* Tr.XII:66).

In the aftermath of Lamour's shooting, Henley pointed to coworkers running from the scene and asked why they were running (Tr.V:149). A police officer who responded to the shooting identified Henley as one of the Roca participants present when he arrived to speak with witnesses (Tr.VIII:59-61). The officer testified, over Henley's objection, that he was familiar with Henley since 2005 (Tr.VIII:60-61). Henley requested his telephone from the Roca van before he was transported to police headquarters where he was interviewed (Tr.VIII:61; C.A.159-76).

Prior to the 2015 shootings, on September 9, 2014, Boston police recovered shell casings in the area of Williams Street and Shawmut Avenue after gunshots were reported in that area (Tr.IX:95-96). A police officer identified Henley as one of two people captured in surveillance photographs running from the scene of that shooting (Tr.IX:38-39).[19] A second person seen running from the area was not Zachery (Tr.IX:41). The 2014 shell casings were discharged from the same firearm Zachery used to kill Lamour and fire at Louberry (Tr.IX:95-96; X:172; XI:21).

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[19] Henley looked dramatically different at the time of trial than he had in 2014 (Tr.IV:103-04).

The trial judge provided a contemporaneous instruction that this evidence could not be considered against Zachery and could only be considered for a very limited purpose against Henley (Tr.XI:25).

At close of all the evidence, the trial judge instructed the jury that nothing going forward was evidence, including closing arguments (Tr.XII:67).

6. Closing Arguments

Henley's closing argument explained why his state of mind was to be in fear of the victim on the day of the shooting -- explaining why he requested the firearm (Tr.XIII:91). In support of this, he specifically relied on Henley's encounter with Williams on the day Williams allegedly brought a gun to Roca, suggesting that the incident put a target on Henley's back (XIII:89). He ended his closing argument with the following:

> And finally, when I sit down or when you deliberate at the end of all this you've cast your verdict and you come to a conclusion as a group, please recognize that this is unlike any other decision you make in your life: buying a car, buying a house, getting married, all those things you can take back. All those things you can change. The verdict in this case you cannot, you cannot. You look in the mirror a week from now and say, "oh boy, I got it wrong, I want to change it," you can't. All reasonable doubt has to be viewed in favor of Mr. Henley, and I'm asking you to find him not guilty.

(Tr.XIII:95-96).

Zachery again moved for severance after Henley's closing argument (Tr.XIII:96). The motion was denied (Tr.XIII:97).

Zachery's closing argument then focused on identification evidence (Tr.XIII:102-03, 106-07). Zachery specifically suggested that surveillance video did not depict him:

> You saw this person on the videotape at various times. . . . Not one single person identified Josiah Zachery as the person who is on that videotape, so it's a great little theory. We have a Charlie Card and we have a black kid, and there's all kinds of people walking around, other black kids. Not one single person, and remember in that videotape, on those videotapes, you have a kid with a hoodie wearing a camouflage jacket. Do you see a camouflage jacket anywhere in this evidence in this case here, anywhere? . . . You can't just say 'here's a video, here's a black kid in Boston, it shows Josiah Zachery, he must be guilty.' Somebody has got to identify him.

(Tr.XIII:102-03). Zachery also focused heavily on the Commonwealth's burden of proof, specifically referencing moral certainty eleven times (*see* Tr.XIII:99-120).

The trial prosecutor's closing argument, meanwhile, included the following:

> Now, the burden of proof is on us, we welcome that. The Judge has explained that to you. Mr. Wheeler hammered on

> that phrase moral certainty like it's suppose[d] to scare you, like it's suppose[d] to scare you out of decisions that juries make in trials every day. But when they try to sell you something, some way of looking at the evidence it's got to be based reasonably on what's in the evidence . . . .

(Tr.XIII:122-23). He went on to summarize the Commonwealth's theory of the evidence that Henley solicited Zachery's help in bringing a firearm to the scene and killing Lamour because Henley and Lamour happened to be on the same work crew as rival gang members (Tr.XIII:123). He also said:

> Now, Mr. Wheeler has very honorably represented Mr. Zachery and done what he could, but his argument amounts to let's pretend. Let's pretend there's no evidence. Let's pretend the content of those text messages isn't there. Let's pretend that the MBTA video doesn't show Josiah Zachery. You see him in the courtroom, you see him on the video. You see him dress first in the camo jacket, then he sheds that for the murder after getting a ride, you can infer that. And then after the murder he sheds the black jacket, and he's left with the hoodie. Is he really asking you to say oh, that's not Josiah Zachery even though it's a person who looks just like him, dressed just like him, using a Charlie Card at those exact moments, talking and texting at the exact moments?

(Tr.XIII:126-27). "Is [Zachery's] lawyer really arguing that's not him using the Charlie Card at the same time as the transaction shows from the card in his pocket?" (Tr.XIII:130).

The prosecutor later said:

> And you know what happened at approximately 10:30 that morning. I'm not going to show you the pictures again of Kenny Lamour's body in the gutter, the way he died bleeding into his hoodie, lungs filling up with blood. I'm not going to show you again now during my closing the picture of the bullet hole that these two men put in Kenny Lamour's head. No, once is enough seeing that stuff . . . .

(Tr.XIII:133). He then made the following related argument:

> And ask yourselves as to Donte Henley was he particularly indifferent to the suffering of the victim. Donte Henley standing there pretending to be just one more shocked and surprised member of the work crew, literally standing there watching as Kenny Lamour's lungs fill up with blood as he's trying to breathe and watching him die in the cold gutter. Kenny Lamour frozen in time at 21 years old.
>
> Because of these defendants, and by these defendants, he was frozen in time, as far as they were concerned, not as somebody's brother, not as somebody's son, not as somebody who like everybody else on the crew was trying to enroll in Roca to get some skills and get some opportunities. They froze him in time as the kid from TA, the kid to be punched up. The kid from Thetford Ave., from the gang. . . . But to Josiah Zachery and Donte Henley that was the only part of Kenny Lamour's life that mattered and that's why they killed him. And that's why they killed him.

(Tr.XIII:145-46).

7. Jury Charge

The trial judge and the parties discussed the final jury charge before the parties' closing arguments (Tr.XII:72-79; XIII:6-17). Henley requested that the jurors be instructed that they could consider gang evi-

dence on Henley's state of mind (XII:73-74). The trial judge agreed and ultimately provided the instruction (Tr.XII:74; XIII:62-63). He also noted, without comment or objection from defendants, that he would instruct on both theories of first degree murder -- deliberate premeditation and extreme atrocity or cruelty (Tr.XII:75).

The trial judge also instructed the jurors at length regarding their role as fact-finders in evaluating the evidence (Tr.XIII:148, 153-65). The instructions included, "[y]ou are not to be influenced by any personal likes or dislikes or opinions or prejudices or biases or sympathy" (Tr.XIII:148). He also offered the following: "[y]ou alone as the jury will determine the weight and the effect and the value of the evidence and the credibility, that is the believability of the witnesses" (Tr.XIII:153); "sympathy for one side or one party or another has no place in your deliberations" (Tr.XIII:154); "you are not to decide this case on the basis of what you might have learned or heard outside of this courtroom or on the basis of any guesswork or speculation or suspicion or unanswered questions in your mind" (Tr.XIII:154); "you may draw inferences and conclusions only from facts which you have found to be more likely true than not true" (Tr.XIII:160). The trial judge instructed further that,

"you have great power in this regard in evaluating the evidence presented by a witness. You, as jurors, are free to believe everything the witness says, some of what the witness says, or none of what the witness says." (Tr.XIII:162). The jurors were expected to "reach an impartial verdict without sympathy" (Tr.XIII:166).

As one of his last instructions, the trial judge provided a lengthy instruction about evaluating expert testimony, clearly tasking the jury with that responsibility and noting that jurors must evaluate testimony from experts as they would any other testimony (Tr.XIII:163-64).

The trial judge also limited how particular evidence and closing arguments could be used in deciding the case. He instructed that closing arguments are not evidence (Tr.XIII:25), and that jurors could not "in any way be influenced by the fact that" photographs in evidence "may be unpleasant or graphic" because defendants were "entitled to verdicts based solely on the evidence and not one based on pity or sympathy for the decedent" (Tr.XIII:60). As for evidence of prior, uncharged conduct, the jurors could consider the allegation that Williams brought a gun to Roca for its effect on Henley's state of mind on the day Lamour was killed (Tr.XIII:63-64). Evidence of the 2014 shooting, meanwhile, could

only be considered on the issue of "whether Mr. Henley had knowledge of or access to" the firearm at issue, could not be used to infer that Henley "has a bad character or that he has a propensity to commit crimes or that he committed any crime on that earlier date," and could not be considered "for any purpose against Mr. Zachery" (Tr.XIII:60-61). The trial judge also precisely defined the limited issues for which the jury could consider gang evidence: the evidence could not be used to find a propensity to commit crime, and could only be considered 1) "as evidence of defendants' state of mind," including as to motive for the crimes and as to fear either defendant may have had toward Lamour or Thetford Avenue, 2) "as evidence of whether there was a joint venture or common purpose or plan," and 3) "as evidence of whether any reported gang affiliations may have influenced certain actions or decisions by members of the Roca Agency" (Tr.XIII:62-63).

