COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK COUNTY NO. 2019-P-0400

COMMONWEALTH OF MASSACHUSETTS

V.

DONTE HENLEY

BRIEF OF THE DEFENDANT ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

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STATEMENT OF THE CASE

On November 30, 2017, a jury convicted the defendant of the lesser included offense of second degree murder in violation of Mass. Gen. Law Ch. 265, sec. 1 after a joint trial with his co-defendant, Josiah Zachery. The judge sentenced him to life with parole eligibility after 20 years incarceration. (12/4/17 20-1)[1]. His notice of appeal was timely filed on December 4, 2017. (A36).

[1] In this brief, citations to the transcript are to the date of the proceeding, followed by a page number. Citations to the Appendix are "A," followed by

STATEMENT OF THE FACTS

Donte Henley (aka "Biggs") and the victim, Kenny Lamour, both worked at ROCA, a nonprofit organization dedicated to helping at risk youth get off the streets, out of gangs, and provide them with vocational training. (11/7/17 95). Mr. Henley had been at ROCA for approximately three months at the time of the homicide. (11/7/17 108). He was a reputed member of the Franklin Hill Giants gang. (11/8/17 at 51). Lamour was a member of the Thetford Avenue Buffalos gang which had a long running dispute with Franklin Hill. (Id. at 51-2). ROCA had a policy to keep rival gang members separated. (11/7/17 101). Henley's co-defendant, Josiah Zachery, was also a reputed member of the Franklin Hill Giants, but was not involved with ROCA. (11/8/17 at 51).

On February 11, 2015, Henley wanted to be part of a ROCA work crew shoveling snow because he was looking for extra shifts. (11/9/17 140-2). His supervisor, Jamar Cokley, texted him that morning to alert him that someone from Thetford Avenue would be part of the crew that day. (11/9/17 143; 11/20/17

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a page number. Citations to the addendum are "Add." followed by a page number.

97). Coakly texted: "Yo I have the kid from TA, he's cool, calm and collective, please keep it cool." (Exhibit 86). Mr. Henley responded, "light."[2] (Id.)

A white ROCA van carrying Cokley, Henley, Lamour, and five other young men arrived on Center Street in Jamaica Plain near the rotary just before 10:00 a.m. (11/9/17 149-50; 11/20/17 114-5). They split up into work crews. (11/8/17 112). Henley, Juan Rivera, and Roy Wilson were in one group shoveling at one end of the rotary. (Id.). It was very cold out and there was fresh snow on the ground. (Id. at 147).

After his feet became cold, Rivera, went back to the van to warm up. (11/8/17 113). He sat in the front passenger's seat. (Id.) Other members of the crew later joined him. (Id.). Henley and Wilson were not among them. (Id. at 129, 131). Rivera was listening to music when he heard a loud bang. (Id. at 116). There were several more bangs afterwards. (Id. at 118). He heard someone inside the van open the side door, and saw the other crew members start running. (Id. at 117-18). Someone said there was a shooting and he also ran away from the van. (Id. at 118). After a short time, he returned. (Id. at 121). There was an ambulance and first responders were picking Lamour up off the ground. (Id.).

[2] Most likely slang for "Alright." See "ight" internetslang.com

Kerry Charlotin was another of the crew members who went back to the van prior to the shooting. (11/9/17 24). He gave Lamour a lighter for his cigarette, and got back inside the van. (Id.). When he heard shots, he got out and ran. (Id. at 27). He later saw Cokley and returned to the van. (Id. at 28). He saw someone on the ground, and Cokley told him to run and get help. (Id.). As he was running down Center Street, the police stopped Charlotin at gunpoint, tackled him to the ground, and handcuffed him. (Id. at 30-1).

Officer William Louberry was responding to a call for a disabled motor vehicle at 1153 Center Street. (11/7/17 55). While driving there, he heard gunshots and pulled over. (Id. at 55-6). On the sidewalk, he saw a man dressed in all black with a grey hoodie over his head running with a gun in his hand. (Id. at 57, 73). The man pointed the gun at him. (Id.). Louberry got out of his car, drew his gun, and then went to the back of his vehicle for cover. (Id. at 59). The man took a shot at him and continued running up the street, away from him. (Id. at 61-2). Louberry called in a description while pursuing him on foot, but lost sight of the shooter when he turned left onto Aldworth Street. (Id. at 62).

Nandita Gawade was the driver of a car on Center Street that morning. (11/20/17 137). She and her husband, David Truman, were stopped at a traffic light. (Id. at 138). She noticed a white van parked on the side of the road, and a

man walking towards the back of the van. (Id.) She saw another man on the sidewalk raise his arm and shoot the man behind the van in the head. (Id. at 139). After the victim fell to the ground, she saw the man shoot twice more. (Id.). The shooter then ran down Center Street away from Arborway. (Id. at 140). She saw a police car a couple of cars behind her, and saw a policeman get out of his car and then get back in. (Id.). She also saw a couple of men get out of the van and run towards Arborway. (Id. at 141). One of them had dreadlocks. (Id. at 142). She was not able to describe the shooter. (Id. at 141).

Walter Prayzabr was driving on Center Street, returning to his house at approximately 10:30 a.m. (11/7/17 142). He saw a male running in the snow with a gun, and a policeman chasing him. (Id. at 145). The man with the gun was running towards him, and he saw the man tuck the gun into his pants around his belt. (Id. at 148). They were running in the opposite direction as Prayzabr was traveling, and he passed them both in his truck. (Id. at 146, 152).

As Prayzabr turned onto Arborway Terrace, he saw a man, later identified as Lamour, lying by the curb, flat out. (Id. at 153). He parked his truck and ran over to him. (Id. at 155). He saw people running away from the area where the man on the ground was. (Id. at 156). Lamour was gurgling blood in his mouth. (Id.). Prayzabr held his head to the side to try to help him breathe. (Id. at 157).

Lamour was looking at him, but did not speak. (Id.). He died while Prayzabr was holding him, before the ambulance arrived. (Id. 158-9).

Officer Ydritzabel Oller and her partner responded to a call about the shooting. (11/10/19 60). They heard a description of the suspect. (Id. at 63). When they arrived on the scene, they saw that other officers had a man on the ground. (Id. at 63-4). She then observed a young black male, later identified at Josiah Zachery, walking across the street with a grey hoodie and black pants. (Id. at 65). She thought it was odd that he was not looking at them and trying to figure out what was going on, but instead seemed to be trying to avoid them. (Id.). He was carrying a shovel. (Id. at 66). She and another officer approached him and asked him where he was coming from. (Id. at 67). He said he had been shoveling snow for the elderly. (Id. at 73). He did not have any gloves, and was wearing sneakers and ankle socks. (Id. at 67-8). They handcuffed him and put him in the police car. (Id. at 78).

Sergeant Detective William Doogan responded to the scene, and, after speaking to Louberry, walked to Aldworth Street. (11/13/17 137). At the first driveway on the right, he noticed some newly disturbed snow. (Id. 137-8). He went up the stairs and onto the back porch of 831 Center Street before observing a line in the snow where it looked like a shovel had been. (Id. at 140,

142). A resident of that home confirmed that his shovel was missing, and later identified the one that Zachery was observed carrying as his. (11/10/17 198, 204). Doogan noticed fresh footprints on the stairs. (11/13/17 143). Another officer found a black jacket hidden in the riser to the stairs to the back porch. (Id. at 145-6). Detective Frank McDonald, who was photographing the scene, recovered a loaded firearm from a nearby rooftop. (11/16/17 65-71).

Detectives asked Louberry to look at two black males (Charlotin and Zachery) who were being detained to see if he could identify anyone. (Id. at 82-4). He thought that the first person (Charlotin) was not the shooter because he had dreadlocks, snow pants, and a cream colored hoodie. (Id. at 85-6). He stated the second person (Zachery) looked like the shooter, except he was not wearing a black jacket. (Id. at 86). Later, officers showed him a black jacket that he said could have been the one the shooter was wearing. (Id. at 89).

Four witnesses from the neighborhood who had seen the shooting or the shooter flee were also asked to look at Charlotin and Zachery separately. (See 11/9/17 52; 11/13/17 64). None of them were able to make a positive identification. (11/13/17 60-77). All but one said that Zachery more closely resembled the shooter than Charlotin. (Id. at 69-73).

As part of the investigation, the police seized Zachery's cell phone and obtained a search warrant to review its contents. (11/10/17; 11/13/17 74; 11/20/17 84). It contained multiple texts and several calls to and from Mr. Henley's phone just prior to the shooting. (Id. at 98). At 7:54 a.m., just after Henley received texts from Cokley concerning Lamour being on the work crew, he texted Zachery, "Ayo where you at?" (Id.). At 7:58 a.m., Zachery replied, "Crib." (Id.). At 7:59 a.m., Henley sent a text, "Ayo I might need you and lil cuzzo to hold me down." (Id.). Zachery replied, "Where u." (Id. at 99). There were also several other short calls between the two. (Id. at 99).

