PETITION APPENDIX

Commonwealth v. DaCosta, 96 Mass App Ct 105, 132 N.E.3d 1067 (2019)

Commonwealth v. Rodrigues, 483 Mass 1107 (2010)

Commonwealth v. DaCosta

Appeals Court of Massachusetts

April 1, 2019, Argued; September 19, 2019, Decided

Nos. 17-P-201 & 17-P-234.

Reporter
96 Mass. App. Ct. 105 *; 132 N.E.3d 1067 **; 2019 Mass. App. LEXIS 121 ***; 2019 WL 4509098

COMMONWEALTH *vs.* **HAILTON DACOSTA** (and a companion case[1]).

Subsequent History: Appeal denied by *Commonwealth v. Dacosta, 483 Mass. 1105, 2019 Mass. LEXIS 688 (Mass., Nov. 14, 2019)*

Prior History: **[***1]** Bristol. INDICTMENTS found and returned in the Superior Court Depart- **[*106]** ment on February 27, 2014, and April 11, 2014.

The cases were tried before *Renee P. Dupuis*, J.

Commonwealth v. Dacosta, 91 Mass. App. Ct. 1123, 2017 Mass. App. Unpub. LEXIS 528, 86 N.E.3d 248 (May 22, 2017)

Disposition: Judgments affirmed.

Counsel: *Jennifer H. O'Brien* for Hailton DaCosta.

Stephen C. Nadeau, Assistant District Attorney, for the Commonwealth.

John M. Thompson (*Linda J. Thompson* also present) for Antonio Rodrigues.

Judges: Present: KINDER, SINGH, & MCDONOUGH, JJ.

Opinion by: KINDER

Opinion

[1072]** **KINDER**, J. On November 23, 2013, defendants Hailton DaCosta and Antonio Rodrigues, together with Samir Baptista and Elito Mendes, executed a plan to rob drug dealer

[1] Commonwealth *vs.* Antonio Rodrigues.

Sharone Stafford in New Bedford. Stafford was fatally shot by DaCosta during the botched robbery. The defendants were indicted for murder, G. L. c. 265, § 1; armed assault with intent to rob, G. L. c. 265, § 18 (b); and unlawfully possessing a firearm, G. L. c. 269, § 10 (a). Baptista and Mendes agreed to cooperate with the Commonwealth, pleaded guilty to various offenses, and testified against the defendants at a joint trial. A Superior Court jury found the defendants guilty of unlawful **[***2]** possession of a firearm and felony-murder in the second degree.[2],[3]

The defendants' principal claim of error on appeal is that the judge failed to conduct individual voir dire of the jurors to determine the extent and effect of the jury's exposure to excluded evidence during deliberations, as required by Commonwealth v. Jackson, 376 Mass. 790, 383 N.E.2d 835 (1978), and its progeny. The judge further erred, they claim, in failing to declare a mistrial on that basis. The defendants raise several other claims, including the sufficiency of the evidence, the propriety of the prosecutor's closing argument, and the failure to instruct on felony-murder and merger. We affirm.

Background. 1. *The murder*. We summarize the evidence in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 677-678, 393 N.E.2d 370 (1979), reserving some facts for our discussion of the issues. In 2013, Baptista regularly used "crack" cocaine purchased on many occasions from the defendants, Mendes, and the victim. In the week before the murder, Rodrigues told Baptista that he (Rodrigues) planned to rob other drug dealers to "get the[m] off the streets." On November 23, **[*107]** 2013, Baptista bought cocaine from Rodrigues in the parking lot of the Portuguese Sports Club (club) in New Bedford. At the time, Rodrigues was in **[***3]** Mendes's black Nissan Sentra with Mendes and DaCosta; DaCosta asked Baptista to telephone drug dealers to help him (DaCosta) with his plan to rob them. Baptista agreed to help later that evening, as the defendants and Mendes continued discussing their scheme to rob drug dealers. Baptista called various dealers and eventually arranged to meet the victim on Winsor Street to purchase cocaine. Rodrigues gave Baptista money so as not to arouse the victim's suspicion.

The defendants, Mendes, and Baptista left the club in the Nissan. Before departing, Mendes and DaCosta retrieved DaCosta's handgun from the Nissan's trunk. They dropped Baptista off near Winsor Street to avoid being seen by the victim.

Baptista walked to Winsor Street, located the victim, and entered his car. As they talked, the Nissan drove by. The victim became suspicious and ordered Baptista out of his car. As Baptista left the victim's car, Mendes parked the Nissan and the defendants got out. DaCosta approached the victim's car and opened the driver's door. After DaCosta and the victim "had words," the victim closed the door and DaCosta shot him twice through the car window. DaCosta

[2] The predicate felony for felony-murder in the second degree was armed assault with intent to rob.

[3] We note that felony-murder in the second degree has been abolished as a separate theory. See Model Jury Instructions on Homicide (2018).

ran to Mendes's car, he **[**1073]** and Rodrigues got in, **[***4]** and Mendes drove away. Meanwhile, Baptista approached the victim, who lay dead on the street. He searched the victim's car for drugs or money but found none. Baptista took a cell phone and left the area.