The trial judge further noted that "the Commonwealth's theory of murder against Donte Henley is that he participated in a joint venture" with Zachery "to murder Mr. Lamour" (Tr.XIII:42). He imposed the following mens rea requirements in defining the intent required for Henley to be convicted under that theory:

- that Henley "knowingly" participated in the crime "with the intent required to commit the murder" (Tr.XIII:43);
- acted with "the intent of making the crime succeed" (Tr.XIII:44).
- "at the time Mr. Henley knowingly participated in the commission of the murder he had the intent required for that crime" (Tr.XIII:44);
- "mere knowledge that a crime is to be committed is not sufficient to convict" (Tr.XIII:44); and
- "that he intentionally participated in some fashion in committing that particular crime and that he had or shared the intent required to commit the crime" (Tr.XIII:45).

The trial judge also thoroughly instructed the jury on the related issue of the intent required for second degree murder (Tr.XIII:37). The Commonwealth was required to prove:

> that the defendants intended to kill Kenny Lamour, or intended to cause grievous bodily harm to Kenny Lamour, or intended to do an act which in the circumstances then known to them a reasonable person would have known created a plain and strong likelihood that Kenny Lamour's death would result.

(Tr.XIII:37).

The parties and the trial judge held sidebar conferences before jury instructions were completed and again at the conclusion of the jury charge (Tr.XIII:70-74; 173-75). Henley noted that he was satisfied with the judge's gang evidence instruction (Tr.XIII:70). But he suggested that the following language should have been used as part of the joint venture instruction: "The requirement that the defendant's act must have been done 'knowingly' to be a criminal offense means that it must have been done voluntarily and intentionally, and not because of mistake, accident, negligence or other innocent reason" (Tr.XIII:71-72, 174; Henley A:36). The motion for a request for a supplemental mistake/accident instruction was denied (Tr.XIII: 174). Zachery was satisfied with the instructions as they were given (Tr.XIII:175).

<u>SUMMARY OF THE ARGUMENT</u>

Zachery's motion to suppress was properly denied in all respects (P. 50). Substantial evidence that he was shooting a firearm at people established reasonable suspicion of a crime justifying his seizure as he walked down a street, and ultimately probable cause for a search warrant for the contents of his cell phone (P. 61). Meanwhile, the MBTA's providing Charlie Card transactions to police investigators did not

amount to a constitutional search because Zachery could not reasonably have expected to maintain privacy in his movements within public transportation stations, and because the third party doctrine applied (P. 57).

Moreover, Henley and Zachery received a fair trial that comported with due process requirements and evidentiary rules. As an initial matter, defendants properly were tried together because their trial defenses were not mutually antagonistic (P. 97). Furthermore, evidence of uncharged conduct, in various forms, carried minimal risk of undue prejudice and was properly admitted as direct evidence of the charged crimes, and as evidence of the motive and means to carry out those crimes (P. 66). Regardless, most of the prior conduct evidence in fact was favorable to Henley's case, and he was the defendant most affected by it (P. 68). The trial judge, moreover, consistently and accurately instructed the jury on the applicable law, including on the intent requirements for murder (P. 86). Finally, the trial prosecutor accurately addressed anticipated evidence in his opening statement and properly argued from the evidence -- and in response to defendants' arguments -- in his closing argument (P. 88).

ARGUMENT

I. ZACHERY'S MOTION TO SUPPRESS EVIDENCE WAS PROPERLY DENIED.

In reviewing a motion to suppress, this Court will accept the motion judge's findings of fact unless there is clear error but "make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." C*ommonwealth v. Tremblay*, 460 Mass. 199, 205 (2011). Here, the motion judge's findings of fact and rulings of law were proper. Accordingly, the denial of defendant's motion to suppress should be affirmed.

A. Zachery's cell phone was lawfully seized to prevent destruction of evidence while he was detained based on reasonable suspicion that he had just been shooting people in a coordinated attack.

Zachery alleges that his stop on Centre Street was an unconstitutional seizure, requiring suppression of resulting evidence (Zachery Br.21-27). "To justify a police investigatory stop under the Fourth Amendment or art. 14, the police must have 'reasonable suspicion' that the person has committed, is committing, or is about to commit a crime." *Commonwealth v. Costa*, 448 Mass. 510, 514 (2007) (quoting *Commonwealth v. Lyons*, 409 Mass. 16, 18-19 (1990)). "Reasonable sus-

picion must be 'based on specific, articulable facts and reasonable inferences therefrom.'" *Id.* (quoting *Lyons*, 409 Mass. at 19). "[T]o proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous." *Commonwealth v. Narcisse*, 457 Mass. 1, 7 (2010) (quoting *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009)). Police officers, moreover, may conduct a warrantless search or seizure, supported by probable cause, in order to prevent the imminent destruction of evidence. *Commonwealth v. Washington*, 449 Mass. 476, 480-81 (2007); *accord Commonwealth v. DeJesus*, 439 Mass. 616, 620 (2003) (requiring only "reasonable belief as to the potential loss or destruction of evidence"). Furthermore,

> [u]nder the inevitable discovery doctrine, evidence may be admissible as long as the Commonwealth can demonstrate that discovery of the evidence by lawful means was certain as a practical matter, "the officers did not act in bad faith to accelerate the discovery of evidence, and the particular constitutional violation is not so severe as to require suppression."

Commonwealth v. Hernandez, 473 Mass. 379, 386 (2015) (quoting *Commonwealth v. Sbordone*, 424 Mass. 802, 810 (1997)).

An abundance of factors created reasonable suspicion that Zachery was an active shooter, justifying his seizure. The motion judge

found, and Zachery does not dispute, that the seizure occurred when he was handcuffed, after he said that he was in the area shoveling snow for the elderly (Zachery Br.21-27; Zachery-A.94). *See Commonwealth v. Matta*, 483 Mass. 357, 362 (2019) (seizure occurs where "an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay").[20] Zachery appeared on a sidewalk from the direction where the shooter had disappeared, five to six minutes after the shooting, and only two blocks away from it (Zachery-A.94). He apparently did not arrive there simply by walking down the street as one would expect, because Oller had not seen him pass her on Centre street even though he was only a short distance from her and she had been there for several minutes (Tr.11-29-16:38, 56-57). Zachery's conduct and physical appearance also raised suspicions. He behaved strangely in that he calmly ignored a chaotic scene with police officers taking another person into custody just after gunshots were fired (Zachery-A.94). Zachery's clothing, meanwhile, was significant in two respects. First, his gray hooded sweatshirt

[20] Oller's motion testimony arguably was ambiguous as to when in the encounter Zachery was pat-frisked (Tr.11-29-16:50-52, 100-02).

and black pants generally matched the description of the shooter (Zachery-A.93-94). Second, Zachery was clearly underdressed for the frigid temperatures -- wearing no jacket or gloves, short socks, and sneakers (Zachery-A.94). This suggested both that the shovel he was carrying might be a prop and that he may have shed a jacket in an attempt to disguise himself. Zachery's subsequent statement, that he was in the area to shovel snow for the elderly, was facially implausible given his state of dress (Zachery-A.94). There plainly was sufficient evidence for police to reasonably suspect Zachery was the shooter. *Lyons*, 409 Mass. 16, 18-19.

Zachery's subsequent pat-frisk and detention in a police cruiser also were proper. The pat-frisk was warranted because the specific suspicion of criminality at issue (*i.e.*, two shootings that had happened in the area minutes earlier) clearly included suspicion that he was armed and dangerous. *See Narcisse*, 457 Mass. at 7. The subsequent detention to facilitate further investigation, including show-up identification procedures, also was warranted. *See Commonwealth v. Sinforoso*, 434 Mass. 320, 325 (2001) (proper length of detention turns on "whether the police diligently pursued a means of investigation that

was likely to confirm or dispel their suspicions quickly") (quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985)).

Lewis then properly seized Zachery's cell phone to prevent the destruction of evidence because he had both probable cause that it contained evidence that Zachery was the shooter and a reasonable belief that the evidence could be destroyed if left in Zachery's control. *See Washington*, 449 Mass. at 480-81; *DeJesus*, 439 Mass. at 620. By the time the cell phone was seized, there was substantial additional evidence that Zachery was the shooter in addition to the evidence described above (*see* Argument, *supra* at 51-53). First, the discovery of a footpath leading from where the shooter was last seen to a porch where a black jacket was stashed and from which a shovel was taken (Zachery-A.100). Moreover, four witnesses said Zachery's appearance was consistent with the shooter's -- stopping short of definitive identifications (Zachery-A.98-99; Tr.3-3-17:28). Eyewitnesses also essentially eliminated the other person taken into custody as a suspect (Zachery-A.98-99), and the police perimeter in the area did not reveal any other potential suspects (Tr.3-3-17:37).

