SJC-12677

COMMONWEALTH vs. ANDREW ROBERTSON.

Suffolk. January 10, 2022. - February 28, 2022.

Present: Budd, C.J., Lowy, Kafker, Wendlandt, & Georges, JJ.

Homicide. Firearms. Evidence, Joint venturer, Acts and declarations of conspirator, Photograph, Videotape, Opinion, Fingerprints, Relevancy and materiality. Joint Enterprise. Constitutional Law, Confrontation of witnesses. Practice, Criminal, Capital case, Confrontation of witnesses, Argument by prosecutor, Instructions to jury, Assistance of counsel.

Indictments found and returned in the Superior Court Department on April 11, 2014.

The cases were tried before Linda E. Giles, J.

David H. Mirsky for the defendant.
Darcy A. Jordan, Assistant District Attorney (Ian Polumbaum, Assistant District Attorney, also present) for the Commonwealth.

LOWY, J. After a mistrial due to a hung jury, the defendant, Andrew Robertson, was convicted at a second trial of murder in the first degree on theories of deliberate

premeditation and extreme atrocity or cruelty.[1] He appeals from his convictions, arguing that (1) there was insufficient evidence to convict him at the first and second trials, (2) the defendant's motion to sever should have been allowed, (3) various pieces of evidence were admitted erroneously, (4) the prosecutor improperly expressed his opinion in closing argument, (5) the judge's instruction on accessory after the fact was improper, (6) the defendant was denied the right to a fair trial when a codefendant attacked him as the verdicts were being read, and (7) we should reduce the verdict of murder in the first degree pursuant to G. L. c. 278, § 33E. We affirm.

Background. Viewing the evidence in the light most favorable to the Commonwealth, the jury could have found the following at both the first and second trials. See Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979).[2]

The victim, Romeo McCubbin, was shot multiple times and killed while sitting in his sport utility vehicle (SUV). Surveillance video footage caught the shooting on camera. In the footage, a small SUV parks parallel to a sidewalk. An individual wearing a scarf and white-soled shoes -- the defendant -- runs onscreen from the left with his arm extended,

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[1] The defendant also was convicted of possessing a firearm without a license.

[2] The evidence at both trials was largely the same.

stops facing the SUV's front driver's side window, and fires multiple shots into it. The vehicle then rolls forward, and the victim falls out of the front passenger's side door. The shooter jumps into the front passenger's side of a waiting SUV, which speeds away. A second person then runs up and shoots the prone victim multiple times; a third person then kicks the victim once.

A detective responding to the shooting followed an SUV being driven quickly away from the area of the scene of the shooting. The vehicle eventually turned into a driveway. Omar Bonner and Omar Denton got out of the SUV and were arrested after a chase. While in custody after his arrest, Denton said to Bonner that he "told Sophie to call SP" and "called SP" from "the wagon."[3] The defendant's nickname was "Spoilers," and he received a call from Denton around the time that Denton was arrested.

The defendant used his cell phone to communicate or attempt to communicate with Bonner immediately before and after the killing, and he received calls from Javaine Watson, who was a friend of the defendant, the night of the incident. In the month leading up to the shooting, the defendant engaged in hundreds of telephone contacts with Watson, Denton, and Bonner.

[3] It is unclear from the record who "Sophie" is.

The defendant asked his girlfriend to cancel his cell phone number the day after the shooting.

Police recovered from the property where they had chased Denton and Bonner a gun that had fired ballistics found at the scene of the shooting, including the bullets found in the victim's jacket and in the victim's head. Police also investigated a red SUV blocking a driveway down the street from where the chase had occurred. The SUV was still on, in reverse, and resting against a fence. They took custody of this vehicle, as well as the one Denton and Bonner had been driving.

Watson's cell phone was in the red SUV. He had borrowed the vehicle from his girlfriend that day and had told her it was parked in front of a driveway. His girlfriend had rented the vehicle the day before Watson borrowed it. Photographs introduced at trial revealed the SUV to be nearly identical to the first shooter's getaway vehicle, as shown in the videotape of the shooting. The defendant's fingerprints were on the SUV, including on the front passenger's door's handle. Bonner's, Denton's, and Watson's fingerprints also were on the vehicle.

The defendant was at a nightclub down the street from the shooting on the night of the incident, wearing a scarf and

white-soled shoes.[4] Denton, Bonner, and Watson also were at the club that night, as was the victim. A photograph from that night at the club shows the defendant, Denton, and Bonner standing near each other.

