SJC-13509

COMMONWEALTH vs. MICHAEL A. CARLETON.

Suffolk. September 10, 2025. - January 5, 2026.

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

Homicide. Firearms. Cellular Telephone. Search and Seizure, Probable cause. Intent. Evidence, Intent, Inference, Argument by prosecutor, Photograph. Practice, Criminal, Motion to suppress, Argument by prosecutor, Capital case. Probable Cause.

Indictments found and returned in the Superior Court Department on October 12, 2018.

A pretrial motion to suppress evidence was heard by Christine M. Roach, J.; a second pretrial motion to suppress evidence was heard by Robert L. Ullmann, J., and the cases were tried before him.

Richard P. Heartquist for the defendant.
Erin Knight, Assistant District Attorney (Craig Iannini, Assistant District Attorney, also present) for the Commonwealth.

WOLOHOJIAN, J. The defendant drove a car while his front seat passenger used a laser-guided firearm to shoot and kill Deondra Lee, who was seated next to his wife on a sidewalk while

watching fireworks on the Fourth of July. After a jury trial, the defendant was convicted as a joint venturer of murder in the first degree on the theory of deliberate premeditation, G. L. c. 265, § 1, and of possessing a firearm without a license, G. L. c. 269, § 10 (a). In this direct appeal from his convictions, the defendant first argues that the evidence was insufficient to prove beyond a reasonable doubt that he shared his codefendant's lethal intent. Second, the defendant argues that the prosecutor impermissibly shifted the burden of proof, misstated the evidence, expressed personal belief, and made personal assurances during his opening statement and closing argument. Third, the defendant argues that photographs and associated metadata obtained from a cell phone seized from his home should have been suppressed because there was no probable cause to believe there was a nexus between the cell phone and the crimes and because the search of the cell phone was unreasonably delayed and exceeded the scope of a warrant obtained after the cell phone was seized.

We conclude that the evidence of the defendant's shared lethal intent was sufficient. Viewed in the light most favorable to the Commonwealth, the evidence permitted the jury to find that the defendant intended to, and did, facilitate the murder through, among other things, the manner in which he maneuvered and drove the car before, during, and after the

shooting. We also conclude that the prosecutor's opening statement and closing argument stayed within permissible bounds. Finally, we conclude that there was sufficient evidence establishing a nexus between the cell phone and the crimes, that the search was not unreasonably delayed, and that there is nothing to suggest that the search of the cell phone exceeded the scope of the warrant. Furthermore, as part of our plenary review under G. L. c. 278, § 33E, we have considered whether the warrantless seizure of the cell phone fell within an exception to the warrant requirement and, passing on that question, we conclude that the admission of four photographs obtained from the cell phone was harmless beyond a reasonable doubt in light of the strength of the properly admitted evidence against the defendant, the cumulative nature of two of the photographs, and the tangential significance of the other two.

For these reasons, we affirm the conviction of murder in the first degree. Although the defendant does not raise the issue, we vacate without need for further discussion the defendant's conviction of unlawful possession of a firearm and remand for further proceedings on that charge because the jury were not instructed that the Commonwealth bore the burden to prove that the defendant did not have a valid firearms license.[1]

[1] The Commonwealth acknowledges that the firearm conviction must be vacated and remanded for further proceedings.

See Commonwealth v. Guardado, 493 Mass. 1, 12 (2023), cert. denied, 144 S. Ct. 2683 (2024).

Background. Because the defendant challenges the sufficiency of the Commonwealth's proof, we recite the evidence, together with the reasonable inferences to be drawn from it, in the light most favorable to the Commonwealth. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). Much of the evidence consisted of videotapes (and still images from those videotapes) recorded by security cameras mounted on utility poles, Massachusetts Bay Transportation Authority buses, and privately owned buildings, which captured not only the shooting, but also events preceding and following it. See Commonwealth v. Phillips, 495 Mass. 491, 492-493 (2025).

On the evening of July 4, 2018, Lee (victim) and his wife were sitting in lawn chairs at the corner of Dacia and Brookford Streets in Boston to watch the fireworks. At 9:47 P.M., the defendant drove his girlfriend's car slowly around the corner of the intersection and past the seated couple. The defendant wore a distinctive green T-shirt with an orange and white "Airmax" logo on it, cargo shorts, and sneakers. In the front passenger seat was Travis Phillips, who was known to both the defendant and his girlfriend. See Phillips, 495 Mass. at 496-497.

After making his initial pass by the victim and his wife, the defendant circled the car around the block. Shortly before

again reaching the corner where the victim and his wife remained seated, the defendant pulled the car over to allow the car behind to pass. Dacia Street is a one-way street with parking on both sides of the road. Once the road was clear of cars, the defendant again drove past the victim and his wife. This time, he braked to slow the car as Phillips, using a laser-guided firearm trained on the victim, fired multiple shots through the lowered passenger side window of the car. At least three of those gunshots struck the victim as intended. The light from the laser could be seen inside the car before the gun was pointed out the window.

The defendant then drove the car in an orderly fashion directly to a private parking lot behind a building located at 630 Dudley Street, where it arrived approximately one minute after the shooting, at 9:49 P.M.[2] The defendant got out of the car, still wearing the Airmax T-shirt, and walked through an alleyway leading to Dudley Street and Mary Hannon Park, as did Phillips. Security camera footage showed the defendant walking and acting calmly as he emerged and walked away from the car. Police investigation revealed that the defendant had a listed home address very close to 630 Dudley Street, and Phillips's

[2] The private parking lot required a permit that the girlfriend's car did not have.

mother's apartment was also nearby. Phillips walked to his mother's apartment, where he retrieved a hat.

In the immediate aftermath of the shooting, the police conducted a query on the social networking website Facebook for the defendant's name, and found a public account in the name of Michael "Mittyboi" Carleton.[3] That person, whom the jury could reasonably infer was the defendant, posted a "selfie" photograph less than two hours before the shooting showing the defendant wearing a T-shirt with an orange and white Airmax logo on the front.[4] The photograph showed the defendant smoking a marijuana cigarette, and it was accompanied by the message, "Just me my blunt n my thoughts." When police attempted to access the same Facebook page the following day, the account was no longer visible to the public.