There was also probable cause that evidence of the shootings would be found on Zachery's cell phone. This is true, in part, because Lamour's killing was consistent with a coordinated ambush. *See Commonwealth v. Arthur*, 94 Mass. App. Ct. 161, 165 (2018) (where facts suggested that there was coordination between crime participants probable cause existed to believe that cell phones had been used to coordinate the crime). The first evidence of this is that there was no apparent instigating event between the parties at the scene of the shooting that might have led to the violence (*see* Zachery-A.71). Second, it is unlikely that Zachery, acting alone, simply responded to Lamour's workplace to kill him because Lamour worked as part of a moving snow shoveling crew (*see* Zachery-A.93). If there was coordination between Zachery and a coconspirator, it plainly is reasonable to believe the cell phone in Zachery's pocket was used as a part of that coordination. Finally, separate from any evidence of coordination, the mere fact that Zachery carried the cell phone during the commission of the crime, alone, established probable cause that the phone contained evidence of the shootings. *See Commonwealth v. Hobbs*, 482 Mass. 538, 547 (2019) ("the location of a suspect's cell phone at the time of the criminal activity pro-

vides evidence directly related to his or her participation, or lack thereof, in the criminal activity").

It is also readily apparent that there was a reasonable possibility that Zachery would destroy any evidence on his cell phone if allowed to keep it. *See Commonwealth v. Hinds*, 437 Mass. 54, 62 (2002) ("by nature, computer data are not readily separable from the hard drive and [the officer] was faced with the prospect of their destruction through physical destruction of the phone"). Beyond that, Lewis had specific knowledge, personal and professional, that cell phone data deletion was a real possibility (Tr.3-3-17:48-49).

Moreover, the motion judge properly found that the cell phone evidence would have been inevitably discovered as an independent basis for denying the suppression motion -- a finding that Zachery tellingly does not even attempt to rebut (Zachery-A.122; Zachery Br.21-27). Zachery was not released after being placed in the rear of the police cruiser, but was transported to police headquarters where he was arrested and his clothing and other personal property taken (Zachery-A.94-96). The ultimate seizure of the cell phone thus was practically certain. *Hernandez*, 473 Mass. at 386. Furthermore, any error in the

seizure of the cell phone clearly was not an especially severe impropriety. *See id.*

B. Police acted properly and did not conduct a search in the constitutional sense by obtaining Zachery's Charlie Card transactions from the MBTA.

Zachery erroneously suggests that investigators improperly obtained Charlie Card data from the MBTA (Zachery Br.27-36). The Fourth Amendment and art. 14 of the Massachusetts Declaration of Rights are implicated only where there has been a search or seizure by the Government. *Commonwealth v. Augustine*, 467 Mass. 230, 240 (2014).

> To establish [a Fourth Amendment or art. 14] violation, the defendant bears the burden of proving that, in the circumstances presented, the search and seizure falls within the purview of the Fourth Amendment and art. 14, that is, that he had a reasonable expectation of privacy in the items seized.

Commonwealth v. Miller, 475 Mass. 212, 219 (2016). "To do so, the defendant must demonstrate both that he had a subjective expectation of privacy in the item and that the 'expectation of privacy [is] one that society is prepared to recognize as reasonable.'" *Id.* at 219-220 (quoting *Matter of a Grand Jury Subpoena*, 454 Mass. 685, 688 (2009)) (alteration in original) (internal quotation marks omitted).

Moreover,

> the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Commonwealth v. Cote, 407 Mass. 827, 834 (1990) (quoting *United States v. Miller*, 425 U.S. 435, 443 (1976)). Massachusetts courts apply a comparable doctrine under art. 14 while declining to accept the specific language or universal application of the Fourth Amendment doctrine. *See id.* at 835 (although a "closer question under art. 14 than under the Fourth Amendment, we conclude that the defendant cannot hold a reasonable expectation of privacy in the telephone message records" of answering service). In recent years, under both the Fourth Amendment and art. 14, a narrow exception has been carved out of the third party doctrine for CSLI (cellular site location information) data provided to third party cell phone service providers. *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018); *Augustine*, 467 Mass. at 251-52. *See also Commonwealth v. Almonor*, 482 Mass. 35, 36-37, 44 (2019) (causing third party cell phone provider to "ping" cell phone for real-time tracking is a constitutional search).

Zachery has failed to meet his burden. As for his subjective expectation of privacy, Zachery simply alleged that he "did not know" that use of his Charlie Card created a record of transactions (Zachery-A.26-27). It is not clear how this establishes an affirmative expectation of privacy in his use of the card. But Zachery more clearly fails to meet the prong of objective reasonableness, even before the third party doctrine is applied. This is true, first, because surveillance cameras are present virtually everywhere a Charlie Card transaction can occur (Tr.3-3-17:173-74, 186). This alone would alert a user to the fact that transactions are not private. Second, the very nature of using a reloadable stored value card system necessarily and intuitively requires transaction information to be disclosed to and stored by the MBTA for the system to function. Third, the MBTA publicizes for anyone with an internet connection to see that transaction information may be shared with law enforcement (Tr.3-3-17:175, 182, 191). Fourth, the MBTA allows anyone with possession of a Charlie Card to check past transactions -- both directly at a fare terminal and by consulting MBTA personnel (Tr.3-3-17:180-81). Moreover, Zachery's Charlie Card was not even issued directly to him; he instead received a Charlie Card contain-

ing a free pass from a school as part of a special program (Tr.3-3-17:159, 162-63, 192-93). One would reasonably expect such specially issued passes to be monitored for abuse. These factors, especially in combination, demonstrate that Zachery has failed to establish a privacy interest in a few, recent Charlie Card transactions.

Any doubt on this point is removed by application of the third party doctrine. The requirements clearly are met by the third party MBTA providing data within its control to police investigators. *See Cote*, 407 Mass. at 834.[21]

Zachery erroneously relies on the recently articulated CSLI exception to the third party doctrine (Zachery Br.35). *See Carpenter*, 138 S. Ct. at 2217; *Augustine*, 467 Mass. at 251-52. Nothing in the exception's supporting rationale suggests that it should be extended to Charlie Card transactions. To the contrary, the *Augustine* Court was clear that its holding was narrow and that the third party doctrine continues to be

[21] Zachery in passing suggests that the MBTA, as a government agency, was not a third party, and actually triggered the protections of the Fourth Amendment and art. 14 by collecting and storing Charlie Card data (Zachery Br.28). Zachery offers no support for the suggestion that a non-law enforcement public agency implicates constitutional search and seizure protections by maintaining a payment system for public transportation.

generally applicable. *Augustine*, 467 Mass. at 251 (the court did "not reject categorically the third-party doctrine and its principle that disclosure to a third party defeats an expectation of privacy, and we see no reason to change our view that the third-party doctrine applies to traditional telephone records"). The rationale for the CSLI exception rested on the fact that modern cell phone technology and cell phone use permits essentially constant location monitoring in "both public and private places[.]" *Id*. at 246, 250-51. In contrast, Charlie Card data, even if linked to a particular person, reveals only where a user begins a trip on public transportation, not even where the trip ends (Zachery-A.101-02). The *Augustine* Court also relied on the fact that cell phone users provide CSLI data only as a disconnected byproduct of their intended cell phone use. *Id*. at 250-51. In contrast, the information that a commuter provides to the MBTA by using a Charlie Card at a fare gate is precisely what the user intends to communicate -- that they have paid for a public transportation trip at a particular location (Zachery-A.101-02). Zachery has not shown a reasonable expectation of privacy in his Charlie Card activity. Accordingly, there was no search in the constitutional sense.

C. Zachery's cell phone was properly searched pursuant to a warrant supported by probable cause.

Zachery next argues that the application in support of the search warrant permitting the search of his cell phone failed to establish probable cause that evidence of the crime would be found on the cell phone (Zachery Br.37-45). Zachery specifically argues that the warrant application failed to establish probable cause that the cell phone contained evidence of the shootings (Zachery Br.37), or a nexus between the shootings and the cell phone (Zachery Br.40), and that the affidavit lacked particularity (Zachery Br.42).

> When considering the sufficiency of a search warrant application, our review "begins and ends with the four corners of the affidavit" (quotation and citations omitted). Common*wealth v. Cavitt*, 460 Mass. 617, 626 (2011). "In determining whether an affidavit justifies a finding of probable cause, the affidavit is considered as a whole and in a commonsense and realistic fashion . . . ." *Id.* The affidavit should not be "parsed, severed, and subjected to hypercritical analysis" (quotation and citation omitted). *Commonwealth v. Donahue*, 430 Mass. 710, 712 (2000). "All reasonable inferences which may be drawn from the information in the affidavit may also be considered as to whether probable cause has been established." *Id.* Importantly, "[w]e give considerable deference to a magistrate's determination of probable cause." *Commonwealth v. McDermott*, 448 Mass. 750, 767, cert. denied, 552 U.S. 910 (2007).

Commonwealth v. Dorelas, 473 Mass. 496, 500-01 (2016) (footnote omitted) (alterations in original). In the virtual context, affiants "must be clear as to what it is they are seeking on the [device] and conduct the search in a way that avoids searching files of types not identified in the warrant." *Id*. at 502 (quoting *United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001). Searches of electronic devices, nonetheless, "'may be as extensive as *reasonably* required to locate the items described in the warrant' based on probable cause[.]" *Id*. (quoting *United States v. Grimmett*, 439 F.3d 1263, 1270 (10th Cir. 2006) (emphasis in original). A bear assertion that evidence is likely to be found is insufficient.