The jury could not reach a verdict regarding the charges against the defendant after a trial against the defendant, Denton, and Bonner.[5] Following a second trial, which was against the defendant, Denton, Bonner, and Watson, the jury found the defendant guilty of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty, as well as unlawfully possessing a firearm.

Discussion. 1. Sufficiency of the evidence. The defendant argues that there was insufficient evidence to convict

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[4] The evidence of the defendant's clothing in the club was clearer in the first trial than in the second trial, but sufficient in both to demonstrate what the defendant was wearing. At the first trial, a witness identified an individual wearing a scarf and white-soled shoes in two photographs from the club, and an individual whose clothing was not as visible in a third photograph from the club, as the defendant. At the second trial, that witness identified the defendant only in the third photograph, where his scarf and shoes were not visible. The other two photographs were introduced in evidence, however, and the jury could infer that the individual in the third photograph was the same individual as in the first two photographs based on the clothing visible in all the images.

[5] At this first trial, the jury found Omar Bonner guilty of unlawfully possessing a firearm and resisting arrest; they also found Omar Denton guilty of unlawfully possessing a firearm. Javaine Watson was severed from the first trial due to his attorney's illness.

him at both his first and second trials because the Commonwealth failed to prove at both trials that he was the first shooter. See Berry v. Commonwealth, 393 Mass. 793, 798 (1985) (pursuant to double jeopardy principles, Commonwealth may not retry defendant after hung jury if there was insufficient evidence to convict). We disagree.

As a preliminary matter, the Commonwealth argues that the defendant has waived his right to contest the sufficiency of the evidence at his first trial because, before his second trial, he did not appeal from the denial of his motion to dismiss on double jeopardy grounds. This is incorrect. "[T]he defendant's contention that the evidence at his first trial was insufficient to warrant a conviction can . . . be raised at least as well in the appeal following his second trial as it could have been raised under G. L. c. 211, § 3." Commonwealth v. Preston, 396 Mass. 1006, 1006 (1985).

Nevertheless, the defendant's sufficiency argument fails. Considering all the evidence in the light most favorable to the Commonwealth, the evidence at both trials was sufficient to show beyond a reasonable doubt that the defendant was the first shooter. See Latimore, 378 Mass. at 677-678.

The evidence, along with reasonable inferences therefrom, showed that the defendant was associated with Denton and Bonner, at least one of whom was in possession of one of the guns used

to shoot the victim, and Watson, whose cell phone was in the getaway vehicle. The defendant communicated with Watson, Denton, and Bonner hundreds of times in the month leading up to the shooting, including immediately before and after the incident. See Commonwealth v. Barbosa, 477 Mass. 658, 667 (2017) (defendant's "telephone calls with his suspected coventurers immediately before the shooting and in the thirty minutes after . . . allow the reasonable inference of the defendant's participation in and shared intent to commit the murder"). The defendant, Denton, Bonner, Watson, and the victim were at a club near the shooting on the night of the murder. The defendant was wearing a scarf and white-soled shoes that night, as was the first shooter. His fingerprints were on the door handle of the getaway vehicle, which had been rented the day before. See Commonwealth v. Netto, 438 Mass. 686, 701-702 (2003) (fingerprint evidence may suggest defendant's guilt when coupled with other evidence). Finally, the defendant asked his girlfriend to cancel his cell phone number the day after the shooting, demonstrating consciousness of guilt. See Commonwealth v. Porter, 384 Mass. 647, 653 (1981) (consciousness of guilt, coupled with other evidence, may suggest defendant's guilt). This evidence was more than sufficient for a rational jury to identify the defendant as the first shooter beyond a reasonable doubt.

2. Evidentiary issues. a. Hearsay. The defendant argues that Denton's statements that he "told Sophie to call SP" and "called SP" from "the wagon" should not have been admitted against the defendant, whose nickname was "Spoilers," as they were inadmissible hearsay. The Commonwealth argues that the statements were admissible against the defendant under the joint venture exemption to the rule against hearsay. See Mass. G. Evid. § 801(d)(2)(E) (2021). We conclude that the judge did not abuse her discretion in admitting the statement.