At 8:30 a.m., Zachery texted, "Im on 29 goin straight to Jackson." (Id.). A detective opined that his meant he was on the 29 bus[3] going from Mattapan Square to Jackson Station in Roxbury. (Id. at 100). At 8:43 a.m., Henley texted Zachery, "ayo ima be at the hills." (Id. at 101). The detective opined this meant Forest Hills. (Id.). At 9:16 a.m., Henley texted Zachery, "Hurry up bro I wanna punch the kidd up bro aso." Zachery replied: "im bouta get off bus bro im at the light by jackson" and then "And im tryna get a ride." (Id. At 105). At 9:19 a.m., Henley texted Zachery, "Bro I'll do I just need my steal." (Id. at 106). At 9:21

[3] The police seized Zachery's Charlie Card from his person at the time of his arrest from which they obtained still photos allegedly depicting him at bus and subway stations. (See 11/20/17 at 82-4).

a.m., Zachery replied, “Biggs! Thats stupid, work like its nothing ill clean up but its yours you can do whatever.” (Id. at 106). Henley replied, “But my nigga I’m not waiting so a nigga could try and get me,” and then a minute later, “It’s like it’s me or him and I ain’t going.” (Id. at 107). Zachery then texted, “light fuck him your right snm (say no more).” (Id. at 107).

At 9:29 a.m., Henley texted Zachery, “So how we gon do it?” (Id. at 111). Zachery replied, “Its not in a bag or nuffin its in my pocket.” (Id.). At 9:30, there was a 19 second phone call between the two phones. (Id.) At 9:31, there was a series of texts from Henley to Zachery: “Yo kidd got on black scully”; “and acgs black ones”; “And blue American Eagle jeans”; “and a pea coat”; and “Just take the back way to the hood.” (Id. at 112). At 9:36 a.m., Henley texted Zachery, “Ayo we up the street a lil you can get back on MBTA at the hills too,” “Just don’t run all the way back.” (Id. at 114). At 9:38 a.m. after an attempted call from Zachery, Henley texted, “I’m still in van ima call you in a sec.” (Id. at 114-5). At 9:47, there was a minute phone call between them. (Id. at 116). At 10:20 a.m., Zachery texted. “I see the van can’t find yall.” (Id. at 120). Two brief phone calls between them followed. (Id.). That was their last communication. (Id. at 120-1).

Mr. Henley’s theory of the case was that in his texts and phone calls he was simply asking Zachery to bring him his gun for protection because he felt

physically threatened by Lamour's presence on the crew that day, and he did not intend Zachery to shoot Lamour. (11/27/17 76-7). Defense counsel presented evidence that Mr. Henley feared for his safety at ROCA as a result of prior incidents. Thae Thai, the assistant director, testified that a Thetford Avenue member, Richie Williams, who was a friend of Lamour's, was escorted out of the ROCA building in October of 2014 because he was rumored to have a gun, although no gun was found after a pat down. (11/20/17 156, 159-61). Henley was coming into the building as Williams was leaving, and Williams turned around after he passed him. (Id. at 161, 166). Angela Cooper, who was the ROCA director for Boston during this time period, also testified about the incident, and further testified that Williams was prohibited from coming into the ROCA building afterwards until he was terminated from the program approximately ten days later for unrelated reasons. (11/7/17 199-200, 210; Exhibit 8).

Mr. Henley' mother's, Chandra Henley, testified that in late December of 2014, he expressed concerns to her about his safety at ROCA, and stated there was a "possible rival enemy working there" from Thetford Avenue. (11/21/17 51-3). He told her he had had a conversation with people at ROCA about "general safety issues" and felt that he was okay with working there as long as "they kept them separate." (Id. at 53). He stated there had been an incident in

which a Thetford Avenue member had approached him in what he thought was an aggressive and hostile manner while he was talking to another crew member. (Id. at 54-5). He also told her he heard that a Thetford Avenue member brought a gun to ROCA on another occasion as a result of his presence. (Id. at 55-6).

The Commonwealth charged Mr. Henley with first degre murder under the theories of premeditation and extreme atrocity or cruelty. (A17). The judge instructed the jury on the lesser included offense of involuntary manslaughter. (11/27/17 38-41). The jury returned a guilty verdict on second degree murder. (A35).

SUMMARY OF THE ARGUMENT

The judge erred in allowing the Commonwealth to elicit testimony that Mr. Henley was observed running away from the area where shots were fired in September of 2014, and the gun used in that incident was alleged to have be the murder weapon in this case. Because there was no evidence that Mr. Henley was in possession of the firearm or had access to it in 2014, and he offered to stipulate to key facts in this case that would have made the testimony unnecessary, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. (See p. 20- 30) The judge further erred in allowing a police officer to testify over counsel's objection that he had personally

known Mr. Henley since 2005, as the jury could have reasonably inferred from this evidence that Mr. Henley had had previous law enforcement contacts or arrests dating back to when he was a juvenile. (See p. 30-3).

The judge further erred in allowing the Commonwealth's gang expert to interpret text messages from Mr. Henley to Zachery where he was not qualified to do so and his testimony infringed on the fact finding function of the jury. (See p. 39-41). The judge erred in permitting the Commonwealth's gang expert to testify concerning the gang database, and violence committed by gangs generally, including homicides, shootings, stabbings, robberies, and jail fights committed by gangs not involved in this case. The evidence was highly prejudicial and had little probative value. (See p. 41-7). The judge's instruction concerning the jury's use of the gang evidence was overbroad and constitutes reversible error. (See p. 47-9).

The trial judge also erred in not giving the defendant's requested instruction on mistake or accident as this went to the heart of his defense. (See p. 49-53). This Court should order a new trial as a result of the cumulative effect of the court's errors which allowed the jury to infer that Mr. Henley was a violent and dangerous gang member. (See p. 53). Mr. Henley also joins in the suppression,

severance, and prosecutorial misconduct arguments made by Mr. Zachery. (See p. 54).

ARGUMENT

I. The Judge Committed Reversible Error In Admitting Evidence Of Prior Misconduct That Connected The Defendant To An Earlier Shooting.

A. Additional Facts In Support Of This Claim.

The Commonwealth filed a motion to admit prior misconduct evidence, and Mr. Henley filed a motion in limine, "seeking to exclude other ballistics evidence." (A27-31). Following a pretrial hearing on the matter (10/24/17 15-23), the judge ruled that the Commonwealth's witnesses could testify that in September of 2014, approximately five months before Lamour was killed, Mr. Henley and another individual (not Zachery) were observed running away from a location where shots were fired, and the Commonwealth's ballistics expert believed the weapon in that incident was the same one used to kill Lamour. (See 11/6/17 163-5; 11/16/17 31).

Sergeant Ryan Mason testified that he investigated an incident on September 9, 2014, in which shell casings were recovered from Williams Street. (11/16/17 98). As part of that investigation, he obtained video of two individuals running from the area where the casings were found. (Id. at 99). He

disseminated the video to other the Boston Regional Intelligence Center. (Id. at 100). Officer Michael Paradise testified that he viewed the video and recognized one of the individuals as Mr. Henley. (Id. at 38, 39).

Angela Cooper of ROCA testified that through her work she became familiar with Mr. Henley. (11/7/17 171-2). In the week after Lamour's murder, the police showed her a still shot from a video from 2014 (Comm's Exhibit 9), and she testified that the person depicted looked like Mr. Henley. (11/7/17 204-5). Detective Martin Lydon opined that the shell casings recovered from the 2014 incident were fired from the gun recovered from the rooftop the day Lamour was killed. (11/17/17 171, 11/20/17 17, 20-1).

Defense counsel proposed a stipulation to eliminate any need the Commonwealth had for the prior bad act evidence. (11/16/17 29-33, 86-7). The Commonwealth declined to accept the stipulation. (Id. at 86-7). It was also opposed by counsel for Mr. Zachery. (Id. at 88). The proposed stipulation, which was docketed, consisted of two parts; A) that Mr. Henley requested that Mr. Zachery bring a firearm to him, and B) that the gun on the roof a nearby garage on the day of Lamour's murder was the "same firearm requested by Mr. Henley." (Id. at 28; 86-8; A32). The judge denied counsel's motion to read the proposed stipulation to the jury. (Id.).