The search warrant affidavit in the present case established probable cause that particular evidence would be found on Zachery's cell phone. As an initial matter, the affidavit presented substantial evidence that Zachery murdered Lamour and fired at Louberry (Zachery-A.69-71). The affidavit taken as a whole also established a probability that the crimes were part of a coordinated effort. Zachery deliberately traveled to the area and provided a demonstrably false explanation for why he was there and how he had arrived (Zachery-A.70-72), and there was no altercation at the scene that might have led to the shooting

(Zachery-A.71). It is reasonable to infer that Zachery was coordinating with someone to reach the scene for two reasons. First, Zachery did not live in Jamaica Plain (Zachery-A.71) and there was no other apparent basis for him to learn of Lamour's whereabouts as Lamour worked as part of a travelling work crew. Second, the only apparent motive for the crime was a gang rivalry, and there was another active member of Zachery's gang on the work crew with Lamour (Zachery-A.72). While it may be a technical possibility that Zachery independently decided to target Lamour and researched his whereabouts, it is reasonable to infer instead that Zachery's fellow gang member, present with Lamour, facilitated the attack (*see* Zachery-A.72). *See Dorelas*, 473 Mass. at 501 (all reasonable inferences considered in establishing probable cause). Moreover, if there was coordination, it is reasonable to infer that Zachery used the cell phone found on his person (*see* Zachery-A.70).

Even though nothing more was needed for issuance of the warrant, there were independent bases for issuance of the warrant. Bliss offered a series of opinions based on his extensive training and experience each of which independently established probable cause: "common practice for victims, witnesses or perpetrators of firearm-related or other violent

incidents to make phone calls or send text messages prior to and immediately after the event" (Zachery-A.73); cell phones commonly are used both in furtherance of crimes and to cover up crimes after the fact (Zachery-A.73); cell phones frequently are used to photograph friends and associates together (Zachery-A.74); and people who possess firearms often photograph themselves with those firearms (Zachery-A.74). Most of these opinions are independently supported by common sense, and are easily distinguishable from the broadly stated and essentially standalone opinion discussed in *Commonwealth v. White*, 475 Mass. 583, 589-90 (2016). *See id.* (acknowledging officer training and experience are relevant factors, but finding opinion that "coventurers often use cellular telephones to communicate with each other" in combination with defendant owning cell phone did not establish probable cause).

Zachery's broad claim that the affidavit lacks particularity also fails (Zachery Br.42-45). The affidavit, in fact, specifically sought eight types of evidence (Zachery-A.66, 74), and explained why the evidence could be found throughout the cell phone (Zachery-A.74). *See Dorelas*, 473 Mass. at 502 ("may be as extensive as *reasonably* required to locate the items") (quoting *Grimmett*, 439 F.3d at 1270). *Contrast White*, 475

Mass. at 590 (affiant did not "claim that there existed a particular piece of evidence likely to be found"). The search warrant was supported by probable cause and the scope of the search was reasonable.

II. TRIAL EVIDENCE OF UNCHARGED CONDUCT WAS PROPERLY ADMITTED BECAUSE ITS SUBSTANTIAL PROBATIVE VALUE WAS NOT OUTWEIGHED BY A MINIMAL RISK OF UNDUE PREJUDICE.

"[R]elevant evidence is admissible unless unduly prejudicial[.]" *Commonwealth v. Adjutant*, 443 Mass. 649, 663 (2005) (quoting *Commonwealth v. Arroyo*, 442 Mass. 135, 144 (2004)).

> "Evidence is relevant if it has a rational tendency to prove an issue in the case, or render a desired inference more probable than it would be [otherwise]." *Commonwealth v. Wallace*, 70 Mass. App. Ct. 757, 764 (2007) (citations and quotations omitted). Mass. G. Evid. § 401 (2014). "Whether evidence is relevant in any particular instance, and whether the probative value of relevant evidence is outweighed by its prejudicial effect, are questions within the sound discretion of the judge." *Commonwealth v. Dunn*, 407 Mass. 798, 807 (1990).

Commonwealth v. Tarjick, 87 Mass. App. Ct. 374, 379 (2015) (alterations in original). Evidence of uncharged criminal activity is admissible if relevant for a reason other than to show criminal propensity. *Commonwealth v. Holley*, 478 Mass. 508, 532 (2017). Such evidence specifically may be admitted to show the means to commit a crime (*id.*) and

where it is "inextricably intertwined" with charged conduct. *Commonwealth v. Facella*, 478 Mass. 393, 401 (2017). Trial judges are given "'great latitude and discretion' with respect to the probative-unfairly prejudicial analysis, and '[appellate courts] uphold a judge's decision in this area unless it is palpably wrong.'" *Id.* (quoting *Commonwealth v. Sicari*, 434 Mass. 732, 752 (2001)).

A. Evidence of the uncharged 2014 shooting directly implicated Henley in the charged murder and presented a minimal risk of undue prejudice.

Despite Henley's claim to the contrary, the trial judge properly admitted evidence that Henley ran from a prior firearm incident involving the same weapon used to kill Lamour (Henley Br.20-30).

Evidence of the 2014 shooting was probative evidence. The Commonwealth alleged that Henley aided and abetted Zachery in the murder in part by instructing Zachery to bring Henley's own firearm to the scene (Tr.XIII:123). The evidence at issue thus established access to a firearm as a general matter (*See Holley*, 478 Mass. at 532), and was intertwined with the Commonwealth's particular theory of Henley's involvement. *See Facella*, 478 Mass. at 401. *See also Commonwealth v.*

McGee, 467 Mass. 141, 156 (2014) (permitting evidence that defendant possessed firearm on prior occasion).

The prejudicial effect of the evidence, meanwhile, was minimal. The jury could rationally have inferred that Henley had some association with a firearm used in the 2014 incident, but jurors could not have rationally inferred that he was solely or principally responsible for the incident, that anyone was in fact shot, or even that Henley attempted to shoot someone. The mere inference that Henley had access to a firearm could not have unduly prejudiced him because other evidence suggested that he had a firearm (Tr.V:55-56), and Henley himself readily acknowledged the fact in his opening statement (Tr.IV:30, 33). Moreover, evidence of prior violence generally was helpful to Henley's case because he was firmly committed to a defense that he requested a firearm not as part of a plan to kill, but because his gang history was so significant that it put a "target on his back" (Tr.IV:30, 33; XIII:89, 91).

Henley relies on *Commonwealth v. Barbosa*, 463 Mass. 116 (2012) to suggest that the 2014 incident was unfairly prejudicial because the connection between Henley and the firearm was speculative (Henley Br.24-25). Henley's reliance on *Barbosa* is misplaced. In *Barbosa* the

SJC found inadmissible ammunition and a magazine that definitively were not used in the charged shooting and were tenuously linked to the defendant. *Id.* at 121-22. The Court found the evidence should have been excluded in the circumstances of that case, but expressly noted that a "weapon that could have been used in the course of a crime is admissible" as evidence of the means of committing a crime. *Id.* In contrast, here, the 2014 firearm definitively was the same one used to kill Lamour (Tr.IX:95-96; X:172; XI:21), and Henley was linked to the firearm not only by his presence at the prior shooting (Tr.IX:38-39), but also by Zachery bringing the very same firearm to the scene when Henley asked for his own gun (Tr.IX:95-96; X:172; XI:21. *See Holley*, 478 Mass. at 532-33 (theft of firearms admissible to show the means of committing shooting and access to firearms, even though neither firearm was linked to charged shooting, and one was excluded as the murder weapon).

Henley was not prejudiced even if there was error despite his objection to the evidence (Tr.XI:22-23). *See Commonwealth v. Hughes*, 82 Mass. App. Ct. 21, 29 (2012) (preserved error reviewed for whether it "did not influence the jury, or had but very slight effect") (quoting *Commonwealth v. Vick*, 454 Mass. 418, 423 n.5 (2009)). This is true,

primarily, because the jury was simply unlikely to draw significant improper conclusions from the evidence, and because evidence of prior violence was helpful to Henley's defense (Argument, *supra* at 68). Moreover, the trial judge clearly instructed the jury on the permissible use of the evidence and that it could not be used to infer bad character, propensity, or that Henley previously committed a crime (Tr.XI:25; XIII:60-61). The jury is presumed to have followed these instructions. *Commonwealth v. Medina*, 430 Mass. 800, 803 (2000).[22]

B. An identification witness's testimony that he was familiar with Henley since 2005 was probative of the strength of his identification and did not prejudice Henley in the circumstances of this case.

Despite Henley's contention to the contrary, a police officer's testimony, over Henley's objection, that he went to the scene where Lamour was killed and recognized Henley as part of the Roca work crew was

[22] Henley argues that the "judge's limiting instruction was also defective because did not [sic] require the jury to first find that Mr. Henley possessed the gun in September of 2014 or had access to it" (Henley Br.29). Henley does not explain why the instruction was required in that exact location. But, more importantly, the instruction was included there as the trial judge instructed the jurors that they could only consider the evidence "[i]f you find the evidence concerning the prior incident credible" (Tr.XIII:61). He was more specific elsewhere: "you may draw inferences and conclusions only from facts which you have found to be more likely true than not true" (Tr.XIII:160).

admissible because its probative value outweighed undue prejudice (Tr.VIII:59-60; Henley Br.31-33).