Officers located the parked car within minutes of the shooting, and subsequent forensic investigation established that the defendant's fingerprints were on the gear shift and on the exterior of the driver's side door. Additional forensic

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[3] The officer testified that a public Facebook account is accessible to anyone.

[4] The Facebook query was made at some point after 10:10 P.M. on the night of the shooting, and Facebook showed that the photograph had been posted two hours earlier, thus leading to the conclusion that it had been posted less than two hours before the shooting.

evidence (fingerprints and deoxyribonucleic acid [DNA]) tied Phillips to the passenger side of the car. The police determined that the car was registered to the defendant's girlfriend, who lived on Woodbole Avenue with the defendant. Legal paperwork in the defendant's name and with the same Woodbole Avenue address was discovered in the car pursuant to a later search warrant.

When the police subsequently searched the Woodbole Avenue home pursuant to a warrant, they found in the defendant's bedroom a green T-shirt with an orange and white Airmax logo on the front and cargo shorts -- both resembling those worn by the defendant on the night of the shooting. The police also located and seized a cell phone the jury could reasonably infer belonged to the defendant given its location next to where he slept. A subsequent extraction of the cell phone's files and data conducted pursuant to a different warrant produced photographs and associated metadata. One of those photographs was the same as the one posted on Facebook by Michael "Mittyboi" Carleton. This photograph was taken in Mary Harmon Park on the day of the shooting at 7:41:47 P.M., slightly more than two hours before the murder. A second photograph was an almost identical image, taken four seconds earlier at the same location. A third photograph depicted Phillips standing in the hallway of a four-unit residence located near the spot where the defendant parked

the car after the murder. See Phillips, 495 Mass. at 494-495. The fourth photograph showed the defendant wearing an Airmax T-shirt approximately twenty minutes before the shooting.

The defendant was indicted on charges of murder in the first degree, G. L. c. 265, § 1, and of possessing a firearm without a license, G. L. c. 269, § 10 (a). He was tried together with Phillips, whose murder conviction we have previously affirmed. See Phillips, 495 Mass. at 506. The defendant's theory at trial was that the Commonwealth failed to prove beyond a reasonable doubt that he was the driver of the car at the time of the shooting, and that it failed to prove that he shared Phillips's lethal intent. The jury convicted the defendant as a joint venturer of murder in the first degree on a theory of deliberate premeditation, and of the firearm charge. The case is now before us on direct appellate review under G. L. c. 278, § 33E.

Discussion. The defendant raises three arguments on appeal. First, he contends that the evidence was insufficient to prove beyond a reasonable doubt that he shared Phillips's lethal intent. Second, he argues that he is entitled to a new trial because the prosecutor went outside the permissible bounds of opening statement and closing argument. Third, he argues that photographs and associated metadata extracted from the cell

phone seized during the search of his girlfriend's residence should have been suppressed. We address each argument in turn.

1. Sufficiency of the evidence of intent.[5] The defendant rests his argument that the Commonwealth failed to prove beyond a reasonable doubt that he shared Phillips's lethal intent on a line of cases in which we have found insufficient evidence of shared lethal intent where a defendant drove a vehicle in a helpful manner for another person who killed someone outside the driver's presence or acted merely as a getaway driver for such a person. See Commonwealth v. Tse, 495 Mass. 74, 81-84 (2024) (evidence of defendant's maneuvering of vehicle leading up to shooting, without more, insufficient for jury to infer shared lethal intent); Commonwealth v. Baez, 494 Mass. 396, 401-405 (2024) (inference that defendant began moving car only after shooting insufficient for jury to infer defendant shared lethal intent with passengers); Baxter v. Commonwealth, 489 Mass. 504, 509-511 (2022) (insufficient evidence of shared lethal intent where no evidence defendant had knowledge of passenger's lethal intent or joined shooter during commission of shooting); Commonwealth v. Mandile, 403 Mass. 93, 100-102 (1988) (evidence of defendant's role as getaway car driver for armed robbery did

[5] The defendant moved, at the end of the Commonwealth's case and at the close of evidence, for a required finding of not guilty on the ground that there was insufficient evidence of joint venture. Both motions were denied by the trial judge.

not support inference defendant knew that victim had been murdered during such robbery). In the defendant's view, because he too acted only as a driver, there was insufficient evidence to prove that he shared Phillips's lethal intent. We disagree.

Unlike the cases upon which the defendant relies, this is not a case where "there was no evidence that the defendant saw or joined the shooter during the commission of the shooting." Baez, 494 Mass. at 403, quoting Baxter, 489 Mass. at 511. Instead, the evidence easily permitted the jury to find that the defendant drove the car before, during, and after the shooting of the victim, which occurred in the defendant's presence. It also permitted the jury reasonably to infer that the defendant's manner of driving the car was designed to facilitate the shooting, and that the defendant continued to act in furtherance of a joint venture with Phillips even after the defendant learned that Phillips had a firearm.

In reviewing the sufficiency of the evidence, "we assess the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found each element of the crime beyond a reasonable doubt." Commonwealth v. Robinson, 493 Mass. 303, 307 (2024), citing Latimore, 378 Mass. at 677-678. "Evidence relied on to support a verdict of guilty 'may be entirely circumstantial,'" and "[t]he inferences a jury may draw from the evidence need only be

reasonable and possible and need not be necessary or inescapable" (quotation omitted). Commonwealth v. Shakespeare, 493 Mass. 67, 80 (2023), quoting Commonwealth v. Whitaker, 460 Mass. 409, 416 (2011).