The Commonwealth stipulated that the other person running away in the 2014 incident was not Zachery. (11/16/17 41). The judge also gave a contemporaneous limiting instruction stating that the jurors could not consider the evidence of the 2014 incident against Zachery. (11/20/17 25). During the testimony of the Commonwealth's ballistics expert, the judge told jurors that he would instruct them on the use of the evidence against Mr. Henley, but he did not give a contemporaneous limiting instruction. (11/20/17 23- 25).

In his final charge, the judge instructed the jury as follows:

> You also heard testimony, if you credit it, that may have placed Donte Henley in the area of a prior incident in which shots were fired allegedly from the same weapon which the Commonwealth contends was used in the crime charged in the present case. If you find the evidence concerning the prior incident credible you may consider that evidence only for a limited purpose; that is, on the issue of whether Mr. Henley had knowledge of or access to that particular weapon. You may not use the evidence to conclude that Mr. Henley has a bad character or that he has a propensity to commit crimes or that he has committed any crime on that earlier date in September of 2014. (11/27/17 60-1).

Counsel argued that the limiting instruction was insufficient and requested a mistrial. (Id. at 174).

B. Preservation And Standard of Review.

This issue is preserved as a result of counsel's objection to the testimony and his motion for a mistrial. (See 11/16/17 32-3, 90-1; 99, 100; 11/17/17 168;

11/20/17 18-19, 23). This Court therefore reviews his claim for prejudicial error. See *Commonwealth v. Tavares*, 482 Mass. 694, 712 (2019). An error is nonprejudicial only when we are sure that the error "did not influence the jury, or had but very slight effect.... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445 (1983)*, quoting *Kotteakos v. United States,* 328 U.S. 750, 764-765 (1946).

The denial of a motion for a mistrial is reviewed for an abuse of discretion. *Commonwealth v. Bryant*, 482 Mass. 731, 739-40 (2019).

C. The Probative Value Of The Evidence Was Substantially Outweighed By the Danger Of Unfair Prejudice.

There was no evidence that Mr. Henley possessed or had access to the gun in 2014 incident. Instead, the evidence, even when viewed in the light most favorable to the Commonwealth, merely demonstrated that Mr. Henley was in the vicinity when shots were fired from that gun and he ran away. It should be obvious to this Court that running away from the sound of gunshots is not unusual or incriminating behavior in and of itself, and this fact did not increase

the probative value, if any, of the evidence. More importantly, the Commonwealth did not establish a direct connection between Mr. Henley and the discharge of the gun in 2014 through any witness or other evidence. There was no evidence that he had custody, control, or even knowledge of the gun used in the 2014 shooting.

In *Commonwealth v. Barbosa*, 463 Mass. 116, 121 (2012), the SJC held that the trial judge erred in allowing the Commonwealth to introduce evidence concerning the seizure of a magazine, ammunition, and security measures from the defendant's apartment where he lived with several other people. The judge concluded that the ammunition and magazine could not have been used in conjunction with the murder weapon, but that they were nontheless admissible to show the defendant's "access to or familiarty with firearms." (Id.). The SJC concluded that the judge erred in part because the defendant's connection to the ammunition and magazine was "speculative," and as a result, the danger of unfair prejudice to the defendant outweighed the probative value of the evidence. (Id. at 123). Contrast *Commonwealth v. McGee,* 467 Mass. 141, 156-7 (2014) (judge did not err in allowing the Commonwealth to call several witnesses who testified that prior to the shooting the defendant possessed a gun of the same type used in the murder); *Commonwealth v. Vazquez*, 478 Mass. 443, 448-9

(2017) (witness testified that he observed the defendant with a firearm of a similar type one month before the shooting). Without testimony of any connection between Mr. Henley and the gun used in the 2014 shooting other than him being in the vicinity of shots being fired, the evidence had little probative value.

Moreover, the judge did not admit evidence concerning the 2014 shooting for any of the stated purposes to the exception to the rule prohibiting the use of prior misconduct evidence. "Such evidence can be highly prejudicial to the defendant, and therefore must be excluded unless it comes within one of the permitted uses, such as to show common scheme, pattern of operation, absence of mistake or accident, identity, intent or motive." *Commonwealth v. Montanino*, 409 Mass. 500, 505 (1991). See Mass. G. Evid. sec. 404(b)(2). It may also be admitted to show the defendant has the means to commit the crime. *Vazquez*, 478 Mass. at 448.

Here, the judge admitted the evidence on the basis that it could show Mr. Henley's "knowledge of and access to that particular weapon." (See 11/27/17 60-1). Zachery's knowledge of and access to the gun was clearly relevant where he was alleged to have been the shooter, and as a result of his defense that the Commonwealth had failed to prove the shooter's identity beyond a reasonable

doubt. The evidence related to the prior shooting, however, was not probative of Mr. Henley's identity as an accomplice or his means to commit the crime where he was not alleged to have been the shooter, and where he offered to stipulate that he asked Zachery, via text, to bring him his gun which was later recovered near where Lamour was murdered.

In *Commonwealth v. Gray*, 463 Mass. 731, 753-7 (2012), the SJC held that the trial judge had committed reversible error in admitting into evidence a rap video purportedly demonstrating the defendant's gang membership where the video was overwhelmingly prejudicial and the defendant offered to stipulate as to his membership in a gang. But see *Commonwealth v. Worcester*, 44 Mass. App. Ct. 258, 262, *review denied*, 427 Mass. 1103 (1998) ("[A] judge may admit relevant evidence even if a party has agreed to stipulate to the fact that the offered evidence tends to prove). The judge here similarly committed reversible error in not accepting the defendant's proposed stipulation in order to eliminate the need for the highly prejudicial prior misconduct evidence.

In his opening statement, Mr. Henley did not meaningfully challenge the Commonwealth's proof with respect to identity, instead arguing that he was reasonably in fear of Lamour because he was in a rival gang, and wanted Zachery to bring him the gun for his own safety. (11/7/17 29-33). Whether he

had the means to commit the crime was therefore not in dispute or a live issue in the case. See *Gray*, 463 Mass. at 754 ("By the time the rap video was introduced, the defendant had not otherwise contested that he was a gang member").

By contrast, the danger of unfair prejudice to Mr. Henley was high as a result of the jury hearing that he was in the vicinity of a prior shooting, allegedly involving the same gun as was used to kill Lamour. The SJC has found:

> The introduction of evidence that a defendant possessed a weapon on a prior occasion creates a risk that the jury will use the evidence impermissibly to infer that the defendant has a bad character or a propensity to commit the crime charged.

McGee, 467 Mass. at 156. See also *Commonwealth v. Dwyer*, 448 Mass. 122, 129 (2006) (prior bad act evidence carries "high risk of prejudice to a defendant."), quoting *Commonwealth v. Barrett*, 418 Mass. 788, 795 (1994). As a result of the prior misconduct evidence, the jury likely inferred that Mr. Henley was involved in another shooting in September of 2014, shortly before Lamour's murder because the gun belonged to him. Introduction of his text message to Zachery on the day of the murder, asking Zachery to bring "my steal," combined with expert testimony that the gun recovered from the rooftop on the day of Lamour's murder was the same one used in the 2014 shooting

inevitably led jurors to this conclusion. This, in turn, inevitably led jurors to conclude that Mr. Henley was a violent and dangerous person with a propensity to commit offenses involving firearms.

Because the probative value of evidence concerning the 2014 shooting was substantially outweighed by the danger of unfair prejudice, the judge erred in admitting the evidence over counsel's objection and in rejecting his proposed stipulation.

D. The Defendant Was Unfairly Prejudiced By Admission Of The Evidence Despite The Court's Limiting Instruction.

Although the prosecutor did not mention the 2014 shooting in his closing argument, during the trial, four different witnesses for the Commonwealth testified on that subject matter, either identifying Mr. Henley from a still video image near where the shooting occurred or linking ballistic evidence from Lamour's murder to the prior shooting. It was therefore a prominent issue in the case.

The court did not give a contemporaneous limiting instruction concerning the jury's use of the evidence with respect to Mr. Henley, although it did give such an instruction prohibiting its use against Mr. Zachery. (11/20/17 25). Thus, when they first heard the testimony, the jury was not informed that they could not infer from the evidence that Mr. Henley was a bad person who had a propensity

to commit criminal acts with firearms. But see *Commonwealth v. James*, 424 Mass. 770, 780-1 (1997) (no limiting instruction necessary where defendant *is in possession* of a weapon capable of being the murder weapon on an earlier occasion). The court's limiting instruction, given as part of its two part final charge, was brief and near the end of a length set of preliminary instructions where it was likely to be given little import by jurors. (See 11/27/17 22-70).