The evidence was relevant. If there are any murder trials in which a defendant's presence at the scene of the killing is not probative evidence, the present case is not among them. That Henley was physically present with Lamour was central to the Commonwealth's theory of how and why Henley orchestrated the killing (*see* Tr.XIII:123). Moreover, the length of time that the identification witness was familiar with Henley was relevant to the strength of his identification (Tr.VIII:60-61). *See Commonwealth v. Adams*, 458 Mass. 766, 771 (2011) ("identification by a witness who knows the individual well" is more reliable than identification by someone who does not know individual).

As for alleged improper undue prejudice, Henley's only claim is that the jury was likely to infer from the testimony a long history of police contact (Henley Br.32). But this was insignificant prejudice in the context of this case where Henley himself claimed his history of gang involvement as the center of his defense. He did this in both his opening statement (Tr.IV:27-28, 30, 33), closing argument (XIII:89, 91). And through his own witnesses in his case in chief (Tr.XI:159; XII:52-53).

For these same reasons, Henley was not prejudiced by any error despite Henley's objection to the testimony (Tr.VIII:60). *See Hughes*, 82 Mass. App. Ct. at 29.

C. Ford offered proper expert testimony that was helpful to the jury's determination of the case and was not unduly prejudicial.

Henley next argues that the trial judge improperly admitted Ford's expert gang testimony (Henley Br.33-49). Henley does not contest -- and did not contest below -- that Ford's extensive experience with Boston street gangs (Tr.9-14-17:27-29; V:11-25) generally qualified him as an expert in that subject (*see Tr.10-24-17:42-43*; Henley Br.39-49). He instead raises two narrower claims: first, the trial judge's limiting instruction to the jury permitted consideration of the gang evidence for too many purposes; and second, some of the testimony was inadmissible for any purpose because it was either unduly prejudicial or outside of Ford's expertise (Henley Br.33-49).

"Expert testimony 'is admissible whenever it will aid the jury in reaching a decision, even if the expert's opinion touches on the ultimate issues that the jury must decide.'" *Commonwealth v. Evans*, 469 Mass. 834, 849 (2014) (quoting *Commonwealth v. Dockham*, 405 Mass. 618,

628 (1989)). "The purpose of expert testimony is to assist the trier of fact in understanding evidence or determining facts in areas where scientific, technical, or other specialized knowledge would be helpful." *Commonwealth v. Pytou Heang*, 458 Mass. 827, 844 (2011). "Proper bases [for expert testimony] include facts within the witness's direct personal knowledge, or unadmitted but independently admissible evidence." *Commonwealth v. Barbosa*, 477 Mass. 658, 667 (2017). Trial judges have "wide discretion in qualifying a witness to offer an expert opinion" and that "determination will not be upset on appeal if any reasonable basis appears for it[.]" *Pytou Heang*, 458 Mass. at 845 (quoting *Commonwealth v. Mahoney*, 406 Mass. 843, 852 (1990).

i. Ford properly interpreted certain phrases based on his many years of gang-related police work.

Henley erroneously claims that Ford should have been precluded from testifying to what it meant to "hold someone down" and "punch someone up" because the testimony lacked foundation, went beyond Ford's expertise, and invaded the province of the jury (Henley Br.39-40). The trial judge did not abuse his discretion in permitting Ford to interpret the phrases because Ford had specialized knowledge of the phrases that was helpful to the jury. *See Pytou Heang*, 458 Mass. at 844.

Ford's opinions were helpful because the meanings of the phrases were not readily apparent without interpretation, nor does Henley claim that they were (*see* Henley Br.39-40). Ford's knowledge of Boston gang terminology also was specialized. He had many years of focused professional practice in the area of Boston gang policing (Tr.V:12-17). His experience specifically included an abundance of exposure to gang communication -- thousands of hours of gang member jail calls (Tr.V:20-21), more than 100 gang member interviews (Tr.9-14-17:27-28), facilitating "cease fires" with gang associated people and participating in community reentry panels (Tr.V:22-23), contact with arrestees about gang issues (Tr.9-14-17:29; V:17-18), and review of the contents of telephones (Tr.9-14-17:37, 50). *See Commonwealth v. Rosa*, 468 Mass. 231, 240 (2014) ("Expert testimony is useful where speakers engage in coded conversation or speak about a subject using specialized vocabulary"); *Commonwealth v. Anderson*, 425 Mass. 685, 687 n.5 (1997) (witness "testified that by 'cap him,' he understood the defendant to mean fire a pistol or shoot").

Henley's claim hinges on misplaced reliance on the holding in *Commonwealth v. Gray*, 463 Mass. 731 (2012) that "a 'gang expert' can-

not, without more, be deemed an expert qualified to interpret the meaning of rap music lyrics . . . ." *Id*. at 755; (Henley Br.39). Henley ignores that the holding was specific to musical lyrics with a tenuous connection to the defendant. *Id*. at 754-55.[23]

Heney's related claim that Ford provided inadequate foundation for his interpretations fails for several reasons (Henley Br.39-40). First, the specific basis for expert opinion testimony need not be admitted for the opinion to be offered. *See Goddard*, 476 Mass. at 448 (basis of opinion left for cross-examination where it is admissible but not admitted). Moreover, Ford explained that he had in fact heard or "become familiar with" the phrases in the context of "gang activity" (Tr.V:55-56). He also was clear that his familiarity stemmed from his extensive gang-related

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[23] The rap video:

> was available on a commercial Web site promoting rap artists. The defendant did not write or perform the lyrics or produce the video, and it was not found in his possession. The lyrics show no connection to the defendant that would suggest they were biographical or otherwise indicative of his own motive or intent at the time of the shooting.

Gray, 463 Mass. at 754-55. The *Gray* Court convincingly made the point with an analogy that "we do not likely believe that Johnny Cash shot a man simply to watch him die" or "generally take to heart Bob Marley's proclamation: 'I shot the sheriff, but I did not shoot the deputy[.]'"

police work -- including his review of telephones pursuant to search warrants and his extensive review of jail calls (Tr.9-14-17:37, 50; V:20-25, 53, 55).

ii. ***Ford's testimony properly addressed relevant trial issues without invading the province of the jury or stating opinions on ultimate issues.***

Henley also is incorrect that several portions of Ford's testimony invaded the province of the jury (Henley Br.40).

> There is no prohibition on an expert testifying to an opinion that touches the ultimate issue in a case. *Commonwealth v. Canty*, 466 Mass. 535, 543 (2013). See Mass. G. Evid. § 704 (2016). However, an expert opinion stating whether a defendant is guilty or innocent is not permitted. *Commonwealth v. Hamilton*, 459 Mass. 422, 439 (2011). The jury must be allowed to reach their own conclusion from the evidence; an opinion touching on guilt or innocence usurps the jury's function as the sole and exclusive finders of the facts. Where testimony approaches an ultimate issue of guilt, "the probative value of the opinion must be weighed against the danger of unfair prejudice." *Canty*, 466 Mass. at 544. See Mass. G. Evid. § 403 . . . .

Goddard, 476 Mass. at 446-47.

Henley suggests that Ford's interpretation of what it meant to "hold someone down" or "punch someone up" "invaded the fact finding function of the jury" because the text messages "went to the heart of" the case (Henley Br.40). But "[e]xpert testimony may be admitted to

explain the meaning of conversations conducted in 'street-level jargon,' or other coded language[.]" *Rosa*, 468 Mass. at 240 n.12 (citing *United States v. Baptiste*, 596 F.3d 214, 222 & n.6 (4th Cir. 2010)). Only "interpretations of clear conversations are not admissible." *Id.* (quoting *United States v. Gonzalez-Maldonado*, 115 F.3d 9, 17 (1st Cir. 1997). The mere fact that the interpretations were important to the Commonwealth's case clearly does not mean that Ford testified to an ultimate issue. *See Goddard*, 476 Mass. at 446-47.

Henley also suggests that Ford's testimony that younger members in gangs -- or "crashes" -- may commit violent acts to gain status in a gang too closely paralleled the facts of his case (Henley Br.40; Tr.V:33). Henley appropriately does not challenge the relevance of the testimony or its helpfulness to the jury (*see* Henley Br.40), and the Commonwealth plainly was permitted to provide its theory as to why Zachery would travel through the city and shoot a stranger in the head with minimal prompting. *See Gray*, 463 Mass. at 752 (evidence of both gang feud and gang membership "was relevant to provide a reason for an otherwise inexplicable killing"). Henley's statement that the evidence "closely mirrored the facts of this case" appears to be nothing more than a sugges-

tion that the testimony was important to the case (Henley Br.40).[24] As discussed, expert testimony is not improper merely because it is especially important. *See Goddard*, 476 Mass. at 446.