To prove the defendant guilty as a coventurer, "the Commonwealth was required to 'prove beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, and that the defendant had or shared the required criminal intent'" (quotation omitted). Tse, 495 Mass. at 81, quoting Commonwealth v. Watson, 487 Mass. 156, 162 (2021). Where, as here, a driver of a vehicle is charged as a joint venturer with a passenger who commits a murder, the Commonwealth is required to show "that the defendant was the driver of the suspect vehicle, that [he] knew [his] passenger[] intended to kill the victim, and that [he] shared this intent." Tse, 495 Mass. at 81, quoting Baez, 494 Mass. at 400. Intent "may be inferred from 'the defendant's knowledge of the circumstances and subsequent participation in the offense.'" Commonwealth v. Woods, 466 Mass. 707, 713, cert. denied, 573 U.S. 937 (2014), S.C., 480 Mass. 231 (2018), quoting Commonwealth v. Cohen, 412 Mass. 375, 381 (1992).

Viewed in the light most favorable to the Commonwealth, the evidence permitted the jury to find that the defendant used his girlfriend's car to drive Phillips to the intersection where the

victim was seated with his wife. When the defendant reached the intersection the first time, he slowed, but did not stop, the car before rounding the corner and proceeding around the block. It was for the jury to assess the reason why the defendant slowed the car at the intersection, and it was open to them to conclude that he did so as part of his reconnaissance with Phillips of the victim. See Watson, 487 Mass. at 164 (sufficient evidence of shared intent where, among other things, driver conducted reconnaissance prior to shooting, remained at scene during shooting, and picked shooter up after shooting). The defendant then drove Phillips around the block before returning to the same intersection, which permitted the jury reasonably to infer that the intersection was the defendant's intended destination from the outset. From that same fact, the jury could reasonably infer that the victim was the intended target of the defendant's and Phillips's activity. In addition, the jury could find that, on his second approach to the intersection, the defendant pulled the car over to the side of the one-way road to allow the car behind to pass and the road to clear for the shooting he knew was to come.

Although, as the defendant argues, there are many innocuous reasons why a driver may pull to the side of a road, the jury were permitted to infer that the defendant did so on this occasion to facilitate the shooting that would next occur. See

Commonwealth v. Guy, 441 Mass. 96, 103 n.7 (2004) (jury permitted to reject defendant's innocuous explanation of events). Similarly, although there are undoubtedly many innocent reasons why a passenger may lower a car window on a summer evening, the jury were permitted to infer that the reason the window was lowered on this particular night was to permit Phillips to shoot the victim while remaining inside the car next to the defendant. See id. Given the proximity of the defendant to Phillips within the close confines of the car, the jury could permissibly infer that the defendant knew that the window had been lowered and the reason for it. This inference is bolstered by the fact that the beam from the firearm's laser sight was visible inside the car before Phillips put his arm out the window to shoot. The visibility of the laser within the car in turn permitted the jury to infer that the defendant knew Phillips had a firearm. See Robinson, 493 Mass. at 308-309 (evidence of shared intent sufficient where defendant continued to act in furtherance of joint venture even after learning of coventurer's weapon). Likewise, the jury could permissibly infer that the defendant applied the car's brakes and slowed the car to enhance Phillips's ability to aim the gun at the victim, thus facilitating the murder.

The jury could also observe from the extensive video footage the orderly manner in which the defendant immediately

drove the car after the shooting to a private parking lot near Phillips's mother's apartment. "The jury could also reasonably infer that, in the aftermath of the murder, [the defendant] and the shooter wished to park the car somewhere private, out of view of the public or police, and used the private parking lot to accomplish that end." Phillips, 495 Mass. at 496. They could also observe the surveillance footage showing the defendant calmly getting out of the car and walking with Phillips through a passageway leading to Dudley Street and Phillips's mother's apartment, where Phillips then retrieved a hat. The jury could infer that the defendant drove the car to the parking lot in furtherance of the joint venture with Phillips, and specifically so that Phillips could go to his mother's apartment. See Commonwealth v. Bonner, 489 Mass. 268, 279 (2022) ("individual who acts as a getaway driver or otherwise helps the principal to escape may be convicted as an accomplice to the crime"); Commonwealth v. Akara, 465 Mass. 245, 255 (2013) (evidence of joint flight supported inference of shared intent and willingness to assist in accomplishing crime). They could also reasonably infer from the defendant's unremarkable operation of the car in the immediate aftermath of the shooting, and from his calm manner of leaving and walking away from the car with Phillips, that the shooting of a few minutes before did not catch the defendant by surprise. See

Commonwealth v. Beneche, 458 Mass. 61, 72 (2010) (jury could find that defendant exhibiting nothing unusual in his behavior after murders "reflected consciousness of guilt for willing participation in the murder").

Finally, the jury could consider the fact that the defendant's Facebook account, on which he had posted a picture of himself wearing the same T-shirt he wore during the shooting, was changed within a day so as to make it no longer publicly available. "While consciousness of guilt alone is insufficient to support a guilty verdict, such evidence may be sufficient when combined with other probable inferences." Woods, 466 Mass. at 715.

This case is thus distinguishable from those in which we have concluded that there was insufficient evidence of shared lethal intent where a defendant merely acted as a driver of a car in which a passenger -- outside the presence of the defendant -- committed a shooting. Contrast Tse, 495 Mass. at 81-84; Baez, 494 Mass. at 402-405; Baxter, 489 Mass. at 509-511; Mandile, 403 Mass. at 100-102. Those cases do not involve a defendant who drove a car while a shooting took place in his presence from within the car itself. Rather, this case is most closely analogous on its facts to Commonwealth v. Sanders, 101 Mass. App. Ct. 503 (2022), where the Appeals Court held that evidence of a driver's shared lethal intent with his passengers

who shot at occupants of another car was sufficient, reasoning that the defendant in that case

> "did not let his passengers out of the [car] so that the attackers had different options for how to attack the victims. Instead, a reasonable and strong inference from the evidence (viewed in the light most favorable to the Commonwealth) was that he positioned the [car] so that the occupants could attack the [victims] from inside the [car]."

Id. at 509.