An out-of-court statement presented for its truth is exempted from the rule against hearsay if it "is offered against an opposing party and . . . was made by the party's coconspirator or joint venturer during the cooperative effort and in furtherance of its goal, if the existence of the conspiracy or joint venture is shown by evidence independent of the statement." Mass. G. Evid. § 801(d)(2)(E). "To admit the statement of a joint venturer, the judge must make a preliminary determination, based on a preponderance of the evidence, other than the out-of-court statement itself," that the statement was made during, and in furtherance of, a joint venture between the declarant and the defendant. Commonwealth v. Rakes, 478 Mass. 22, 37 (2017). See Mass. G. Evid. § 104(a). "This determination permits the statement to be placed in front of the jury . . . but does not suffice for the jury to consider it as bearing on

the defendant's guilt." Rakes, supra. "The jury must first make their own independent determination, again based on a preponderance of the evidence other than the statement itself, that a joint venture existed and that the statement was made [during and] in furtherance thereof." Id.[6] "We review the judge's decision to place a joint venturer's statement before the jury for abuse of discretion." Id.

Here, as discussed supra, there was sufficient evidence for a rational jury to conclude beyond a reasonable doubt that the defendant, Denton, Bonner, and Watson were coconspirators in the victim's murder. Accordingly, there was sufficient evidence for the judge and jury to so conclude by the lesser preponderance of the evidence standard. There also was sufficient evidence for the judge and jury to conclude by a preponderance of the evidence that Denton's statements were made in furtherance of the conspiracy. Denton's use of the initials "SP" suggests his intent to hide the defendant's identity from the police, and his comments to Bonner suggest that Denton was trying to conceal the crime by reaching out to a coventurer who was still at large and by expressing to Bonner a continued camaraderie. See Commonwealth v. Leach, 73 Mass. App. Ct. 758, 764 (2009), quoting Commonwealth v. Anderson, 445 Mass. 195, 211 (2005)

[6] The judge here gave a proper joint venture instruction when submitting the issue to the jury.

("Although the statements were made while the defendants were in custody, the conversations occurred shortly after the shooting, and clearly, the defendants were sharing information and 'acting to conceal the crime that formed the basis of the enterprise'").

Additionally, admitting Denton's out-of-court statements against the defendant did not offend the confrontation clauses of the United States and Massachusetts Constitutions. "Where an individual does not appear at trial, that individual's 'testimonial' out-of-court statements are not admissible against a criminal defendant absent unavailability and a prior opportunity for cross-examination." Commonwealth v. Wardsworth, 482 Mass. 454, 463-464 (2019), citing Crawford v. Washington, 541 U.S. 36, 68 (2004). "Testimonial statements are those made with the primary purpose of 'creating an out-of-court substitute for trial testimony.'" Wardsworth, supra at 464, quoting Michigan v. Bryant, 562 U.S. 344, 358 (2011). "The test is an objective one; we examine 'the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances.'" Wardsworth, supra, quoting Commonwealth v. Imbert, 479 Mass. 575, 580 (2018). In general, "statements of joint venturers . . . are the type of remarks that the [United States Supreme Court has] deemed nontestimonial." Commonwealth v. Burton, 450 Mass. 55, 64 (2007), citing Crawford, supra at 56.

Although Denton made his statements to Bonner in the presence of a police officer, who testified to the statements at trial, a reasonable person would not have thought that Denton was making a formal statement that constituted an out-of-court substitute for trial testimony. The officer was sitting between the cells where Bonner and Denton were being held, and Bonner and Denton were shouting back and forth to each other without any questioning by the officer. In addition to the comments about "SP," Denton also told Bonner that "when [he] was in [his] driveway, [he] seen police, [he] started running." Denton was debriefing with his coconspirator in coded language about what had occurred, not trying to create a record of events for the observing officer's benefit. See United States v. Norwood, 982 F.3d 1032, 1049 (7th Cir. 2020) ("an officer's mere presence" is not dispositive of confrontation clause inquiry as is "an officer's questioning"). Therefore, the judge did not abuse her discretion in admitting Denton's statements.[7]

[7] This conclusion disposes of the defendant's argument that the judge should have severed his case from those of the other defendants because Denton's statements referring to "SP" amounted to an incriminating confession pursuant to Bruton v. United States, 391 U.S. 123, 126 (1968). See Commonwealth v. DePina, 476 Mass. 614, 629 n.13 (2017) (evidence "properly admitted under the joint venture exception to the hearsay rule" "does not implicate the Bruton rule"). The defendant also argues that the judge should have severed his case because his and Watson's defenses were mutually antagonistic, as Watson's counsel informed the jury of the defendant's incarceration and

b. Reenactment evidence. The defendant contends that the judge erred in admitting still photographs from a reenactment video recording the police created. He does not, however, acknowledge that the photographs were admitted for a limited purpose or address that the Commonwealth referred to the photographs in closing argument for a purpose other than the limited one. We conclude that regardless of whether the judge erred in admitting the photographs for a limited purpose, the Commonwealth erred in referring to the photographs substantively in closing. That error, however, did not create a substantial likelihood of a miscarriage of justice.