Even if there was error in the testimony about violence by younger gang members, Henley did not object to the testimony (Tr.V:33), and it did not create a substantial risk of a miscarriage of justice. *See Commonwealth v. Dirgo*, 474 Mass. 1012, 1016 (2016) (reviewed for "serious doubt whether the result of the trial might have been different had the error not been made") (quoting *Commonwealth v. Azar*, 435 Mass. 675, 687 (2002)). Evidence of gang violence generally was helpful to Henley's case and he promoted that evidence from the trial's start to its finish (*see* Argument, *supra* at 71). The specific evidence here, moreover, supported Henley's claim that his text message was misinterpreted as an order to kill Lamour (Tr.IV:30, 33) – an otherwise less than compelling claim that lacked an explanation for Zachery's motive.

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[24] Henley specifically focuses on Ford's use of the word "crash" (Henley Br.40). But it is not clear how the testimony paralleled the present case because there was no evidence of "crash" being used – including during Zachery's booking procedure telephone call (Tr.VII:91), the specific context in which Ford previously had heard the term used (Tr.V:33-34).

iii. Ford properly testified to the general factors considered in making gang association and membership determinations.

Henley also claims undue prejudice from Ford's mentioning certain factors in assessing whether someone is associated with a gang – specifically the factors of "self-admission" on the street and in jails, "altercations with rival gang members," and information from other law enforcement agencies (Tr.V:42; Henley Br.40-41). Henley claims that from this testimony "the jury could reasonably infer that both defendants had had previous contacts with law enforcement, past periods of incarceration, and previous altercations with rival gang members" (Henley Br.41).

Henley relies fully on *Commonwealth v. Wardsworth*, 482 Mass. 454, 468 n.25 (2019), for the legal basis for his claim (Henley Br.41). But the *Wardsworth* Court specifically found it improper for a gang expert to testify that the defendant was a gang member simply because another police officer entered him into the gang database, where the testifying expert did not know what factors were considered and conducted no analysis himself. *Id.* at 467-68. Indeed, the *Wardsworth* Court actually considered it error that there "was no testimony regard-

ing how the database is created or maintained, or what criteria police use to determine whose names are entered in it." *Id.* at 468. Where, as here, the officer testified to his personal knowledge, *Wardsworth* is inapplicable.

Furthermore, the probative value of the evidence was not outweighed by the risk of undue prejudice. *See Tarjick*, 87 Mass. App. Ct. at 379. The testimony was probative in that it provided required, general foundation for Ford's central expert opinions of gang membership. *See Commonwealth v. Gant*, 51 Mass. App. Ct. 314, 321 (2001) (proper foundation required for "expert testimony . . ., including special knowledge in narcotics cases"); *see also Commonwealth v. Carter*, 481 Mass. 352, 371 (2019) (experts permitted to testify to general principles). As for prejudice, Ford's description of general factors was helpful to Henley. This is true, first, because Ford was clear that gang determinations can be based on such innocuous facts as social media posts, wearing certain clothing, and simply being seen with particular people (Tr.V:42-43), and that simply being seen with another gang member could carry two points toward the ten point threshold (Tr.V:62), demonstrating that evidence of violence, incarceration, or imprisonment are

not required. Ford also expressly clarified that not all gang members or associates have committed violent acts (Tr.V:63). The evidence also was helpful because it supported his defense, as demonstrated by the fact that he himself twice elicited that self-admission is a factor, and once that jail events are a factor (Tr.V:61-62, 64). He also raised the history of violence between Thetford Avenue and Franklin Hill (Tr.V:63). This questioning is unsurprising as it was entirely consistent with the strategy he pursued from opening statement through his closing argument -- that he requested a firearm out of fear because of his own gang involvement (*see* Tr.IV:30, 33; XIII:89, 91). *See Commonwealth v. Tevlin*, 433 Mass. 305, 318 (2001) ("theory on which a case is tried will not be ignored on appeal"). Accordingly, there was no prejudice even if there was error. *See Hughes*, 82 Mass. App. Ct. at 29.

iv. Ford properly testified to general gang background information because the relevance of the testimony was not outweighed by undue prejudice.

Henley next broadly claims that Ford improperly referenced violence that had no connection to either defendant because undue prejudice from the evidence outweighed any probative value (Henley Br.41-

44).[25] Henley's alleged undue prejudice is that "[a]s a result of Ford's testimony, the jury was undoubtedly left with the impression that all gang members, including defendants in this case, were dangerous criminals who routinely engaged in murders and other extremely violent acts" (Henley Br.44). The argument ignores that Ford expressly clarified that not all gang members or associates have committed violent acts (Tr.V:63). It also ignores that Henley's defense required the jury to accept that gang violence was a real factor in Henley's mind (see Tr.IV:30 33; XIII:89, 91), and that he supported this defense by elicited gang violence testimony from Ford himself (Tr.V:63), and by obtaining a jury instruction that permitted the jury to consider gang evidence on Henley's state of mind (XII:73-74). There was no error and thus no undue prejudice.

Henley again relies on a misapplication of *Wardsworth*, 482 Mass. 454 for support (Henley Br.41). *See id.* at 472-73. The gang evidence there was admitted for the limited purpose of establishing "the rivalry

[25] Henley specifically challenges Ford's mentioning a 2003 murder as an example of the start of a gang rivalry *(*Tr.V:29), and other unremarkable, passing references to violence throughout his testimony (Tr.V:18, 20-1, 23, 25, 26, 30, 34), without particularizing his claims (Henley Br.41-44).

between [two] gangs, which might have given the defendant a motive to kill." *Id.* at 473. Despite the limited purpose of the expert's testimony, the expert broadly testified to extensive prejudicial conduct of the very two gangs involved in the case -- including drug dealing at schoolyards and playgrounds, shootings, prostitution, access to guns, and the hiding of "community guns." *Id.* The *Wardsworth* Court disapproved of this specific, overtly prejudicial, irrelevant evidence, while expressly approving testimony about a gang rivalry and gang memberships at issue in this case. *Id.* at 471-72. Here, there was no such testimony.

v. The trial judge's limiting instruction on the gang evidence properly limited the jury's use of the evidence to its consideration of joint venture mens rea requirements.

Henley next argues that the judge's gang evidence limiting instruction was defective in two respects: first, the instruction permitted the jury to consider the evidence too broadly; and second, the instruction failed to remind the jurors that they could only rely on the evidence if they credited it (Henley Br.48-49).

The instruction was not overly broad. Henley does not allege that the gang evidence was irrelevant to either joint venture or to explain the actions of Roca personnel (Henley Br.47-49), nor can he since the ev-

idence plainly was relevant to both. Instead, he simply argues that the language of the challenged instruction too closely parallels a disapproved instruction in *Wardsworth*, 482 Mass. 454 (Henley Br.47-48). *Wardsworth*, again, is inapposite. The *Wardsworth* Court found it improper to permit gang evidence to be considered in evaluating any aspect of whether a defendant participated in a joint venture, where doing so essentially permitted use of the evidence for any purpose. *Id.* at 472. The Court did not suggest that gang evidence could not be used to establish the mens rea for a joint venture, but instead repeatedly approved the use of gang evidence for that purpose. *Id.* at 471 n.30, 472. The trial judge here twice correctly instructed that one of the three "very limited" purposes for which the gang evidence could be considered was whether there was "a joint venture or common purpose or plan" (Tr.V:16; XIII:63). This was a proper instruction. *See Id.* at 472 (approved restricting "gang evidence to 'the limited purpose of showing motive and joint venture,' that is, 'that the defendants therefore shared a common motive'") (quoting *Commonwealth v. Akara*, 465 Mass. 245, 266, 268 (2013)).

Henley also claims that the trial judge erred in failing to instruct the jury that it could rely on the gang evidence only if it credited the testimony (Henley Br.48-49). The trial judge's instructions on this point were abundantly clear. When Ford offered his testimony, the judge instructed that jurors could consider the evidence "[i]f you credit" it (Tr.V:15). In his final jury charge the trial judge used "if you conclude" language to make the same point. (Tr.XIII:63). Elsewhere he instructed, "you may draw inferences and conclusions only from facts which you have found to be more likely true than not true" (Tr.XIII:160). The trial judge offered similar instructions elsewhere (Tr.XIII:153, 154), and separately instructed that the responsibility to evaluate evidence applied with equal force to expert testimony (Tr.XIII:162-64).

Any error is reviewed for a substantial risk of a miscarriage of justice because Henley not only failed to object to, but specifically approved of the gang evidence instruction as given (Tr.XIII:70). *See Dirgo*, 474 Mass. at 1016. Where there was no error, there can be no substantial risk.

III. THE TRIAL JUDGE CORRECTLY, CLEARLY, AND UNEQUIVOCALLY INSTRUCTED THE JURY THAT HENLEY COULD ONLY BE CONVICTED OF MURDER IF HE HAD THE INTENT TO COMMIT THAT CRIME.