In sum, although the evidence of the defendant's shared lethal intent with Phillips was circumstantial, the evidence provided ample basis for the jury to find beyond a reasonable doubt that the defendant knew Phillips intended to kill the victim and shared that intent. See Watson, 487 Mass. at 163-164 (evidence of shared lethal intent sufficient where Commonwealth introduced "some proof that the defendant" acted with his coventurer "during the crime with the intent of making the crime succeed" [quotation and citation omitted]); Woods, 466 Mass. at 713-715 (defendant's prior threats to victim, arrangement to meet victim in parking lot, luring of victim into defendant's car, and attempt to construct alibi by leaving victim alone while shooting occurred allowed inference of shared lethal intent).

2. Opening statement and closing argument. The defendant argues that the prosecutor went beyond the permissible bounds of opening statement and closing argument by misstating the

evidence, engaging in burden shifting, and expressing personal belief and making personal assurances. As no objection was made to either the opening or the closing, we review to determine "whether any error created a substantial likelihood of a miscarriage of justice." Commonwealth v. Cheng Sun, 490 Mass. 196, 210 (2022).

a. Misstating the evidence. The defendant contends that the prosecutor repeatedly misstated evidence or went beyond the evidence, and we have set out in the margin the particular statements to which the defendant points.[6] In essence, the

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[6] (1) The defendant and Phillips "came to an agreement that was so calculated, so malignant, and so devastating"; (2) the defendant and Phillips "decided [the victim] only had minutes to live"; (3) the defendant "calculatingly, with the intent of knowing exactly what was about to go down, pulled that car over"; (4) the defendant and Phillips "drove to the corner of Brookford and Dacia Streets for the sole purpose of killing [the victim]"; (5) as the defendant "slowed that car down for . . . Phillips to get as best a shot as he could, . . . Phillips fired"; (6) the defendant and Phillips "were plotting [the victim's] demise"; (7) the defendant and Phillips were "in that car working together, each performing their own role"; (8) the "crime cannot happen the way it went down unless both of those people are performing that job with precision"; (9) "the shooter, right here, with dreadlocks, . . . and his partner in crime, the driver, [the defendant]"; (10) the defendant and Phillips "are the men who engineered the murder of [the victim]"; (11) the videographic evidence "shows the people inside that car as they went to commit this murder"; (12) the evidence shows what the defendant's "thoughts were going to be little bit later, and what was on his thoughts hours later is murder"; (13) "[h]ow do you know that [the defendant] and . . . Phillips participated together in this? . . . I would say look at the video"; (14) the defendant and Phillips "shared that same intent"; (15) the defendant and Phillips "beg[a]n contemplating

defendant objects to three categories of statements: those in which the prosecutor referred to the defendant and Phillips as having an agreement, those that referred to the defendant's intent, and those that referred to the defendant's state of mind. The defendant's view is, at bottom, that the prosecutor could not argue these matters because there was no direct evidence of them.

Although prosecutors may not misstate the evidence or refer to facts not in evidence, they are not limited to arguing only the direct evidence presented at trial; they may also argue forcefully for a conviction based "on inferences that may reasonably be drawn from the evidence." Commonwealth v. Martinez, 476 Mass. 186, 200 (2017), quoting Commonwealth v. Kozec, 399 Mass. 514, 516 (1987). Where, as here, the defendant's intent is at issue, "resort frequently is made to proof by inference from all of the facts and circumstances developed at trial." Bonner, 489 Mass. at 283. This is an unsurprising proposition because direct evidence of the inner workings of a person's mind is often not available. Commonwealth v. Casale, 381 Mass. 167, 173 (1980) ("knowledge or

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killing [the victim]"; (16) the defendant pulled the car over perhaps because "they needed to get the gun ready to kill [the victim]"; (17) there was "[j]ust an agreement [between the defendant and Phillips] which is right there in front of you"; and (18) there was a "partnership . . . between these two men, [the defendant] and . . . Phillips."

intent is a matter of fact, which is often not susceptible of proof by direct evidence, so resort is frequently made to proof by inference"). The defendant's intent was a question of fact for the jury to determine, Bonner, 489 Mass. at 283, and the prosecutor was entitled to argue all inferences that could be reasonably drawn from the evidence that would help the jury decide that question. Here, the direct evidence of coordinated activity between the defendant and Phillips amply supported the prosecutor's statements that there was an agreement between them, and that the defendant shared Phillips's intent to kill the victim.

b. Burden shifting. Impermissible burden shifting occurs when, for example, a prosecutor makes "direct comment on a defendant's failure to contradict testimony" or "calls the jury's attention to the defendant's failure to call a witness or witnesses" (citation omitted). Commonwealth v. Tu Trinh, 458 Mass. 776, 787 (2011). "A prosecutor impermissibly shifts the burden of proof when he or she calls the jury's attention to the defendant's failure to produce evidence, because in so doing, the prosecutor 'signal[s] to the jury that the defendant has an affirmative duty to bring forth evidence of his innocence, thereby lessening the Commonwealth's burden [of proof].'" Commonwealth v. Grier, 490 Mass. 455, 473 (2022), quoting Tu Trinh, 458 Mass. at 787. "[P]rosecutors should scrupulously

avoid any statement that suggests that the defendant has any burden to produce evidence." Commonwealth v. Collazo, 481 Mass. 498, 503 (2019), quoting Commonwealth v. McMahon, 443 Mass. 409, 419 (2005). But a prosecutor may "emphasize the strong points of the Commonwealth's case and the weaknesses of the defendant's case," even if doing so "prompt[s] some collateral or passing reflection" on the fact that the defendant has not produced certain evidence (citation omitted). Collazo, 481 Mass. at 503.