"A videotaped demonstration may be admitted in evidence provided it sufficiently resembles the actual event so as to be fair and informative" (citation omitted). Commonwealth v. Javier, 481 Mass. 268, 287 (2019). In making this determination, a judge should consider whether the reenactment is relevant, whether its "conditions correspond to those of the original incident," and whether it "will confuse or mislead the

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suggested to the jury that a witness had lied to protect the defendant. We already decided in our review of Watson's convictions that his and the defendant's defenses were not so antagonistic as to require separate trials. Commonwealth v. Watson, 487 Mass. 156, 167-169 (2021). As we stated in that case, "[t]here was not 'a danger that the jury [would] feel compelled to choose between defendants rather than to assess the proof against each defendant separately.'" Id. at 169, quoting Commonwealth v. Moran, 387 Mass. 644, 659 (1982).

jury." Id., quoting Commonwealth v. Chukwuezi, 475 Mass. 597, 603 (2016). We review decisions to admit reenactment evidence for abuse of discretion. Javier, supra at 288.

Here, four days after the shooting, the police drove by the scene of the incident in the SUVs they had recovered the night of the shooting, that is, the SUV Denton and Bonner had been driving and the red SUV found near the scene of the chase; they then retrieved the recording of this reenactment from the video camera that had recorded the shooting itself. The judge did not allow the Commonwealth to play the reenactment video recording, concluding that the reenactment was not "sufficiently similar" to the conditions of the shooting "to make the simulation of any value to the jury." She was concerned that the reenactment occurred four days after the shooting, that there was snow on the ground during the reenactment but not during the shooting, that the recordings occurred at different times of day, that the vehicles in the reenactment were driven past the camera in a different manner from that of the vehicles in the video footage of the shooting, and that the reenactment video recording was "much brighter" than the shooting video footage. The judge, accordingly, told the Commonwealth that it could reference the reenactment, without playing the video recording, only as evidence of an adequate police investigation. See Commonwealth v. Bowden, 379 Mass. 472, 486 (1980).

The Commonwealth then sought to introduce still photographs from the reenactment video recording. The judge observed that some of her concerns applied to both the video recording and the still photographs, but not her trepidation about how the vehicles were driven by the camera in the video recording. She deferred ruling on the issue. Later in the trial, she decided that the Commonwealth could use the still photographs and observed that any differences between the conditions during the reenactment and during the shooting went to the weight that the jury would give to the photographs, not to the photographs' admissibility. She did not state that the Commonwealth's use of the reenactment photographs would be limited to the adequacy of the police's investigative process.

When the photographs were introduced at trial, however, the judge instructed the jury that the still photographs were to be used "for the limited purpose [of] show[ing] . . . the steps that the police took in their investigation, and for that purpose only." Although the judge did not say so expressly, she apparently had changed her mind regarding the purpose for which the jury could use the photographs. See Commonwealth v. Spencer, 465 Mass. 32, 40 n.11 (2013), quoting Luce v. United States, 469 U.S. 38, 41-42 (1984) ("even if nothing unexpected happens at trial, the judge is free, in the exercise of sound

judicial discretion, to alter a previous in limine ruling" [alteration omitted]). No party addressed this change at trial.

Whether the judge abused her discretion in restricting how the jury could use the photographs is immaterial. Her ruling was that the evidence was admitted for a limited purpose, and that is the only purpose for which the jury could consider the evidence.

Contrary to the judge's limiting instruction, and relying perhaps on the judge's earlier decision to admit the photographs without limitation, the prosecutor argued in closing that the still photographs from the reenactment video recording showed the same vehicles as the still photographs from the shooting video footage. This was error. See Commonwealth v. Bregoli, 431 Mass. 265, 278 (2000), citing Commonwealth v. Johnson, 412 Mass. 318, 321-324 (1992) ("prosecutor may not present to jury evidence admitted for limited purpose as if it were substantive evidence"). Because there was no objection, we review for a substantial likelihood of a miscarriage of justice and conclude that there was none. See Commonwealth v. Moffat, 486 Mass. 193, 201 (2020).