The judge's limiting instruction was also defective because did not require the jury to first find that Mr. Henley possessed the gun in September of 2014 or had access to it. Contrast *Barbosa*, 463 Mass. at 121-2 (court instructed the jury: "You may consider this as some evidence showing the defendant's familiarity with or access to firearms or firearms ammunition, but *only if you first conclude that the defendant knowingly had possession, custody, or control over that nine millimeter evidence*. If you're not satisfied the defendant had knowing possession, custody, or control over that ammunition and the magazine, then you should not consider that evidence in any way.") (Emphasis added).

The jury in this case deliberated for the better part of four days, ultimately rejecting first degree murder, the verdict sought by the Commonwealth. Thus, the evidence against Mr. Henley was far from overwhelming. The court's admission of the testimony about the 2014 shooting could have made a

difference in the outcome of his trial, causing the jury to reject the lesser included offense of involuntary manslaughter. See *Gray, supra*; *Commonwealth v. Picariello*, 40 Mass. App. Ct. 902, *review denied*, 422 Mass. 1106 (1996) (conviction for violation of restraining order reversed based on erroneous admission of evidence of defendant's abusive conduct prior to issuance of restraining order "because its prejudicial effect far exceeded its probative value"); *Montanino*, 409 Mass. at 505-507 (admission of testimony that similar sexual misconduct occurred on more recent occasions was deemed erroneous because it, "'diverts the attention of the jury from the [crime] immediately before it; and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him'"), quoting *Commonwealth v. Trapp*, 396 Mass. 202, 206 (1985). Because the erroneously admitted evidence concerning the prior shooting was overwhelmingly prejudicial, Mr. Henley's convictions must be reversed.

II. The Judge Committed Reversible Error In Allowing A Police Officer To Testify That He Had Known The Defendant Since 2005 Because It Was Highly Prejudicial.

A. Additional Facts In Support Of This Claim.

Sergeant Detective Richard Lewis testified that he saw Mr. Henley on the street shortly after the murder and allowed him to go into the ROCA van to

retrieve his phone. (11/13/17 61). Just prior to that testimony, the following exchange took place during direct examination:

> Q: Did you personally recognize anybody who was a member of that crew?
> A: I did.
> Q: Who did you recognize on the street?
> A: Mr. Dante [sic] Henley.
> Q: And going back, how far have you been familiar with Mr. Dante Henley?
> Mr. Budreau: Objection, Your Honor.
> The Court: Overruled.
> Q: Just how much time?
> The Court: Just a date or time.
> A: Since I arrived in Mattapan, probably- - actually before that. It would [sic] I was in the Gang Unit.
> Mr. Budreau: Objection, Your Honor. Move to Strike
> The Court: Objection sustained. Disregard that.
> A: 2005 (Id. at 59-60).

B. Preservation And Standard Of Review.

The issue is preserved as a result of counsel's objection, and therefore this Court reviews for prejudicial error. See sec I(B) of this brief.

C. The Testimony Was Unduly Prejudicial And Not Probative Of Any Issue In The Case.

The judge erred in overruling counsel's objections to two questions posed by the prosecutor; 1) whether Detective Lewis knew anyone at the scene, and 2) for how long Lewis had known Mr. Henley. Whether Lewis knew Mr. Henley and for how long was completely irrelevant to any contested issue in the case. The

testimony therefore had no probative value. The prosecutor could simply have asked him to identify Mr. Henley in the courtroom if there was any question about the identity of the individual who asked to retrieve his phone from the van, which there was not.

Moreover, Lewis' answer, since 2005, was extremely prejudicial. In 2005, Mr. Henley would have been a juvenile (he was born in 1990). That he had had law enforcement contacts that early in life was likely to be seen by the jury as evidence of his bad character and criminal propensity. The jury was likely to infer that Lewis knew him as a result of previous stops or arrests and therefore to conclude that Mr. Henley had been in trouble with the law beginning at a very early age. Lewis' testimony, later struck by the judge, that his familiarity with the defendant began when he worked at the Gang Unit, unquestionably reinforced that view. In addition, this was the second police officer in trial to testify about his familiarity with Mr. Henley. The judge had previously erred in allowing Detective Paradise to testify that he recognized Mr. Henley from a still photo taken from the scene of a 2014 shooting. (11/16/17 38-9). Paradise's testimony was cumulative of Angela Cooper's testimony identifying Mr. Henely from the same photograph and was therefore also unnecessary in addition to being prejudicial. See sec. I(A) of this brief.

D. The Error Requires Reversal.

As a result of the testimony that Mr. Henley was known by name and sight to more than one detective, the jury likely inferred the defendant had committed prior criminal offenses. The court's evidentiary error requires reversal because the judge did not instruct the jury that police can have knowledge of a defendant for reasons unrelated to prior criminal activity. Compare *Commonwealth v. Westbrook*, 58 Mass. App. Ct. 692, 699, *review denied*, 440 Mass. 1104 (2003) (no error in judge's failure to exclude officer's testimony that he drove the defendant home and had had prior dealings with him a week earlier); *Commonwealth v. Peguero*, 54 Mass. App. Ct. 1114 (2002) (unpublished) (no danger of unfair prejudice from officer's testimony that he knew the defendant from prior dealings where the court instructed the jury that there are many reasons that an officer would know someone and they were not to draw any negative inferences from the testimony). Mr. Henley was unfairly prejudiced as a result of the judge's failure to sustain counsel's objections and a new trial is required.

III. The Judge Committed Reversible Error In Admitting Certain Testimony Of The Commonwealth's Gang Expert And His Limiting Instruction On The Jury's Use Of The Gang Evidence Was Overbroad.

A. Additional Facts In Support Of This Claim.

The Commonwealth gave notice of its intent to introduce gang testimony (A18-21). Counsel filed a Motion In Limine Seeking to Exclude, Or Alternatively Limit Gang Expert's Testimony.[4] (A22-6). The judge held a pretrial hearing concerning the gang expert, Sergeant Detective John Ford's, basis of knowledge. (See 9/14/17). On November 21, 2017, the defendant filed a Motion Seeking To Admit Evidence of Victim's Gang Related Activities.

Prior to Ford's trial testimony, the judge gave the following limiting instruction, in pertinent part:

> [Y]ou may hear through testimony evidence associating one or both of the defendants, Mr. Zachery and Mr. Henley, with a certain group or a gang and evidence associating the deceased, Kenny Lamour, with a different group or gang.
>
> 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 hostility or fear that either of the defendants held for Mr. Lamour or his group;

---

[4] In the motion and supplement to the motion, counsel for Mr. Henley argued that there was an insufficient basis for the expert to testify that the defendant was a member of Franklin Hill rather than an associate. (See A22-6).

> 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 of the ROCA agency.
>
> If you conclude that either defendant is affiliated with a gang or group that in itself is not proof that either defendant committed the crimes with which he is charged in this case. (11/8/17 15-16).

Defense counsel did not object to the limiting instruction. (Id. at 16). The judge repeated the limiting instruction in the first part of his final charge although he left out the words "if you credit it." (11/27/17 62-3).

During his testimony, the gang expert, Ford, on multiple occasions referenced violence committed by gangs including shootings, stabbings, robberies, and jail fights. (11/8/17 18, 20-21, 23, 25, 30). He defined a gang in Boston, in pertinent part, as "a group of individuals that represent a street or housing project" that is "involved in committing crimes, committing violent crimes and have ongoing conflicts with other gangs." (Id at 26). He also spoke about disputes ("beefs") between gangs and "cease fire meetings" where the goal was to stop "the shooting." (Id. at 23, 29). He testified that ceasefires were more difficult to broker when a dispute involved a murder because "somebody is dead" as opposed to a beef as a result of a robbery. (Id. at 25). He testified about a beef between two particular gangs as follows:

> I could tie Lucerne Street and Morse Street beef to a murder. A mst kid was murdered. They perceived 1st did it outside a house party and that has kicked off multiple shootings and multiple homicides involving those two groups. And I am talking that incident probably happened in 2003 and it's still ongoing today. (Id. at 29).

Defense counsel did not object to any of the foregoing testimony.

Ford also testified about the hierarchies within gangs, and opined that the level of violence committed by a member increases his standing within the group. (Id. at 31). The judge sustained several objections by counsel to testimony about the difficulty of withdrawing from a gang, younger gang members volunteering to commit acts of violence in order to obtain status (Id. at 32-3, 34), and spontaneous violence between rival gangs, but overruled an objection by Mr. Zachery's attorney to a question about the term for a younger gang member who volunteers to commit violence ("Crash" or "Crash Test Dummy").[5] (Id. at 34). Ford testified concerning preplanned violence between rival gangs around anniversaries of homicides. (Id. at 34).