The defendant asserts that two statements in closing argument impermissibly shifted the burden to him: (1) that he and Phillips were "in that car working together, each performing their own role"; and (2) that he and Phillips "are the men who engineered the murder of [the victim]." There was no impermissible burden shifting here; the prosecutor's two statements merely argued the inferences that could be reasonably drawn from the Commonwealth's evidence, making no express or implied commentary concerning the defendant's failure to present evidence to contradict them. See Martinez, 476 Mass. at 200.

c. Personal belief and assurances. The defendant contends that the prosecutor impermissibly expressed his personal belief and made assurances to the jury by inviting the jury to look at the videographic evidence to see that the defendant and Phillips "participated together in this" and by stating that "the evidence against these two defendants is utterly damning." As

to the first comment, the prosecutor was entitled to invite the jury to focus on specific evidence and ask them to draw a reasonable inference from it. As to the second, the prosecutor's comment was a permissible "appraisal of the evidence and the strength of the Commonwealth's case." Commonwealth v. Shea, 401 Mass. 731, 739 (1988).[7]

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[7] The defendant identifies additional statements in the opening and closing as being problematic but does so without identifying the basis of his objection to them. Nonetheless, as part of our review under G. L. c. 278, § 33E, we have examined those statements carefully and conclude that the prosecutor did not err. Specifically, the prosecutor's use of the phrase "kill team" and his reference to the defendant and Phillips as "killers" were forceful, but permissible. See Phillips, 495 Mass. at 498-499; Commonwealth v. Barbosa, 477 Mass. 658, 669 (2017) (phrase "killing team" not improper). We also see no error in the prosecutor's statement during opening that the evidence would come in piecemeal "and those pieces will interlock until a full picture of the people who killed [the victim] becomes apparent." See Commonwealth v. Sylvia, 456 Mass. 182, 188 (2010) ("proper function of an opening is to outline in a general way the nature of the case which the counsel expects to be able to prove or support by evidence" [citation omitted]). Finally, taken in context, the prosecutor's statement in closing, "I can't tell you why somebody would commit a crime like this. What I can tell you is they did it, and this is a bottom line, ultimately because they could and because they wanted to," cannot be fairly read to suggest that the prosecutor had knowledge independent of the evidence before the jury. See Commonwealth v. Ciampa, 406 Mass. 257, 265 (1989) (vouching occurs where prosecutor "explicitly or implicitly . . . indicates that he or she has knowledge independent of the evidence before the jury verifying a witness's credibility"). Taken in context, the prosecutor's statement permissibly addressed the defendant's and Phillips's arguments that the Commonwealth had not proved that they were the people responsible for the shooting or that they shared the same intent. See Commonwealth v. Alemany, 488 Mass. 499, 511 (2021) (we consider prosecutor's statements "in the context of the whole . . . closing, as well as the entire case").

3. Search and seizure of cell phone. The defendant's cell phone was seized when officers were at the defendant's residence to execute a warrant for his arrest, and it was later taken to the station after the residence was searched pursuant to a search warrant (first search warrant). The cell phone was subsequently searched pursuant to a different search warrant (second search warrant). The defendant filed two motions to suppress: one challenging the seizure of the cell phone (first motion to suppress), and the second challenging its search (second motion to suppress). Both motions were denied.

In reviewing the denial of a motion to suppress, "we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of [the] ultimate findings and conclusions of law" (quotation omitted). Commonwealth v. Barillas, 484 Mass. 250, 253 (2020), quoting Commonwealth v. Ramos, 470 Mass. 740, 742 (2015). However, if the judge's findings are based entirely on documentary evidence, we review those findings de novo. Commonwealth v. Johnson, 481 Mass. 710, 714, cert. denied, 589 U.S. 977 (2019), citing Commonwealth v. Monroe, 472 Mass. 461, 464 (2015).

Here, the defendant's first motion to suppress was based entirely on a stipulated documentary record consisting of the warrant, the affidavit attached to and incorporated in the warrant, five police reports, and a videotape of the defendant's

interview by police after his arrest. Similarly, the second motion to suppress was based entirely on stipulated facts. Because both motions were decided on stipulated documentary records, "'we are in the same position as the motion judge' to assess" the evidence. Johnson, 481 Mass. at 715, quoting Monroe, 472 Mass. at 464.

a. Probable cause to seize cell phone. The defendant argues that the warrantless seizure of the cell phone was not supported by probable cause because the Commonwealth failed to establish a sufficient nexus between the crimes and the cell phone. We recite the pertinent portions of the stipulated record.[8]

Immediately after police responded to the scene, they reviewed video footage of the intersection where the shooting had occurred. That footage showed a silver Volkswagen with distinctive characteristics circling the block before the shooting, "scoping out the area." It also showed the Volkswagen slowing down while a "larger black male wearing a white shirt, seated in the passenger seat," extended his arm out the window

[8] Contrary to the rules of appellate procedure, neither the defendant nor the Commonwealth provided us with the transcript or exhibits from the hearing on the first motion to suppress. See Mass. R. A. P. 18 (a) (1) (D), as appearing in 491 Mass. 1603 (2023); Mass. R. A. P. 18 (a) (2) (A), as appearing in 481 Mass. 1637 (2019). We have obtained those materials on our own initiative.

and fired numerous shots with a pistol toward a group seated on the corner, mortally wounding the victim. The video footage also showed that the driver was wearing a T-shirt with an orange and white logo on the chest.

Approximately fifteen minutes after the shooting, police located the Volkswagen parked behind 630 Dudley Street. Security camera footage from 630 Dudley Street showed the driver getting out of the car while wearing a T-shirt with a "similar" Airmax logo across the chest. Investigation revealed that the car was registered to Raquel Lamons, of Woodbole Avenue, and that the defendant was her boyfriend.

Also in the aftermath of the shooting, police conducted a search of social media sites and found a Facebook account in the name of Michael "Mittyboi" Carleton, with a photograph showing a man fitting the description of the defendant and wearing a green T-shirt with "Airmax" written across the chest in orange and white, accompanied by the caption, "Just me my blunt n my thoughts." The photograph had been posted approximately two hours before the shooting.

Police searched the Volkswagen pursuant to a search warrant and found personal and legal papers in the defendant's name bearing the same Woodbole Avenue address as Lamons. They also obtained latent fingerprints from the driver's side door

exterior handle and the gear shift that were "individualized" to the defendant.