The argument was a small part of the prosecutor's closing, and the jury were instructed that closing arguments are not evidence. See id. at 202-203. We presume, moreover, that the jury followed the earlier instruction to consider the evidence

for a limited purpose. See id. at 203. The prosecutor's improper argument also was cumulative, as there was other evidence that the red SUV the police recovered was the getaway vehicle: a witness testified at the second trial that he saw a red SUV with the same make as the recovered SUV leaving the street where the shooting occurred after gunshots were fired. See Commonwealth v. Hobbs, 482 Mass. 538, 555 n.16 (2019). Accordingly, the error does not require a new trial.

c. Enhanced photographs. The defendant challenges the admission at trial of certain enhanced photographs and related lay witness testimony. We conclude that the photographs were admitted properly and that any error in the testimony about the photographs was not prejudicial.

Whether the enhanced photographs properly were admitted is an issue of authentication and the balancing of probative value and prejudicial effect. See Mass. G. Evid. § 901(a) ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is"). See also Mass. G. Evid. § 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of," among other things, "unfair prejudice" or "misleading the jury"). Although we do not appear to have so stated previously, where, as here, a party seeks to

introduce an enhanced image, "there must be testimony by a person with some degree of computer expertise, who has sufficient knowledge to be examined and cross-examined about the functioning of the computer" (quotation and citation omitted). State v. Swinton, 268 Conn. 781, 813 (2004). The judge has "broad discretion" in deciding whether to admit an enhanced photograph. Renzi v. Paredes, 452 Mass. 38, 51-52 (2008).

Here, the Commonwealth introduced enhanced versions of photographs, purportedly of the defendant, taken the night of the shooting at the club near where the shooting occurred. A witness explained that he enlarged each photograph and used computer software to lighten and sharpen shadowed areas. He testified that these modifications did not alter the photograph's pixels other than to change their colors.

Through cross-examination, defense counsel brought out the differences between the enhanced photographs and the original photographs taken at the club, including with regard to the defendant's skin color, and introduced in evidence a comparison of the original and enhanced photographs. He also suggested that the enhancements resulted from subconscious bias because the witness attempted to match the club photographs to a known image of the defendant when performing the enhancements.

The judge did not abuse her discretion in admitting the enhanced photographs. The original photographs had been

authenticated earlier in the trial by the individual who took them, and the direct and cross-examination of the individual who enhanced the photographs revealed that the images were not so altered as to make them unduly prejudicial or misleading. Moreover, the witness who enhanced the photographs was sufficiently familiar with the enhancement program to answer intelligently the prosecutor's and defense attorney's questions about how the program functioned. See Swinton, 268 Conn. at 813.

The defendant also argues that the witness who enhanced the images asserted his opinion improperly about similarities between an individual in the enhanced photographs and a known photograph of the defendant. A witness may identify a defendant in a photograph only "if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." Commonwealth v. Vacher, 469 Mass. 425, 441 (2014). Because the individual who enhanced the photographs was in no better position than the jury to identify the defendant, the prosecutor was careful to avoid asking the witness to opine about what was in the photographs. Despite these efforts, on one occasion the witness testified in a manner that arguably came too close to the line of improper lay opinion. The following exchange occurred during direct

examination concerning a photograph purportedly of the defendant in the club and a known photograph of the defendant.

> The prosecutor: "And is it true now, we can't get into whatever your opinions might be, that's ultimately for the jury, but were you looking to juxtapose certain points of comparison in this picture?"
>
> The witness: "I was looking for similar features in each picture."
>
> The prosecutor: "Okay, and again, without getting into any opinion about whether they're the same or not, were you trying to focus on a certain location on the body of each person, the known person on the right and the person in the club?"
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> The witness: "I was."
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> The prosecutor: "And what was that?"
>
> The witness: "I was looking at that particular arm, the left arm, the left-hand area, and the tattoo that's located by the wrist."

The witness's use of the phrase "similar features" might have suggested to the jury that the witness believed the individuals in the two photographs were comparable, especially regarding the left arm, left hand, and wrist tattoo. This exchange, therefore, demonstrates the danger of lay testimony about photographic or video evidence that a party wants the jury to compare. However, we need not decide whether the testimony was erroneous because, even if it was, it does not require reversal.