[5] In *Commonwealth v. Wardsworth*, 482 Mass. 454, 473 (2019), a different gang expert called by the Commonwealth testified that a "Crash" Or "Crash Test Dummy" was a *non gang member,* leading one to question whether there are in fact uniform or standard interpretations for this and similar terms or whether the interpretations vary widely depending on the user and the "expert."

When Ford began to testify about spontaneous violence, counsel for the co-defendant renewed his objection, and the judge instructed him to move on. (Id.) Counsel then requested a sidebar where he noted that many of the prosecutor's questions appeared to be tied to the facts of this case, and he objected to testimony about specific instances of violence and conduct. (Id. at 35). The judge directed the prosecutor to move into testimony about the specific gangs at issue in this case. (Id. at 38).

When Ford began testifying about Thetford Avenue, co-counsel objected to testimony about the gang database kept by the Boston police. (Id. at 41). The judge overruled the objection. (Id.). Ford testified about the difference in the database between a member and an associate and the point system used. (Id. at 41-4). After testifying about the gang affiliations of the two defendants and the victim, Ford testified over co-counsel's objection concerning the "very violent" dispute between Thetford Avenue and Franklin Hill. (Id. at 51-2). Finally, Ford testified, after the judge overruled objections by both defense counsel, as to the meaning of phrases at issue in this case, including "hold me down" (take care of, show loyalty) and "punch somebody up"[6] (shoot someone). (Id. at 55-6).

B. Preservation And Standard of Review.

[6] That phrase is not contained in the online slang dictionary. See onlineslangdictionary. com

The defendant's claim is partially preserved as a result of the objections of counsel and co-counsel to portions of Ford's testimony. Those portions are reviewed for prejudicial error. See *Commonwealth v. Charles*, 57 Mass. App. Ct. 595, 598, fn. 7 (2003) (applying same standard of review to the coventurers even where co-counsel did not say, "me too" when the other objected).

With respect to the unpreserved portions, including Mr. Henley's claim of instructional error, this Court's standard of review is whether the error, if any, resulted in a substantial risk of a miscarriage of justice. *Wardsworth*, 482 Mass. at 471. In analyzing a claim under the substantial likelihood standard, this Court "reviews the evidence and case as a whole and consider whether any error made in the course of the trial was likely to have influenced the jury's conclusion." *Commonwealth v. Berry*, 457 Mass. 602, 618 (2010).

The determination of whether to admit expert testimony lies within the broad discretion of the trial judge. *Commonwealth v. Richardson*, 423 Mass. 180, 182 (1996). 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." *Simon v. Solomon,* 385 Mass. 91, 105 (1982).

C. Certain Testimony Of The Gang Expert Was Outside Of The Detective's Area of Expertise, Without Proper Foundation, Unduly Prejudicial, And Too Closely Tailored To The Facts Of The Case.

Ford testified, over objection, that to "punch someone up" meant to shoot someone and that "hold me down" meant to "take care of" and "show loyalty." (11/8/17 55-6). Ford, however, was not qualified to give these opinions. His credentials did not include any training or expertise in interpreting slang phrases in texts. (See 9/14/17 7-20; 11/8/17 11-15, 16). In the pretrial hearing, Ford admitted that he had never written in any police reports that "punch someone up" meant to shoot someone, and he could not name any particular instance when he had heard the phrase before. (9/14/17 54). He also testified that he was never assigned to the gang unit at the police department. (11/8/17 17). He did not testify that he received any formal training in gang related investigations. (See Id. at 16-23).

In *Gray*, 463 Mass. at 755, the SJC stated:

> Although [the gang expert] asserted during the voir dire that the video "consists of discussing being a Heath Street gang member and what takes place or what's done or conducted by individuals who are Heath Street gang members," there was no evidence that [he] was an expert on music video recordings or rap music. A police officer who has been qualified as a "gang expert" cannot, without more, be deemed an expert qualified to interpret the meaning of rap music lyrics.

Similarly, a "gang expert" cannot, without more, be deemed to qualify as an expert in text slang interpretation. It was error for the judge in this case to allow

Ford's to testify, over co-counsel's objection, as to the meaning of Mr. Henley's texts because his testimony lacked an adequate foundation and was beyond his area of expertise.

In addition, Ford's testimony interpreting Mr. Henley's texts to Zachery was improper because it invaded the fact finding function of the jury. What Mr. Henley intended for Zachery to do as a result of his messages went to the heart of both the Commonwealth and the defendant's case and was the only contested issue with respect to Mr. Henley. His testimony about spontaneous violence between rival gangs and "crash test dummies" or younger gang members who volunteer to commit acts of violence in order to obtain status in the gang also too closely mirrored the facts of this case. At the time of Lamour's murder, Mr. Henley was almost twenty-five years old while Zachery was eighteen. See *Commonwealth v. Frederico*, 425 Mass. 844, 850-1 (1997) (hypotectical question to child sexual assault expert assumed facts which were the facts of the case and therefore improperly invaded the province of the jury).

The judge also erred in admitting evidence about the Boston police department's "gang database" over counsels' objections. Specifically, with respect to the point system used for the database, Ford testified that information used to assign points came from "self admission" as well as "in the jails. Who

they're observed with; if they engage in altercations with rival gang members." (Id. at 42). He further testified, "It also validates [sic] by another law enforcement agency. So if the sheriff's department has already determined someone is a member that would count as a certain number of points." (Id.). From this testimony, the jury could reasonably infer that both defendants had had previous contacts with law enforcement, past periods of incarceration, and previous alterations with rival gang members. The court erred in overruling counsel's objections because this testimony was unduly prejudicial and unnecessary. Compare *Wardsworth*, fn. 25, (judge excluded any reference to the database).

Finally, the judge erred in admitting much of Ford's testimony because it was extremely prejudicial and not probative of the issues in this case. In *Wardsworth*, the SJC held that the judge should have excluded a gang expert's testimony about other criminal activities in which gangs were purportedly involved. 482 Mass. 472-3. In that case, the expert testified:

> [T]hat gangs, generally, were responsible for drug transactions "in schoolyards" and "playgrounds." He attributed to the Walnut Park and Academy Homes gangs a range of criminal activity, including "shootings, drugs, [and] some prostitution." [He] also stated that the rivalry between Walnut Park and Academy Homes was responsible for "unsolved shootings." *Id*. at 473.

The SJC held that the testimony, "went well beyond that which was probative of the facts at issue: the rivalry between the Walnut Park and Academy Homes gangs." *Id*. It further concluded that the jury could have interpreted his testimony to mean, "the defendant was engaged in the drug trade, the sex trade, and numerous "unsolved" shootings. *Id*. Compare *Commonwealth v. Akara*, 465 Mass 245, 269 (2013) ("The gang related evidence did not describe Tent City members as being involved in criminal activity aside from small scale vandalism"); *Commonwealth v. Barros*, 83 Mass. App. Ct. 1105, *review denied*, 464 Mass. 1106 (2013) (unpublished) (the judge "strictly limited" the expert's testimony, "excluding all references to gang related violence.")

Here, Ford testified numerous times about gang related shootings, some of them murders, committed by gangs who were not involved in this case. (See 11/8/17 29). He also testified about robberies, stabbings, jail fights, and "beefs" between rival gangs lasting for many years. (Id. at 18, 20-1, 23, 25, 30). He explained how shootings between rival gangs often occurred on the anniversaries of homicides, despite that testimony's complete lack of relevance to this case. (See id. at 34). He defined a gang as a group that commits "violent

crimes."[7] (Id. at 26). Because much of his testimony did not concern either the Franklin Hill or the Thetford Avenue, the probative value of the evidence was low.

Moreover, the risk of unfair prejudice to the defendants was very high. In *United States v. Irvin*, 87 F.3d 860, 865-6 (7thCir.), *cert*. *denied*, 519 U.S. 903 (1996), the Court found:

> Gangs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict.

See also *Commonwealth v. Phim*, 462 Mass. 470, 477 (2012) (citing danger jury will use the evidence to find propensity). "Although 'not all gangs are the same and not all gang affiliations are the same,' community attitudes towards gang violence are likely to color [the] evidence." *Akara,* 465 Mass. at 267-268; Eisen, Gomes, Wandry, Drachman, Clemente, & Groskopf, Examining the Prejudicial Effects of Gang Evidence on Jurors, 13 J. Forensic Psychol. Prac. 1, 11-12 (Jan. 2013) (fact that defendant spent time with gang members or had gang tattoo significantly increased rate at which jurors in study voted to convict).

[7] By contrast, Merriam-Webster defines a gang as "1) Group: such as a): a group of people working to unlawful or antisocial ends especially: a band of antisocial adolescents," a much more innocuous definition.