Six days after the shooting, on July 10, 2018, police were conducting surveillance of the Woodbole Avenue address prior to executing a warrant for the defendant's arrest for murder. At approximately 7 A.M., police intercepted Lamons as she left the residence to go to work, and they asked for her help to effectuate a peaceful and safe entry into the house. Lamons agreed, allowed the officers into the residence, and directed the officers to the second floor, where the defendant was asleep with a small child beside him. The defendant was arrested without incident and taken to police headquarters.

The residence was then "frozen" pending issuance of a search warrant. While the residence remained frozen, "Lamons attempted to retrieve a cell phone that was located on a pile of clothes next to the bed in the bedroom" in which the defendant had been apprehended. Lamons stated that the cell phone was "hers." An officer told Lamons that she could not remove anything from the house and instructed her to return the cell phone to its former location. Lamons complied.

Police obtained and executed the first search warrant shortly thereafter. Although the first search warrant described with particularity the items to be seized during the search of the defendant's residence, it did not authorize police to seize

a cell phone or to search for photographs showing the defendant wearing an Airmax T-shirt. Instead, it authorized a search of the residence for the following: (1) "a green colored T-shirt with the orange and white logo of 'Airmax' embossed across the chest"; (2) "[a] set of keys that may fit" the Volkswagen used during the shooting; (3) "a greenish baseball cap (as depicted in the Facebook photo of [the defendant] from July 4, 2018"; (4) "a pair of long shorts with ties near the hem"; (5) "a firearm, or any firearm related evidence[,] such as ammunition, . . . bullets, primers and casings, ammunition feeding devices such as magazines or speed loaders, [and] gun cleaning kits"; and (6) "any paperwork or photos that would tend to indicate ownership or possession of firearms."

Police executing the search warrant located the green T-shirt with the orange and white Airmax logo in the defendant's bedroom. They also saw a black cell phone on top of clothes in a hamper located next to the head of the bed in which the defendant had been asleep. "Officers[,] now realizing that the 'Airmax' t-shirt picture was probably taken using a cellular phone, surmised that this was probably the phone used to post the [Facebook] picture and seized this phone based upon its proximity to the [defendant] and the evidence it potentially held, in anticipation of a search warrant." The cell phone was taken to police headquarters.

As we have already noted, the defendant argues that there was an insufficient nexus between the crimes and the cell phone to support its warrantless seizure. "[E]ven where there is probable cause to suspect the defendant of a crime, police may not seize or search his or her cellular telephone to look for evidence unless they have information establishing the existence of particularized evidence likely to be found there." Commonwealth v. White, 475 Mass. 583, 590-591 (2016). See Commonwealth v. Morin, 478 Mass. 415, 426 (2017). Taking the facts contained in the affidavit and the stipulated-to police reports as a whole, without parsing, severing, or subjecting them "to hypercritical analysis" (citation omitted), Commonwealth v. Snow, 486 Mass. 582, 588 (2021), such information existed here. When police encountered the cell phone located next to where the defendant had been sleeping, they knew that a person called Michael "Mittyboi" Carleton had posted on Facebook a photograph of the defendant only two hours before the shooting, wearing a distinctive Airmax T-shirt resembling the one worn by the person who drove the car while Phillips shot the victim. The photograph was accompanied by the first-person message, "Just me my blunt n my thoughts," leading to the inference that the photograph was a selfie -- i.e., one the defendant took of himself. This inference was strengthened by the fact that the Facebook account owner's name had the same

first and last name as the defendant and the fact that the photograph depicted the defendant himself. The inferences drawn from an affidavit, "if not forbidden by some rule of law, need only be reasonable and possible; [they] need not be necessary or inescapable." Commonwealth v. Kaupp, 453 Mass. 102, 111 (2009), quoting Commonwealth v. Beckett, 373 Mass. 329, 341 (1977). Moreover, it is within common knowledge that cell phones are routinely used to take selfies. Cf. Commonwealth v. Watkins, 98 Mass. App. Ct. 419, 420 n.1 (2020) ("For about a decade the word 'selfie' has been widely used colloquially to refer to photographic self-portraits often snapped at odd angles with smartphones, and typically made to post on a social networking website [or sent in a text message]" [citation, quotation, and alterations omitted]); People v. Musha, 69 Misc. 3d 673, 682 (N.Y. Sup. Ct. 2020) ("the common experience of all of us confirms the likelihood that defendant's phone would contain 'selfies'"). And the close proximity of the cell phone to the defendant as he slept tied the defendant to it. In short, there was ample evidence to establish that particularized evidence -- namely, the selfie photograph of the defendant wearing the Airmax T-shirt -- would be contained in the cell phone located next to the defendant while he slept. See Commonwealth v. Cruzado, 480 Mass. 275, 282 (2018) (probable cause established

where cell phone was located near head of sleeping defendant and other circumstances tied cell phone to crime).

b. Search of the cell phone. Fourteen days after they seized the cell phone, the police applied for, and obtained, the second search warrant. The second search warrant authorized a search of the cell phone to locate "photographs, specifically the photo of Micahel Carelton [sic] wearing a green colored Nike 'Airmax' T-shirt and a baseball cap, taken on or about July 4th, 2018." The defendant's motion to suppress the fruits of the search undertaken pursuant to the second search warrant was presented on the following stipulated facts.

The day after the police obtained the second search warrant, the cell phone was connected to a software technology known as GrayKey in order to attempt to unlock the cell phone. GrayKey continuously runs sequences until it finds the code needed to unlock a device. This process takes no set amount of time. In certain instances, the Boston police department has had success unlocking a device using GrayKey in just a few minutes; in others, it has taken as long as two years. In this case, it took almost nine months of continuous sequencing for GrayKey to locate the code necessary to unlock the cell phone. Cellebrite software was then used to read the files extracted from the cell phone, a process that was completed approximately two months later in June 2019. The second search warrant was

returned six days after its issuance, with the inventory stating, "Awaiting results of search warrant. [E]xpected to receive electronic information and photographs."