We review for prejudicial error because a codefendant objected at trial to the relevant testimony. See Commonwealth v. Cruz, 445 Mass. 589, 591 (2005). See also Commonwealth v.

Huan Lieu, 50 Mass. App. Ct. 162, 165 n.3 (2000), quoting Commonwealth v. Seminara, 20 Mass. App. Ct. 789, 795 n.4 (1985) (codefendant's objection preserves error on appeal if issue was "fairly presented to the trial judge in time for him to take what action he saw as necessary"). There was no prejudice, as the judge instructed the jury during the relevant testimony that they were to decide for themselves what the photographs showed. This instruction "correct[ed] any error" and "remed[ied] any prejudice" (citation omitted). Commonwealth v. Durand, 475 Mass. 657, 668 (2016), cert. denied, 138 S. Ct. 259 (2017).[8] Additionally, the prosecutor cautioned the witness repeatedly not to express an opinion about similarities between the photographs, the witness potentially expressed an impermissible opinion only briefly, and the jury could have concluded independently that the defendant was the individual in the photographs of the club. See Vacher, 469 Mass. at 442 (reversal not required where "[t]he [impermissible opinion] testimony, brief and fleeting as it was, did not overwhelm the other compelling, properly admitted evidence against the defendant,"

[8] The judge instructed as follows: "[I]t's for you and only you to determine what any exhibit purports to show. This witness is just indicating what points of comparison he used in enhancing these photographs. Again, though, ultimately, it is for you and only you, members of the jury, to determine what is depicted in any exhibit, including, but not limited to these photographs."

and jury "were capable of drawing the same conclusion" as lay witness).

d. Fingerprint evidence. The defendant argues that the Commonwealth's fingerprint expert improperly asserted her conclusions in absolute terms rather than as opinions. Our case law regarding how a fingerprint expert should present his or her testimony is less than clear, and we take this opportunity to clarify it. This clarification will affect only trials that occur after the date that the rescript in this opinion is issued.

We recognized the potential limitations of fingerprint testimony in Commonwealth v. Gambora, 457 Mass. 715, 724 (2010), where we addressed the defendant's argument that such testimony was unreliable in light of a 2009 report published by the National Research Council for the National Academy of Sciences. Based on that report, we cautioned that "[t]estimony to the effect that a latent print matches, or is 'individualized' to, a known print, if it is to be offered, should be presented as an opinion, not a fact, and opinions expressing absolute certainty about, or the infallibility of, an 'individualization' of a print should be avoided." Id. at 729 n.22.

This directive means that an expert testifying to a fingerprint match must state expressly that the match constitutes the expert's opinion based on the expert's

education, training, and experience. It is not enough, as at least one of our opinions has suggested, for the expert to avoid testifying that the match is one hundred percent certain. See Commonwealth v. Drayton, 473 Mass. 23, 30 (2015), S.C., 479 Mass. 479 (2018). If an expert witness does not clarify that his or her fingerprint testimony is an opinion, then the prosecutor must elicit this clarification even if the defendant does not object. For instance, the prosecutor may clarify that a subjective opinion is being sought and then ask whether the witness has an opinion "to a reasonable degree of fingerprint analysis certainty." Cf. Commonwealth v. Pytou Heang, 458 Mass. 827, 848 (2011) ("The admission of an opinion to a 'reasonable degree of ballistic certainty' is similar to the manner in which our appellate courts permit other empirically based but subjective opinions to be presented . . ."). The prosecutor should not wait for the defendant to address the issue on cross-examination.[9]

Here, we do not decide whether the expert's testimony was erroneous, because any error does not require reversal. The defendant asserts, incorrectly, that this issue was preserved

[9] Here, in the first trial there was vigorous cross-examination of the fingerprint expert about the reliability of fingerprint analysis. The cross-examination of the fingerprint expert at the second trial was more limited and did not address reliability.

through a pretrial motion in limine to preclude all fingerprint evidence as unreliable. The judge properly denied that motion, as we repeatedly have reaffirmed the reliability of fingerprint evidence. See, e.g., Commonwealth v. Wadlington, 467 Mass. 192, 205 (2014). However, because the motion did not give the judge an opportunity to rule on the propriety of how the fingerprint expert would testify, it did not preserve that issue. See Hobbs, 482 Mass. at 554-555; Abraham v. Woburn, 383 Mass. 724, 726 n.1 (1981) ("The purpose of requiring an objection is to afford the trial judge an opportunity to act promptly to remove from the jury's consideration evidence which has no place in the trial").