As a result of Ford's testimony, the jury was undoubtedly left with the impression that all gang members, including the defendants in this case, were dangerous criminals who routinely engaged in murders and other extremely violent acts. Although the judge finally told the prosecutor and Ford to "move on" in response to counsel's objections, at that point the damage was done because the jury had already heard a large amount of unduly prejudicial testimony. (See Id. at 38). Moreover, the judge did not give a limiting instruction concerning Ford's testimony about robberies, stabbings, and jail fights. See *Wardsworth*, 482 Mass. at 473. (noting that the limiting instruction did not cover the testimony about other criminal acts committed by gang members). The judge's error in admitting this improper evidence compounded his error in admitting evidence that Mr. Henley was observed in the vicinity of a shooting in 2014, no doubt reinforcing the jury's view that gang related shootings were commonplace, and that the defendants, as a gang members, had a propensity to engage in this type of violent behavior.

D. Admission Of The Evidence Prejudiced The Defendant And Resulted In A Substantial Risk Of A Miscarriage Of Justice.

Counsel did not meaningfully contest Mr. Henley's gang membership (see 11/8/17 50), and sought to introduce evidence of the victim's membership in a

rival gang and involvement in jail fights[8] in order to show the defendant's fear of the victim and his motive to arm himself on the day of Lamour's murder. The testimony from the Commonwealth's gang expert concerning the gang affiliations of the defendants and the victim, however, was cumulative because several witnesses who worked for ROCA had already testified on this subject matter. (See 11/7/17 129; 189-90). Counsel did not seek to introduce evidence about the gang database or violence committed by gang members generally, including shootings, stabbings, robberies, jailhouse fights, or murderous beefs between rival gangs not involved in this case, and in several instances, objected to this testimony. Therefore, counsel did not induce the judge's error.

In *Commonwealth v. Maldonado,* 429 Mass. 502*,* 505 (1999), the SJC cited with approval the judge's efforts to minimize the danger of unfair prejudice to a defendant from gang affiliation evidence, by conducting voir dire of potential jurors on the issue and by giving a limiting instruction. In this case, the judge followed that procedure, although the voir dire on gang affiliation was done by the attorneys. (See 11/1/17 46). Despite these cautionary measures, the judge

[8] The judge did not allow testimony about Mr. Henley's or the victim's involvement in specific jailhouse fights.

committed reversible error because he did not meaningfully limit the expert's testimony about gang related violence. See *Wardsworth*, 482 Mass. at 473.

In *Wardsworth*, counsel did not object to the Commonwealth's gang expert's testimony about drug dealing, shootings and prostitution, and as a result, the claim was reviewed under the substantial risk of a miscarriage of justice standard. *Id*. at 471. The SJC did not decide whether the improper testimony concerning gang activities met that standard, however, because it held that the judge also committed prejudicial error in allowing testimony that the defendant was a gang member without proper foundation. *Id*. at 469. The SJC stated that at the defendant's new trial, the testimony concerning drug dealing, shootings and prostitution "will not be admitted," suggesting that such testimony could rise to the level of reversible error even when gang affiliation evidence is properly admitted. See *Id*. at 469.

In *People v. Albarran*, 149 Cal. App. 4th 214, 227 (2007), the prosecutor presented "a panoply of incriminating gang related evidence , which might have been tangentially relevant to the gang allegations, but which had no bearing on the underlying charges." The court found:

> Evidence of Albarran's gang involvement, standing alone, was sufficient proof of gang motive. Evidence of threats to kill police officers, descriptions of criminal activities of other gang members, and references to the Mexican Mafia had little or no bearing on any material issue relating to Albarran's

> guilt on the charged crimes and approached being classified as overkill. While the court did admonish the jury concerning the proper use of the gang evidence, certain gang evidence admitted was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of Albarran's actual guilt. (Footnote omitted).

Finding the gang evidence "extremely and uniquely inflammatory," the court concluded that its introduction deprived the defendant of a fair trial under the due process clause of the federal constitution. *Id*. at 229-1. This Court should conclude that similar testimony by the Commonwealth's gang expert here resulted in a substantial risk of a miscarriage of justice.

E. The Judge's Instruction Concerning The Jury's Use Of Gang Evidence Was Reversible Error.

In *Wardsworth*, the SJC held that the trial judge committed reversible error in not properly instructing the jury concerning the testimony of the Commonwealth's gang expert about prior shootings and the rivalry between the two gangs in that case. 482 Mass. at 472. The judge gave a limiting instruction stating, in pertinent part:

> And such evidence, if you believe it, you may consider only on the limited issues of the defendant's state of mind, motive, and whether he engaged in aiding and abetting another in the commission of the crimes with which he is charged. *Id*.

The SJC held that this instruction was overly broad, and "placed virtually no limitation" on the jury's use of the evidence, allowing it to consider it for any purpose related to guilt of innocence. *Id.* By contract, the Court cited with approval the instructions given in *Akara*, 265 Mass. at 266, 268 (2013), where the judge instructed the jury that they could consider the evidence for the limited purpose of "showing motive and joint venture" and "that the defendants therefore shared a common motive." *Id*.

Here, the judge's instruction more closely resembled the one in *Wardsworth* than in *Akara* because it permitted the jury to consider the evidence to determine "whether there was a joint venture or common purpose or plan." (11/8/17 16). That was very similar to the language specifically disapproved of in *Wardsworth*, "whether he engaged in aiding or abetting." The instruction allowed jurors to go beyond motive and state of mind and use the evidence related to gangs to determine "whether there was a joint venture," which for Mr. Henley meant they could use the evidence for any purpose in their determination of his guilt or innocence. In addition, the court's instruction allowed jurors to consider the gang evidence as it affected decisions made by ROCA, an impermissible and arguably irrelevant purpose for use of the gang evidence. Finally, the judge erred in omitting the "if you credit it" language from his gang instruction in the

final charge, thereby implicitly crediting the expert's testimony about the gang membership of the defendants.

V. The Judge Committed Reversible Error In Not Giving The Defendant's Proposed Instruction On Mistake Or Accident.

A. Additional Facts in Support Of This Claim.

Defense counsel submitted proposed instruction #5, which included the following language related to intent:

> 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. (A33-4).

The judge declined to include this language in his charge for reasons that were not sufficiently articulated[9], and counsel took an exception. (11/27/17 15-16, 174).

B. Preservation And Standard Of Review.

The claimed error is preserved as a result of counsel's request to charge and subsequent objection to the instructions given. (11/27/17 15-16, 174). When a timely objection is made, reversible error will be found if the defendant

[9] The judge stated in the charging conference that he thought he had covered that elsewhere in the charge, but that counsel could, "remind me again when we are done." (Id. at 16). Following the charge, he denied counsel's objection without explanation. (Id. at 174).

can show that he was prejudiced by the court's failure to give a requested instruction. See *Commonwealth v. Hughes*, 82 Mass. App. Ct. 21, 28-9 (2012).

C. The Instruction Was Required Where It Went To The Heart Of The Defendant's Theory Of The Case.

Accident or mistake negates the element of malice in second degree murder. *Commonwealth v. Zezima*, 387 Mass. 748, 756 (1982). When analyzing whether a trial judge erred in not giving an accident or mistake instruction, a reviewing court should review the evidence in the light most favorable to the defendant. *Commonwealth v. Figueroa*, 56 Mass. App. Ct. 641, 651 (2002), *cert. denied*, 439 Mass. 1102 (2003). The Model Homicide Instructions IV(B) (2018) indicate that where there is evidence of mistake or accident, the judge should give the following instruction:

> If you have a reasonable doubt as to whether the victim's death was accidental, because the death was caused by a negligent, careless, or mistaken act of the defendant, or resulted from a cause separate from the defendant's conduct, you may not find that the Commonwealth has proved that the defendant intended to kill, intended to cause grievous bodily harm, or intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

In addition, a defendant charged under a joint venture theory of liability, must have "knowingly participated in the commission of the crime" and shared

the intent of his co-venturer. See Model Instructions on Homicide II- Joint Venture (2018).

Although the defendant did not testify in this case, in counsel's opening and closing, he argued mistake or accident; that Mr. Zachery misinterpreted his texts, and that Mr. Henley only wanted Zachery to bring him his gun so that he could protect himself from Lamour and/or members of Thetford Avenue. (11/7/17 29-33; 11/27/1 76-7). Counsel presented evidence from ROCA employees and his mother about Mr. Henley's past incidents with Thetford Avenue members at ROCA in order to demonstrate that Mr. Henley's fear of Lamour was reasonable and justified. (See 11/20/17 156, 159-61; 11/21/17 51-6). Counsel also objected to testimony by the Commonwealth's gang expert, Ford, interpreting Mr. Henley's texts to Zachery, including the meaning of "punch the kid up." (11/8/19 55-6). The judge erred in admitting this testimony (See Sec, III(C) of this brief) because it was without proper foundation. Moreover, the jury could have failed to credit Ford's testimony concerning the meaning of this phrase, finding instead that it meant to literally punch someone rather than to shoot them.