Henley incorrectly claims that the trial judge was required to specifically instruct the jury that Henley could not be convicted if his participation in the crime was the result of "mistake, accident, negligence or other innocent reason" because the instruction went to the heart of his case (Henley Br.49-50). Henley's argument, both below and here, is that the instruction was necessary to clarify the requirement that he knowingly participated in the crime (Henley Br.49-52; Tr.XIII:71-72, 174; Henley A:36).[26]

"A trial judge has the duty to state the applicable law clearly and correctly." *Commonwealth v. Batchelder*, 407 Mass. 752, 759 (1990). "The necessity, scope, and character of a judge's supplemental jury instructions are within his or her discretion." *Commonwealth v. Watkins*, 425 Mass. 830, 840 (1997). "A trial judge 'is not required to grant a par-

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[26] Henley appropriately does not argue for an affirmative defense accident instruction (*see* Henley Br.49-52). In that context, "[a] defendant is entitled to an accident instruction in a shooting death 'only where there is evidence of an unintentional or accidental discharge of a firearm.'" *Commonwealth v. Pina*, 481 Mass. 413, 418 (2019) (quoting *Commonwealth v. Millyan*, 399 Mass. 171, 182 (1987).

ticular instruction so long as the charge, as a whole, adequately covers the issue.'" *Commonwealth v. McGee*, 467 Mass. 141, 154 (2014) (quoting *Commonwealth v. Daye*, 411 Mass. 719, 739 (1992)). Jury instructions are considered as a whole and are assessed for their probable impact on the jury's factfinding. *Batchelder*, 407 Mass. at 759.

The trial judge's jury instructions were not an abuse of discretion in that the jury could not plausibly have believed that Henley could be convicted for accidentally or negligently causing Zachery to shoot Lamour. The trial judge's aiding and abetting instruction was clear that a conviction required knowing participation (Tr.XIII:43, 44), "the intent required to commit the murder" (Tr.XIII:43), "the intent of making the crime succeed" (Tr.XIII:44), the "intent required for that crime" (Tr.XIII:44), and "that he intentionally participated in some fashion in committing that particular crime and that he had or shared the intent required to commit the crime" (Tr.XIII:45). The trial judge elsewhere detailed the intent requirements for second degree murder (Tr.XIII:37). The trial judge instructed further that even a showing that Henley knew that Lamour was to be murdered was "not sufficient to convict" (Tr.XIII:44). Henley was not entitled to dictate the "specific language"

of the jury instructions (*Commonwealth v. Pires*, 453 Mass. 66, 71 (2009)), and the jury clearly was correctly instructed on the applicable law. *Batchelder*, 407 Mass. at 759. The repeated instructions requiring proof of the intent required for murder also demonstrate that Henley was not prejudiced even if an accident instruction should have been given. *See Hughes*, 82 Mass. App. Ct. at 29.

IV. THE PROSECUTOR'S OPENING STATEMENT AND CLOSING ARGUMENT ACCURATELY AND PERMISSIBLY ADDRESSED THE ANTICIPATED AND ADMITTED TRIAL EVIDENCE, THE DEFENDANTS' CLAIMS, AND THE COMMONWEALTH'S BURDEN OF PROOF.

Zachery incorrectly claims that the trial "prosecutor's arguments were riddled with improprieties" that were "so egregious" that they violated Zachery's Fifth Amendment and art. 12 due process rights (Zachery Br.45). A prosecutor may reference anticipated evidence during an opening statement (*Commonwealth v. Sylvia*, 456 Mass. 182, 188 (2010)), and may argue forcefully from admitted evidence and reasonable inferences during a closing argument. *Commonwealth v. Roy*, 464 Mass. 818, 829, 833 (2013). Moreover, a prosecutor may both comment on defense tactics and respond to arguments. *Commonwealth v. Chambers*, 93 Mass. App. Ct. 806, 822 (2018). A prosecutor also is "entitled to

emphasize the strong points of the Commonwealth's case and the weaknesses of the defendant's case[.]" *Id.* (quoting *Commonwealth v. Feroli*, 407 Mass. 405, 409 (1990)). Individual remarks are reviewed in the context of the entire argument, jury instructions, and trial evidence. *Commonwealth v. Camacho*, 472 Mass. 587, 607 (2015).

A. The trial prosecutor properly addressed the Commonwealth's burden of proof.

Zachery erroneously suggests that the prosecutor erred in addressing the Commonwealth's burden of proof even though he does not allege any misstatement in describing the burden (Zachery Br.45-46). He suggests that the prosecutor "scoffed" at defense counsel and simultaneously minimized the prosecution's burden of proof by suggesting that Zachery's counsel had "hammered" on moral certainty language to scare jury out of convicting him (Zachery Br.45-46). Zachery ignores two things: first, "hammered" language was fair since Zachery in fact hit moral certainty language eleven times (Tr.XIII:99-120); second, this directly followed Henley's suggestion that jurors might regret guilty findings for the rest of their lives (Tr.XIII:95-96). The trial prosecutor's brief comment was an entirely fair response to the defendants' closing arguments. *Chambers*, 93 Mass. App. Ct. at 822.

B. The trial prosecutor properly argued that Zachery's criticism of the Commonwealth's evidence simply ignored that evidence.

Contrary to Zachery's contention, the trial prosecutor neither shifted the burden of proof nor attacked Zachery's trial strategy by suggesting that his closing argument amounted to asking the jury to "pretend" the text message and surveillance video evidence did not exist (Zachery Br.46; Tr.XIII:126). A prosecutor may not misstate the law by suggesting that a defendant's trial evidence is not evidence, or that it should not have been presented. *See Commonwealth v. Scesny*, 472 Mass. 185, 202-03 (2015). But a "prosecutor [is] permitted to comment on the defense strategy and tactics, and" even to argue "that the strategy was intended to confuse[.]" *Id.* at 202. The trial prosecutor's challenged statement here simply responded to Zachery's primary argument that the Commonwealth's identification evidence was insufficient (*see* Tr.XIII:102-03, 119-20).

C. The trial prosecutor properly characterized and responded to defense counsel's argument that surveillance video did not depict Zachery.

Zachery argues that his trial counsel never suggested that Zachery was not depicted in surveillance video, so the prosecutor erred

in suggesting that he had made the argument (Zachery Br.47; Tr.XIII:126-27, 130). But Zachery misreads the record as his trial counsel argued the point at some length (Tr.XIII:102-03).

D. The trial prosecutor's opening statement and closing argument properly referenced the circumstances of Lamour's death.

Zachery also claims that the trial prosecutor improperly invoked sympathy for Lamour in his opening statement and closing argument by referencing the circumstances of his death and referencing admitted photographs of his body (Zachery Br.48-53). "A prosecutor 'should not play on the sympathy or emotions of the jury' but is entitled to 'tell the jury something of the person whose life [has] been lost in order to humanize the proceedings[.]'" *Commonwealth v. Chukwuezi*, 475 Mass. 597, 609 (2016) (quoting *Commonwealth v. Rodriguez*, 437 Mass. 554, 566 (2002)) (alteration in original). Moreover, otherwise improper appeals to sympathy are permitted where, as here, extreme atrocity or cruelty is a live issue to address the elements of that offense. *Commonwealth v. Kent K.*, 427 Mass. 754, 759-760 (1998).

Zachery first challenges the trial prosecutor's opening statement assertion that Lamour fell down "in the gutter, gasping for breath.

Lungs filling up with blood as well, bleeding and dying" (Tr.IV:15; Zachery Br.48). But this statement was a proper, abridged, restrained, and factually accurate projection of anticipated evidence that Lamour died and that he suffered as he did so (Tr.IV:156-57; VIII:47). *See Sylvia*, 456 Mass. at 188; *Kent K.*, 427 Mass. at 759-760.

Zachery also challenges several statements from the prosecutor's closing argument. He first asserts that the following statement "served no legitimate purpose other than to needlessly highlight" disturbing evidence and inflame the jury (Zachery Br.48-49):

> I'm not going to show you the pictures again of Kenny Lamour's body in the gutter, the way he died bleeding into his hoodie, lungs filling up with blood. I'm not going to show you again now during my closing the picture of the bullet hole that these two men put in Kenny Lamour's head. No, once is enough seeing that stuff . . . .

(Tr.XIII:133). Zachery similarly attacks the prosecutor's later, direct argument for a conviction on a theory of extreme atrocity or cruelty as "an over the top appeal to sympathy for the victim and the victim's family" (Zachery Br.50-51; Tr.XIII:145-46). The prosecutor there noted Henley's indifference as he stood at the scene of Lamour's death, that Lamour's lungs filled with blood as he died, and that defendants killed Lamour because the only part of his life that mattered to them

was where he lived, not that he had a family or that he was a person trying to find opportunities in his life (Tr.XIII:145-46).

The prosecutor was entitled to offer these limited comments on the circumstances of Lamour's death to humanize him even if the comments did not directly address an element of a charged crime. *See Chukwuezi*, 475 Mass. at 609 (permissibly "described the victim's family as being 'summoned to the hospital that morning after he was shot, forced to bear witness to the [carnage] that this man [inflicted] on his body'" "as part of a broader, humanizing description of the victim's life") (alterations in original); *Commonwealth v. Johnson*, 429 Mass. 745, 749 (1999) (description of murder as "bloody massacre" within the bounds of strong advocacy).