Because there was no objection to the form of the fingerprint expert's testimony, through motion or otherwise, we review for a substantial likelihood of a miscarriage of justice and conclude that there was none. Defense counsel made the reasonable decision to concede in closing argument that the defendant's fingerprints were on the SUV, and to focus instead on arguing that the Commonwealth had not proved when the fingerprints were placed. Thus, the error affected only undisputed evidence.

e. Police radio transmissions. The Commonwealth moved to admit portions of a turret tape, which is a recording of police radio transmissions, from the time of the shooting. The

defendants opposed the motion by arguing, among other things, that the recording included false information harmful to the defendants. The judge observed that the defendants could highlight any discrepancies on cross-examination and allowed the Commonwealth's motion. The defendant argues on appeal that the turret tape should have been excluded as irrelevant because it included information that was untrue.[10]

The false information on the tape was relayed by the detective who followed the SUV driven by Bonner and Denton. On direct examination at a pretrial suppression hearing and at trial, the detective testified that although he said over the radio that he was following a vehicle leaving the "scene" of the shooting, he did not see the vehicle leave the scene and, therefore, should have said over the radio that he was following a vehicle leaving the "area" of the shooting. Because it was undisputed that the detective did not see the vehicle leave the scene of the shooting, any error did not prejudice the defendant.

3. Opinion in closing argument. The defendant argues that the prosecutor improperly asserted his opinion, and argued facts not in evidence, when he stated in closing that the first shooter's scarf and white-soled sneakers suggested that the

[10] The defendant does not argue on appeal that the turret tape was inadmissible hearsay.

defendant was the first shooter. "[P]rosecutors are entitled to marshal the evidence and suggest inferences that the jury may draw from it." Commonwealth v. Drayton, 386 Mass. 39, 52 (1982), S.C., 450 Mass. 1028 (2008). That is what the prosecutor did here when he pointed to various, in his words, "reasonable inferences" connecting the defendant and the first shooter, including that they both were wearing a scarf and white-soled sneakers on the night of the shooting. This argument was based on the video footage of the shooting and the photographs of the defendant at the club on the night of the murder, all of which were in evidence. There was, accordingly, no error.

Because there was nothing improper in the Commonwealth's closing argument, defense counsel was not, as the defendant contends, ineffective for failing to object to it. See Commonwealth v. Dykens, 438 Mass. 827, 837 (2003).

4. Jury instruction on accessory after the fact. The defendant asserts that the jury instruction about accessory after the fact, which applied to Watson, improperly referred to the defendant as the only individual whom Watson could have assisted. According to the defendant, this purported error lessened the Commonwealth's burden of proof regarding the defendant's guilt. The argument fails, however, because Watson was indicted for being an accessory after the fact to the

defendant's crime in particular.[11] See Commonwealth v. Iacoviello, 90 Mass. App. Ct. 231, 247-249 (2016) (relevant principal for accessory after fact analysis is individual named in indictment). The judge also minimized any prejudicial effect when she clarified in her instructions to the jury that "[t]he Commonwealth has the burden of proving, beyond a reasonable doubt, the guilt of each defendant separately and independently. . . . Each defendant is entitled to have his case determine[d] solely from the evidence about his own acts and statements, if any."

The defendant also asserts that his counsel was ineffective for failing to object to the instruction. Because there was no error in the instruction, defense counsel was not ineffective for failing to object. See Dykens, 438 Mass. at 837.

5. Physical attack. The defendant argues that he was unable to "establish [the jury's] unanimity" because Watson attacked him as the verdicts were being announced. Immediately after the foreperson announced the jury's verdict on the final charge, Watson, in the judge's words, "lunged" at the defendant "and created incredible pandemonium." The clerk then polled the

[11] Although Watson's indictment is not in the record before us, we may take judicial notice of the indictment because Watson filed it as part of his appeal in this court. See Watson, 487 Mass. 156. See also Jarosz v. Palmer, 436 Mass. 526, 530 (2002) ("a judge may take judicial notice of the court's records in a related action").

jurors, and each juror affirmed the verdicts. There is nothing to indicate that the jury were not unanimous.

6. Review under G. L. c. 278, § 33E. Having reviewed the entire record, we decline to reduce the verdict of murder in the first degree to a lesser degree of guilt or order a new trial.

Judgments affirmed.