D. The Defendant Was Prejudiced By The Error.

Mr. Henley's theory of the case was that Zachery had misinterpreted his texts and he did not share an intent to kill Lamour. (See defendant's proposed

instruction #4)[10]. The mistake or accident language that was omitted from the court's charge thus went to the heart of his defense.

In *Commonwealth v. McKay*, 67 Mass. App. Ct. 396, 401 (2006), this court held that because the jury was not informed that mistake or accident would be a complete defense to criminal liability for the offense of violation of a no contact order, a new trial was required. While the defendant in that case testified that he had dialed his fiance's number from his phone by mistake as he was driving, this Court noted that mistake was, "the heart of the defendant's theory of defense." *Id.* See also *Hughes,* 82 Mass. App. Ct at 28-9 ("Given that the Commonwealth's case turned on whether the jury credited Ross's identification testimony, it becomes difficult to say with assurance that the error "did not influence the jury, or had but very slight effect"). Because the Commonwealth's case against Mr. Henley turned on his intent with respect to his communications with Zachery and his theory of defense was that Zachery misinterpreted his request concerning the request for his gun, the preserved instructional error here similarly requires reversal.

V. Cumulative Error

[10] The judge also denied counsel's request to give his theory of the case instruction. (See proposed instruction #4).

The cumulative effect of the court's errors was to allow the prosecutor to portray Mr. Henley as a violent and dangerous gang member who had been involved in at least one prior shooting and had had numerous previous contacts with law enforcement. The cumulative error doctrine therefore requires a new trial. See *Commonwealth v. Cancel*, 394 Mass. 567, 576 (1985) (reversing the defendant's conviction based on a combination of errors).

VI. Joinder Of Arguments Of The Co-Defendant

The defendant hereby joins in the arguments of his co-defendant, Josiah Zachery, in his brief, specifically the court's denial of the motions to suppress evidence, to sever the trials, and his arguments regarding prosecutorial misconduct.

CONCLUSION

This Court should reverse the judgment of conviction and order a new trial in Mr. Henley's case based on the judge's aforementioned evidentiary and instructional errors, cumulative error, and for the reasons stated in Mr. Zachery's brief in which counsel joins.

Respectfully submitted,

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September 10, 2019

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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.

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980 N.E.2d 471 (Mass.App.Ct. 2013)

COMMONWEALTH

v.

Casimiro BARROS.

No. 10-P-2104.

Appeals Court of Massachusetts.

January 8, 2013

Editorial Note:

This is an Unpublished Opinion. See MA R A PRAC Rule 1:28

CYPHER, BERRY & AGNES, JJ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Casimiro Barros, appeals from his convictions of voluntary manslaughter, assault and battery by means of a dangerous weapon, and possession of a firearm without a license.

1. *Admission of gang evidence.*

A. *Undue prejudice.*

Evidence of a gang feud and the defendant's gang affiliation was admitted over the defendant's objection. We review for prejudicial error. *Commonwealth v. Smith,* 450 Mass. 395, 398, cert. denied, 129 S.Ct. 202 (2008). " [G]ang affiliation evidence is admissible to show motive." *Commonwealth v. John,* 442 Mass. 329, 337 (2004). " [T]hat [the] gang affiliation was not the only possible motive does not require exclusion of the gang evidence." *Commonwealth v. Phim,* 462 Mass. 470, 477 (2012). The Commonwealth pursued a theory of murder in the first degree, which required proof of deliberate premeditation. The gang evidence was relevant to show that the defendant was motivated by something other than heat of passion upon adequate provocation. In order to meet its burden of proof with respect to murder, the Commonwealth was entitled to offer evidence to show that the defendant engaged in the street shootout with Spank not so much out of loyalty to Barbosa, but rather due to a sense of self-affirmation and bravado as a gang member. The question is whether the probative value of the evidence presented was substantially outweighed by the danger of unfair prejudice. See *Commonwealth v. Robidoux,* 450 Mass. 144, 158 (2007), and cases cited. Without the gang evidence, the jury would not have had the whole picture of the events that led to the shooting. In particular, they would have had difficulty understanding why Spank referred to Roxbury when insulting the group to which the defendant belonged. The jury also might have been puzzled about Nunez's testimony that the defendant parked on a side street to hide his vehicle because of the " drama" in the area. Finally, they would not fully have understood the defendant's relationship with Barbosa.[1] The judge acted in an exemplary manner in taking steps to minimize the prejudice. She conducted a voir dire of the prospective jurors, gave a strong and detailed limiting instruction immediately after the expert's testimony, and repeated this instruction when fully charging the jury. See *Commonwealth v. Maldonado,* 429 Mass. 502, 505 (1999); *Smith, supra* at 400. She also strictly limited the gang

expert's testimony, excluding all references to the gang-related violence. Essentially, all the jury could infer from the expert testimony was that the defendant belonged to the Woodward Street gang called " Purple City," that Barbosa also was affiliated with the gang, and that the gang was engaged in a feud with the Dorchester gang. In these circumstances, the probative value of the evidence far outweighed the danger of unfair prejudice. There was no error.

B. *Qualifications of gang expert.*

Although the judge did not expressly qualify Detective O'Malley as an expert, such a ruling is implied. See *Commonwealth v. Calderon,* 65 Mass.App.Ct. 590, 593 (2006), citing *Commonwealth v. Boyd,* 367 Mass. 169, 183 (1975). Here, the prosecutor laid a sufficient foundation to qualify O'Malley. The judge referred to O'Malley's qualifications as being relevant during the hearing on the motions in limine. Defense counsel referred to O'Malley as an expert during his closing argument. The judge gave instructions on expert testimony. Contrast *Commonwealth v. Wolcott,* 28 Mass.App.Ct. 200, 207 (1990). There was no error.[2]

C. *Gang expert's use of hearsay.*

O'Malley based his knowledge of the relevant gangs, in part, on the intelligence he collected from conversations with neighborhood people, police reports, and field interrogation reports. An expert may rely on hearsay as long as it is independently admissible and a permissible basis for an expert to use in formulating an opinion. See *Department of Youth Servs. v. A Juvenile,* 398 Mass. 516, 531 (1986). See also Mass. G. Evid. § 703 (2012). Statements are independently admissible if they potentially would be admissible through appropriate witnesses, who need not be immediately available in court to testify. See *Commonwealth v. Markvart,* 437 Mass. 331, 337-338 (2002). See also Mass. G. Evid. § 703 & Note (2012). An expert's reliance on hearsay to form an opinion does not violate the defendant's right of confrontation as long as the witness does not testify to the hearsay statements. *Commonwealth v. Barbosa,* 457 Mass. 773, 786-787 & n. 12 (2010). O'Malley did not relay the substance of any hearsay to the jury.[3] The intelligence he used in educating himself about the gang activity was the type of information reasonably relied upon by experts in group characteristics.

2. *Admission of autopsy photographs and bloody clothing.*

The defendant objected to the admission of five autopsy photographs (out of a total of more than forty) of the victim and the admission of her bloody clothing as unfairly prejudicial.[4] We review for prejudicial error. See *Commonwealth v. Vinnie,* 428 Mass. 161, 163 (1998). There was no abuse of discretion.[5] Evidence is not to be excluded merely because it is prejudicial, but only if it is unfairly so. See *Commonwealth v. Delong,* 60 Mass.App.Ct. 528, 535 (2004). " [I]f the photographs possess evidential value on a material matter, they ' are not rendered inadmissible solely because they are gruesome [or duplicative] or may have an inflammatory effect on the jury.' " *Commonwealth v. Urrea,* 443 Mass. 530, 545 (2005), quoting from *Commonwealth v. Benson,* 419 Mass. 114, 118 (1994). Although the defendant did not dispute the injuries or the cause of death, he did not offer to stipulate to them. The Commonwealth therefore bore a burden of proof as to these issues.

3. *Prosecutor's closing remarks.*

The defendant argues that certain of the prosecutor's statements constituted improper

appeal to the jury's conscience and duty: " [T]his case is not just about [the victim]. It is about much more. When those men opened fire on that street, they opened fire on Geneva Avenue.... Geneva Avenue is our street." The defendant objected to the remarks but did not request a curative instruction. We view the statements in the context of the closing argument as a whole and in the context of the trial as a whole. *Commonwealth v. Szerlong,* 457 Mass. 858, 870-871 (2010), cert. denied, 131 S.Ct. 1494 (2011). The prosecutor did not suggest in his closing that it was the jury's duty to find the defendant guilty or that the jury could not go home with a clean conscience without doing so. Contrast *Commonwealth v.. Awad,* 47 Mass.App.Ct. 139, 145-146 (1999). It is instructive to examine the rationale of this section of the closing:

" When you take a dispute like this into the street and you open fire and you put everyone's life in danger, ... the law does not excuse you if you miss your intended target and you hit somebody else.... [T]he articulation in the law of that outrage is the law of transferred intent."