The defendant moved to suppress on the ground that the search was unreasonably delayed because the police waited "over a year to search the phone." On appeal, the defendant renews that argument and adds a claim that the search exceeded the scope of the second search warrant.[9]

i. Delay. General Laws c. 276, § 3A, provides in pertinent part that "[e]very officer to whom a warrant to search is issued shall return the same to the court by which it was issued as soon as it has been served and in any event not later than seven days from the date of issuance thereof." See Commonwealth v. Cromer, 365 Mass. 519, 524 (1976). Although the defendant acknowledges that the second search warrant was returned within seven days of its issuance, he nonetheless argues that execution of the warrant was unreasonably delayed because the process of unlocking the cell phone and extracting its files took almost a year to complete.

[9] The defendant also argues that the second search warrant was not supported by probable cause. We need not repeat our extensive explanation, see part 3.a, supra, why there was probable cause to believe that particularized evidence, namely, the selfie photograph, would be located on the defendant's cell phone.

We have previously rejected the proposition that police need complete their forensic analysis of an electronic storage device, such as a cell phone, within the statutory time allowed for executing a search warrant. "[P]olice do not need to complete forensic analysis of a seized computer and other electronic data storage devices within the prescribed period for executing a search warrant" under G. L. c. 276, § 3A. Kaupp, 453 Mass. at 115. What remains is whether the period of forensic analysis in this case was unreasonably delayed. See Cromer, 365 Mass. at 524 (search warrants must be executed within reasonable time after issuance). The parties stipulated that the defendant's cell phone was connected to GrayKey within a day of the second search warrant's issuance. They also stipulated that it remained connected to GrayKey continuously for almost nine months while that software ran sequences designed to ascertain the code needed to unlock the cell phone. Nothing in the record suggests that this process could have been accomplished more quickly. Nor does the defendant challenge the two-month period during which the Cellebrite software was used to read the files extracted from the cell phone. In these circumstances, we are not persuaded by the defendant's argument of delay.

ii. Scope of the search. "Searches and seizures conducted outside of the scope of a valid warrant are presumed to be

unreasonable." Commonwealth v. Balicki, 436 Mass. 1, 8 (2002). Here, the defendant argues that the cell phone was searched beyond the parameters of the second search warrant, which he contends was limited to photographs of the defendant wearing a green Airmax T-shirt on July 4, 2018.

Electronic devices may "appropriately be searched when there is probable cause to believe they contain particularized evidence." Commonwealth v. Dorelas, 473 Mass. 496, 502 (2016). But officers must "conduct the search in a way that avoids searching files of types not identified in the warrant." Id., quoting United States v. Walser, 275 F.3d 981, 986 (10th Cir. 2001), cert. denied, 535 U.S. 1069 (2002). "[A] computer search 'may be as extensive as reasonably required to locate the items described in the warrant.'" Dorelas, 473 Mass. at 502, quoting United States v. Grimmett, 439 F.3d 1263, 1270 (10th Cir. 2006). "[T]he burden of establishing that evidence is illegally obtained is on the defendant when," as here, "the search is under warrant" (quotation and citation omitted). Commonwealth v. Taylor, 383 Mass. 272, 280 (1981). The defendant also bears the burden "when the claim is that the items seized exceeded those named on the warrant." Id.

Here, the record is silent as to the manner in and the extent to which the police conducted the search of the cell

phone.[10] The defendant has not provided information showing "the scope of the particular intrusion, the manner in which it [was] conducted, the justification for initiating it, and the place in which it [was] conducted." Commonwealth v. Phifer, 463 Mass. 790, 797 (2012), quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979). See Commonwealth v. Sheppard, 394 Mass. 381, 390 (1985) (where police officers limited their search and did not exploit defect in warrant, exclusion of evidence unnecessary). At best, therefore, the defendant's argument can be assessed only against the fruits of the search; namely, the four photographs obtained from the cell phone that were admitted at trial.

Those four photographs do not support the defendant's argument that the search exceeded the scope of the warrant. Three of the photographs showed the defendant wearing a green Airmax T-shirt on the day of the shooting and thus fall squarely within the ambit of the search warrant. Although the fourth photograph did not depict the defendant wearing the Airmax T-shirt, and was created approximately two months before the shooting, the defendant has not shown that the photograph file

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[10] The defendant contends that the Cellebrite extraction report was over 29,000 pages long. That report is not in the record, and the defendant has not provided any information about the document except its length. We accept, for purposes of this appeal, that a report of such length exists, but absent any information about its contents, the defendant has failed to establish its significance or helpfulness to his argument.

was located in an area of the cell phone the police could not "reasonably [search] to locate the items described in the warrant." Dorelas, 473 Mass. at 502, quoting Grimmett, 439 F.3d at 1270. See Commonwealth v. Holley, 478 Mass. 508, 525, 528 (2017) (even where warrant lacked particularity, where record was "silent as to the scope of the search conducted," court found no error in denial of motion to suppress). This is not a case where the discovered objects were of a different type than were authorized to be located by the warrant; the warrant authorized a search for photographs and -- from all that appears -- only photographs were located. Cf. Dorelas, 473 Mass. at 503 (photographs located during search for communications not outside scope of warrant). Contrast United States v. Carey, 172 F.3d 1268, 1274 (10th Cir. 1999) (where warrant only permitted search of computer files for names, telephone numbers, and other documentary evidence related to drug trafficking, police exceeded scope of warrant by opening files labeled "JPG" and featuring sexually suggestive titles).

4. Plenary review under G. L. c. 278, § 33E. Pursuant to our obligation under G. L. c. 278, § 33E, we have considered the whole case and, more particularly, whether the warrantless seizure of the cell phone fell within any exception to the warrant requirement. We decline to decide whether it does because, in any event, admission at trial of the four

photographs and associated metadata obtained from the cell phone was harmless beyond a reasonable doubt, considering the totality of the record, including

> "[1] the importance of the evidence in the prosecution's case; [2] the relationship between the evidence and the premise of the defense; [3] who introduced the issue at trial; [4] the frequency of the reference; [5] whether the erroneously admitted evidence was merely cumulative of properly admitted evidence; [6] the availability or effect of curative instructions; and [7] the weight or quantum of evidence of guilt."