Most of the prosecutor's comments independently were proper as direct argument on elements of charged offenses. Lamour's bleeding out and inhaling blood as he died on a cold street was directly relevant to the issue of extreme atrocity or cruelty -- relevant both to Lamour's suffering and to Henley's indifference as he casually requested his telephone from the van and pretended to be just another curious bystander (*see* Tr.IV:156-57; V:149; VIII:47, 61; C.A.159-76). *See Kent K.*,

427 Mass. at 759-760. The prosecutor's reference to Lamour's bullet wound also was proper for this purpose because Zachery used ammunition specifically designed to cause more damage than other projectiles by expanding on impact (Tr.X:148-50, 152; Tr.XIII:133). *See id.*

E. The prosecutor's opening statement properly referenced anticipated shoeprint testimony.

Zachery also claims that the trial prosecutor's opening statement improperly suggested that the evidence would show that a sneaker print in the fresh snow was the "same size, make, model and tread pattern" as Zachery's sneakers because the print ultimately was not individualized to Zachery's sneaker (Zachery Br.47; Tr.IV:23). But the Commonwealth's expert witness directly testified to the print being the same make, model, and size as Zachery's sneaker (Tr.X:67-69). The statement as to tread pattern, meanwhile, was supported by her testimony, though less directly (Tr.X:54-57, 68), and was independently and directly supported by an exhibit that showed matching tread patterns (C.A.3-7). The opening statement thus correctly anticipated the evidence. *See Sylvia*, 456 Mass. at 188.

F. There was no substantial risk of a miscarriage of justice even if there were errors.

Even if portions of the opening statement and closing argument were improper, neither Zachery nor Henley objected to either (Tr.XIII:146), and any improprieties did not create a substantial risk of a miscarriage of justice. This is true, first, because the lack of objections is indicative "that the tone and manner of the remarks were not unfairly prejudicial." *Camacho*, 472 Mass. at 609. Moreover, the trial judge's instructions ameliorated any unfair prejudice that might have resulted. *See Commonwealth v. Mejia*, 463 Mass. 243, 253 (2012). The trial judge instructed that jurors could not "in any way be influenced by the fact that" photographs in evidence "may be unpleasant or graphic" (Tr.XIII:60), and four separate times that they were not to be swayed by any sympathy in reaching their verdict (Tr.XIII:60, 148, 154, 166). Jurors also were instructed at great length that they were required to decide the case based only on the evidence presented at trial (Tr.XIII:153-66), and also that closing arguments are not evidence (Tr.XII:67; XIII:25).

V. ZACHERY'S TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE IN DECLINING TO CALL DYBALL AS A WITNESS.

Zachery also claims pursuant to *Commonwealth v. Moffett*, 383 Mass. 201 (1981) that his trial counsel provided ineffective assistance by failing to call Dyball as a witness (Zachery Br.57). Zachery's claim fails to satisfy either prong required to establish ineffective assistance. *See Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974) ("serious incompetency, inefficiency, or inattention of counsel" and that the defendant was deprived of an "available, substantial" defense). This is true primarily because Dyball's favorable identification of the shooter as a white man was admitted as substantive evidence through a police witness without Dyball's identification being subjected to cross-examination (Tr VIII:156-59). Moreover, it is clear that Zachery's counsel did not overlook the possibility of calling Dyball as a witness because he considered him a potential witness even on the day his statement ultimately was admitted (*see* Tr.VIII:18). There is thus no basis on this record from which the Court could find either prong of the *Saferian* test. *See Commonwealth v. Peloquin*, 437 Mass. 204, 210 n.5 (2002) (ineffectiveness claim based on trial record alone is weakest form of claim).

VI. ZACHERY WAS NOT ENTITLED TO SEVERANCE OF HIS TRIAL FROM HENLEY'S BECAUSE DEFENDANTS DID NOT PRESENT MUTUALLY ANTAGONISTIC DEFENSES.

Zachery also claims that the motion judge abused his discretion in failing to declining to sever his trial from Henley's (Zachery Br.53-56).

> A decision to sever a trial generally is left to the sound discretion of the trial judge. *See, e.g.*, *Commonwealth v. McAffee*, 430 Mass. 483, 485 (1999). Severance on the ground of mutually antagonistic defenses is required only where "the acceptance of one party's defense will preclude the acquittal of the other." *See Commonwealth v. Ramos*, 470 Mass. 740 , 749 (2015), quoting *Commonwealth v. Moran*, 387 Mass. 644 , 657 (1982). It is not enough that a joint trial may cause a defendant to pursue a different strategy, or that a defendant would stand a better chance of acquittal if tried alone. *See McAfee*, *supra* at 486. Where some defenses overlap, while others are independent, a joint trial is appropriate. *See Ramos*, *supra*.

Commonwealth v. DePina, 476 Mass. 614, 628-29 (2017). *See Commonwealth v. Vasquez*, 462 Mass. 827, 836 (2012) (irreconcilability, not just hostility is required). *See id.* at 837 (severance required that "sole defense of each was the guilt of the other" and "where the acceptance of one party's defense will preclude the acquittal of the other") (quoting *Moran*, 387 Mass. at 656-57).

Zachery first argues, without citation to any legal authority, that severance was required because it would have been "impossible for ju-

rors to ignore" evidence of Henley's connection to the murder weapon. The argument fails even plausibly to meet the severance standard described above (*see* Zachery Br.53-54). The claim also fails because the jury is presumed to have followed the trial judge's instruction that the evidence was not to be considered against Zachery (Tr.XI:25; XIII:60-61). *Medina*, 430 Mass. at 803.

Zachery's second argument that severance was required is that Henley's defense was "entirely antagonistic" to his own because Henley admitted to requesting a firearm (Zachery Br.54). Nothing in defendants' defenses came close to being so antagonistic that acceptance of one defense required conviction of the other defendant. *See DePina*, 476 Mass. at 628-29. It is true that Henley's defense of a miscommunication with the shooter did not serve as a defense of Zachery, but he also did not suggest that Zachery was the shooter (*see* Tr.IV:28-33; XIII:89, 91). It is not clear, and Zachery does not explain how the jury might have found him to have been in communication with Henley and to have been the shooter based on anything other than the Commonwealth's evidence (*see* Zachery Br.54). Zachery thus did not even face a hostile defense from Henley, let alone one that required Zachery to be convicted if Hen-

ley was to be acquitted. *See DePina*, 476 Mass. 614, 628-29; *Vasquez*, 462 Mass. at 836-37.

VII. CUMMULATIVE ERROR ANALYSIS DOES NOT REQUIRE REVERSAL.

Henley incorrectly alleges that the cumulative impact of trial errors created a substantial risk of a miscarriage of justice even if individual errors do not (Henley Br.53). *See Commonwealth v. Cancel*, 394 Mass. 567, 576 (1985). But even if Henley's claims of trial error are correct, these errors primarily served to strengthen Henley's defense, and certainly did not cast a serious doubt on the outcome of the trial. *See Dirgo*, 474 Mass. at 1016.

VIII. DEFENDANTS CANNOT INCORPORATE EACH OTHER'S ARGUMENTS BY MERE REFERENCE.

Each defendant seeks to incorporate the entirety of the other's brief by mere reference, without any attempt to explain how the arguments are applicable to their own cases (Zachery Br.56; Henley Br.53). The passing claims fall well short of appellate argument and should not be addressed by this Court. *See* Mass. R. App. P. 16(a)(9)(A).

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the defendants' convictions.

Respectfully submitted
FOR THE COMMONWEALTH,

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FEBRUARY 28, 2020

ADDENDUM

G.L. c. 265, §1 102

G.L. c. 265, §18(b) 102

G.L. c. 269, §10(a) 102

Mass. G. Evid. § 403 104

Article Twelve of the Massachusetts Declaration of Rights 104

Article Fourteen of the Massachusetts Declaration of Rights 105

Fourth Amendment to the United States Constitution 105

Fifth Amendment to the United States Constitution 105

G.L. c. 265, §1

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

G.L. c. 265, §18(b)

Whoever, being armed with a dangerous weapon, assaults another with intent to rob or murder shall be punished by imprisonment in the state prison for not more than twenty years. Whoever, being armed with a firearm, shotgun, rifle, machine gun or assault weapon assaults another with intent to rob or murder shall be punished by imprisonment in state prison for not less than five years and not more than 20 years.

G.L. c. 269, §10(a)

Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

Mass. G. Evid. § 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Article Twelve of the Massachusetts Declaration of Rights

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury. [See Amendments, Art. XLVIII, The Initiative, II, sec. 2.]

Article Fourteen of the Massachusetts Declaration of Rights

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws. [See Amendments, Art. XLVIII, The Initiative, II, sec. 2].

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CERTIFICATE OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k). This brief complies with the length limit of Mass. R. App. P. 20 (as extended by order of the Massachusetts Appeals Court): it is written in 14-point Century Schoolbook and contains 18,986 non-excluded words, as determined by using Microsoft Word 2010.

/s/Benjamin Shorey
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CERTIFICATE OF SERVICE

I hereby certify, under the pains and penalties of perjury, that today I served copies of the within brief on the defendants, electronically, to their attorneys:

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May 21, 2020

COMMONWEALTH OF
MASSACHUSETTS SUPREME JUDICIAL
COURT

No. SJC-12951
No. SJC-12952

COMMONWEALTH OF
MASSACHUSETTS,
Appellee,

v.

DONTE HENLEY
JOSIAH ZACHERY,
Defendants-Appellants

BRIEF FOR THE COMMONWEALTH ON APPEAL
FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT
(IDENTICAL BRIEF FILED IN EACH CASE)

SUFFOLK COUNTY