In context, it is clear that the remarks related to the doctrine of transferred intent, and there is no basis to conclude that they improperly influenced the jury's verdict. See generally *Commonwealth v. Kozec,* 399 Mass. 514, 516-524 (1987).

Judgments affirmed.

Notes:

[1] There was no evidence that Spank was a member of a rival gang, or that Dorchester gang members wore black hats or hoodies (from which the jury could infer Spank's gang affiliation). However, Spank's words and conduct revealed that he indeed was a Dorchester gang member, as he referred to the Roxbury group as not being on their turf; and without the evidence that the defendant and Barbosa belonged to a rival gang, the jury could not have understood Spank's conduct.

[2] Even if error, there was no substantial risk of miscarriage of justice. While O'Malley's testimony was admitted to show that the gang affiliation bore on the defendant's premeditation to kill Spank, the jury returned a verdict of voluntary manslaughter.

[3] The statements O'Malley did relay were not hearsay or were independently admissible. They were the defendant's statements and other statements not offered for their truth (for example, the defendant's own statement to O'Malley that he was " not part of that snitch bastards," referring to the Dorchester gang; an insult by a Dorchester gang member that the defendant was a " rat snitch bastard" ; and a directive from a gang member to the defendant, " [D]on't even look at me").

[4] We requested the photographs and reviewed them in connection with this appeal.

[5] The prosecutor described the five autopsy photographs he was offering and the judge examined each of them. One photograph showed the " pseudo-stippling" on the victim's hand caused by flying glass, two showed the exit wound, and two showed the entrance wound. The judge who examined each of these five photographs specifically noted that none was a " full body shot," and that they did not depict the scalp peeled back showing the path of the bullet through the skull.

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COMMONWEALTH

v.

Greg PEGUERO.

No. 01-P-804.

Court of Appeals of Massachusetts

May 3, 2002

Editorial Note:

This is an Unpublished Opinion. See MA R A PRAC Rule 1:28

DUFFLY, DREBEN & TRAINOR, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Greg Peguero, appeals from convictions by a jury of possessing a firearm without a license (G.L. c. 269, § 10[a]), and possession of ammunition without a firearm identification card (G.L. c. 269,§ 10[h]). The defendant claims error in the prosecutor's closing argument and the allowance of testimony from police officers, alluding to previous involvement with the defendant, that he claims created a prejudicial inference that he had a prior criminal record. We see no error and affirm the convictions.

1. Prosecutor's comment.

During the Commonwealth's closing argument, the prosecutor made a statement which the defendant claims constituted reversible error. [1] The issue was properly preserved by objection, so our standard of review is to determine whether the statement constituted prejudicial error. *See Commonwealth v. Alphas,* 430 Mass. 8, 13 n. 7 (1999). "In analyzing a claim of improper argument, the prosecutor's remarks must be viewed in light of the 'entire argument, as well as in light of the judge's instruction to the jury and the evidence at trial." ' *Commonwealth v. Lamrini,* 392 Mass. 427, 432 (1984), quoting from *Commonwealth v. Bourgeois,* 391 Mass. 869, 885 (1984). The evidence in this case was strong. Two witnesses identified the defendant on the basis of their firsthand observations in circumstances that permitted them to have unobstructed views of him. Both witnesses recognized the defendant as someone they knew by name.

It was also clear that the judge did not understand the prosecutor to imply any personal opinion of the defendant's guilt, and we agree. The prosecutor "suggested to the jury that he had met his burden of proof by producing sufficient evidence of guilt beyond a reasonable doubt. This approach is within permissible bounds. Though his rhetoric may have been self-serving, it was not reversible error." *Commonwealth v. Quigley,* 391 Mass. 461, 464 (1984). The judge proceeded to instruct the jury that opening statements as well as closing arguments are not evidence. A "certain measure of jury sophistication in sorting out excessive claims on both sides fairly may be assumed." *Commonwealth v. Kozec,* 399 Mass. 514, 517 (1987). We have examined the prosecutor's comments, the judge's instructions to the jury and the evidence, and we conclude that

there was no prejudicial error.

2. Police officer testimony.

The defendant argues that testimony by the police indicating that the officers knew the defendant from past experience was prejudicial and constituted reversible error. [2] We do not agree.

The defendant contends that there was no valid basis for the introduction of such testimony. The testimony, he alleges, created prejudice by implying that the defendant had been previously arrested and had a criminal record without any other relevancy to the trial.

This evidentiary issue had been argued in a pretrial motion in limine. The defendant argues, as he did in his motion in limine, that the police testimony cannot be allowed because of its potential prejudice. The trial judge, however, found such prior knowledge to be significantly relevant in determining the ability of the police officers to identify the defendant so positively. Questions of relevancy "are entrusted to the trial judge's discretion and will not be disturbed except for palpable error." *Commonwealth v. Azar,* 32 Mass.App.Ct. 290, 300 (1992), quoting from *Commonwealth v. LaSota,* 29 Mass.App.Ct. 15, 24 (1990). Evidence is relevant if it has a "rational tendency to prove an issue in the case." *Commonwealth v. Fayerweather,* 406 Mass. 78, 83 (1989), quoting from *Commonwealth v. Chretien,* 383 Mass. 123, 136 (1981). The evidence need not prove the point at issue, so long as it "render[s] the desired inference more probable than it would have been without it." *Commonwealth v. Fayerweather, supra* at 83, quoting from *Commonwealth v. Copeland,* 375 Mass. 438, 443 (1978). Here, the judge concluded that the evidence was highly probative because it went to the central issue in the trial, which was the police officers' ability to identify the defendant as the person exiting the vehicle while carrying the weapon. "[I]n balancing the probative value against the risk of prejudice, the fact that evidence goes to a central issue in the case tips the balance in favor of admission." *Commonwealth v. Jaime,* 433 Mass. 575, 579 (2001), citing *Commonwealth v. Medeiros,* 395 Mass. 336, 352 (1985).

This issue was preserved by timely objection and the judge immediately gave the jury a curative instruction to prevent any potential prejudice. [3] "We presume that a jury follow all instructions given to it ...." *Commonwealth v. Watkins,* 425 Mass. 830, 840 (1997). We conclude, therefore, that even if the comment was error, it would not have influenced the jury or at most would have had only a slight effect. *See Commonwealth v. Flebotte,* 417 Mass. 348, 353 (1994). We also conclude that the judge acted appropriately within his discretion in determining the evidence to be relevant and that any potential prejudice was immediately and adequately addressed in his curative instruction to the jury.

Judgments affirmed.

Notes:

[1] Prosecutor: "And it's my job to prove to you beyond a reasonable doubt that these crimes occurred. I've done that today. [The judge] will instruct you on reasonable doubt. But don't be afraid of reasonable doubt because juries in courtrooms all over this country every day find people guilty of crimes beyond a reasonable doubt. And it is a great burden, but the Commonwealth feels that we have met that burden today and, therefore, you should find this defendant guilty. Thank

you." (Tr. 2:95)

[2] Officer Askins: "Because like I said, at that point we knew who the dri[v]er was. We had no doubt who it was. We've dealt with the subject in the past before and we knew who it was." (Tr. 2:38).

[3] The Court: "Jurors, questions have been asked of this witness of his knowledge of who was in the car. There are many reasons that a police officer may know someone. You're not to draw any negative inferences from the fact that a police officer may say that he knows an individual. Please keep that in mind." (Tr. 2:38).

CERTIFICATION OF COMPLIANCE

I, Katherine C. Essington, counsel to the defendant, hereby certify that, pursuant to Mass. R.A.P. 16 (k), the defendant's brief complies with the rules of court that pertain to the filing of briefs including, but not limited to Mass R.A.P. 16(a)(13), 16(e), 18, 20 and 21. I further certify that in compliance with Mass. R.A.P. 20(2)(A), this brief is done in Arial, proportionally spaced, 14 point font. It was completed in googledocs and contains 10,905 nonexcluded words by google's word count.

/s/ Katherine C. Essington
Katherine C. Essington

CERTIFICATE OF SERVICE

I, Katherine C. Essington, certify that on this 16th day of September 2019, I electronically served a copy of the foregoing, by sending a copy, via the Massachusetts E filing system to:

Janice DiLoreto Smith and
Donna Jalbert Patalano
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/s/ Katherine C. Essington
Katherine C. Essington