Commonwealth v. Gumkowski, 487 Mass. 314, 322 (2021), quoting Commonwealth v. Seino, 479 Mass. 463, 467-468 (2018).

"[B]ased 'on the totality of the record before us, weighing the properly admitted and the improperly admitted evidence together, . . . we are satisfied beyond a reasonable doubt that the tainted evidence did not have an effect on the jury and did not contribute to the jury's verdicts.'" Gumkowski, 487 Mass. at 322, quoting Commonwealth v. Tyree, 455 Mass. 676, 701 (2010). The four photographs and associated metadata, while undoubtedly playing some role in the Commonwealth's case, were of marginal significance in comparison to the properly admitted evidence of guilt, including the surveillance video footage, the physical evidence recovered from the defendant's home, the evidence of consciousness of guilt, and the forensic evidence -- particularly as those items bore on the defense.

One of the four photographs was identical to the photograph the defendant posted on Facebook; the second was nearly identical. Both showed the defendant wearing an Airmax T-shirt and in that sense were duplicative of the Facebook post, which was also admitted at trial. But the metadata associated with the two photographs was not duplicative of other evidence. The metadata showed that the two photographs were created four seconds apart at 7:41 P.M. on July 4, 2018. The timing of the photographs' creation buttressed the Commonwealth's theory that the defendant was the person wearing an Airmax T-shirt while driving the Volkswagen during the shooting. While the metadata added corroborative value to the Facebook post, the jury, looking at the Facebook post alone, could conclude that the defendant took the selfie and posted it the same day; they could also see the defendant wearing the same Airmax T-shirt as in the surveillance footage. It is true that the longitudinal and latitudinal coordinates of the metadata showed that the photographs were taken at Mary Hannon Park, which contradicted the defendant's statement to police that he was at Carson Beach at 7:30 P.M. on the night of the murder, but the prosecutor spent little time on the two photographs during trial and, importantly, referred to them during closing only as part of his

argument that the defendant was the driver of the Volkswagen.[11] See Commonwealth v. Castano, 478 Mass. 75, 82-83 (2017) (even where prosecutor made references in closing argument to tainted evidence, error was harmless where evidence of defendant's involvement was overwhelming). Contrast Tyree, 455 Mass. at 701-704 (error not harmless where prosecutor argued tainted evidence was "the most damaging to the defendant"). Because the properly admitted physical, videographic, and forensic evidence of the driver's identity was overwhelming, admission of the metadata was of no discernible effect. See Commonwealth v. Broom, 474 Mass. 486, 499-500 (2016) (erroneous use of text message to impeach defendant's testimony was harmless error where properly admitted evidence of guilt was "extremely strong"); Commonwealth v. Neves, 474 Mass. 355, 366 (2016) (improperly admitted statements corroborating defendant's involvement in murder was harmless error where other evidence strongly suggested defendant's participation); Commonwealth v. Dame, 473 Mass. 524, 538, cert. denied, 580 U.S. 857 (2016) (any inferences jury could have drawn from improperly admitted

[11] Specifically, the prosecutor argued: (1) "[Y]ou know [the defendant is] not at Carson Beach because he took a photo at Mary Hannon Park at 7:30," and (2) "He also said he didn't have a phone, he hadn't had a phone for a month. Well, you know that's not true because you have seen the pictures on his phone taken on July 4."

evidence from defendant's vehicle was harmless where jury could have drawn similar inferences from properly admitted evidence).

The third photograph showed the defendant wearing an Airmax T-shirt while standing with Oscar Bullard and an unidentified man. The metadata associated with this photograph showed that it was created less than twenty minutes before the murder, at 9:28 P.M. Bullard was observed in the vicinity of the parking lot after the murder and questioned by police; largely based on that fact, Phillips pursued a third-party culprit defense at trial, and suggested that the police did not adequately investigate whether Bullard was the shooter. It appears that the Commonwealth's purpose in admitting the photograph was primarily in anticipation of Phillips asserting this defense. Otherwise, the photograph was at most a cumulative component of the Commonwealth's proof against the defendant that he was the driver of the car based on the Airmax T-shirt. Neither the prosecutor nor defense counsel referred to it in his closing argument. See Seino, 479 Mass. at 468 (erroneously admitted evidence creates harmless error where it does not bear on defendant's guilt).

The fourth photograph showed Phillips standing in the hallway of a four-unit building. The metadata associated with this photograph showed that it had been created two months before the shooting, on May 5, 2018, and was taken in a building

on Dudley Street near the parking lot where the defendant parked the car after the shooting. The prosecutor referred to the photograph only once in closing to argue that the defendant knew Phillips.[12] See Commonwealth v. Samia, 492 Mass. 135, 153-154 (2023) (lack of prosecutor's emphasis on erroneously admitted evidence weighs in favor of harmless error determination). To be sure, the photograph bore on the likelihood of a joint venture between the defendant and Phillips, even though the prosecutor did not explicitly use it for that point in closing. But the two month old photograph's significance pales next to the contemporaneous evidence of joint venture, including the extensive surveillance footage and the DNA and fingerprint evidence placing the defendant and Phillips, acting in a coordinated manner, together in the car during the murder. See Seino, 479 Mass. at 468 (evidence posed harmless error where it did not pertain to defendant's theory of innocence and was cumulative of properly admitted evidence, including significant DNA evidence).

In sum, we conclude that admission of the four photographs and their associated metadata obtained from the cell phone was harmless beyond a reasonable doubt. We also discern no other

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[12] "Furthermore, what you know is that Travis Phillips and Michael Carleton know each other. . . . And, in fact, here's a photo Michael Carleton took of Travis Phillips."

reason to vacate the defendant's murder conviction or to reduce the verdict in the interest of justice.

Conclusion. The defendant's conviction of murder in the first degree is affirmed. The defendant's conviction of unlawful possession of a firearm is vacated and remanded for a new trial.

So ordered.