After the shooting, the defendants and Mendes returned to the club, where Mendes moved the gun from under the passenger seat of the Nissan to DaCosta's mother's car. Inside the club, Rodrigues and Mendes asked DaCosta why he had shot the victim. DaCosta explained that the victim had been trying to take the gun from him. He then physically demonstrated how he shot the victim by raising his right hand parallel to the ground. Meanwhile, Baptista went to a bar after the shooting, then returned to the club to look for Rodrigues. By the time Baptista returned to the club, the defendants and Mendes had left.

Baptista left the club and met the defendants and Mendes on Division Street, where he told them that the victim was dead. DaCosta threatened to kill Baptista and his family if he went to the police. Rodrigues intervened and assured DaCosta that Baptista would remain silent. When Baptista showed them the victim's cell phone, DaCosta took it and smashed it on the ground. **[*108]** Baptista gave Rodrigues **[***5]** his money back. Baptista then went to a Hess gasoline station, where, he told the attendant that he had just shot someone with a shotgun. After smoking crack cocaine, Baptista returned to the crime scene, where police officers observed him pacing and saying, "I can't believe this happened." Baptista was taken to the police station, where he agreed to cooperate.

Although the murder weapon was never found, two spent projectiles and two shell casings were recovered from the victim's body and the crime scene. A ballistics examination revealed that the projectiles were .38 caliber class ammunition. Pursuant to a plea and cooperation agreement, Baptista agreed to testify truthfully in exchange for a joint recommendation of a prison sentence of from nine to ten years on an indictment charging assault with intent to rob. Similarly, Mendes agreed to cooperate in exchange for a prison sentence of from seven to fifteen years on a "reduced charge."[4] Baptista's and Mendes's plea agreements were introduced in evidence at trial, and the judge instructed the jury before they testified that, bearing in mind the potential "future benefits" conferred by the plea agreements, the jury were to examine their testimony "with caution **[***6]** and great care."

Neither defendant testified. The defendants' theory of defense was that Baptista and Mendes were responsible for the victim's death, and that their testimony should not be believed.

2. *Exposure to excluded evidence.* A surveillance video recording from the club was played during Baptista's testimony and introduced in evidence. The audio portion of the recording revealed that Baptista asked the bartender to use her telephone before stating that "[s]omebody got shot down

[4] The record does not specify the charges to which Mendes pleaded guilty.

the street." In response to a question from the bartender, Baptista denied that he was the shooter. The judge excluded the audio portion of the recording on hearsay grounds, but expressed a willingness to revisit the issue if Baptista's earlier statement to the Hess employee (that he shot someone with a shotgun) was raised on cross-examination. The video portion of the recording was then played for the jury without the audio. Although Baptista was cross-examined about his statements to the Hess employee, the **[**1074]** Commonwealth did not seek to introduce the audio portion of the recording.

On the second day of deliberations, the judge received a note from the jury, which stated, "Exhibit 36 Portuguese Sports Club, **[*109]** in the **[***7]** courtroom only video was presented, we have just found it to have audio. Is there any issue with us listening to the video?" The judge confirmed that exhibit 36 included the audio portion that had been excluded. The defendants immediately moved for a mistrial, which the judge denied. Although counsel for DaCosta initially suggested individual voir dire to determine what each juror heard, he agreed with the judge's decision to first ask the foreperson "how much of the audio tape ... was listened to." Before the foreperson entered the court room, the judge found "that the error was inadvertent and was not intentionally done." The foreperson explained in an unsworn statement that the jury "just heard Baptista say someone shot someone outside. That's all we heard and we stopped it because we didn't hear that in here." In response to a question from the judge, the foreperson confirmed that the jury heard nothing before or after that statement.

The judge denied the defendants' renewed motion for a mistrial, noting that she would have admitted the entire recording "under the doctrine of rehabilitation" had the Commonwealth offered the audio portion after Baptista's cross-examination. Counsel **[***8]** for DaCosta then requested that the judge inquire of each juror individually whether they could abide by her instruction and strike the audio recording from their minds. Ultimately, he agreed that the judge could "ask them as a group."

When the jury reentered, the judge reminded them that the audio portion of the recording had not been admitted in evidence and explained that she "had the foreman come in so that we could explore exactly how much of that audio you listened to and it seemed to be a very brief section of the audio." She then instructed them "in very, very forceful terms that you are to strike whatever you heard, whatever portion of the audio that you heard from Exhibit 36 from your minds and you are not to consider it at all in your deliberations." When the judge inquired if any juror was unable to follow those instructions, no juror responded in the affirmative.

After a recess, the defendants renewed their request for a mistrial on the ground that the judge had not conducted an individual voir dire of the jurors. The defendants declined the judge's offer to conduct individual voir dire at that point, stating, "that's just calling more attention to it at this point." The **[***9]** renewed motion for a mistrial was denied.

Discussion. Both defendants challenge (1) the judge's failure to conduct individual voir dire of the jurors

regarding the audio **[*110]** recording; (2) the denial of the motion for a mistrial; (3) the sufficiency of the evidence supporting the firearm conviction, their knowledge that a coventurer was armed, and the maximum penalty for armed assault with intent to rob; and (4) the propriety of the prosecutor's closing argument.[5] Rodrigues also claims that certain of Baptista's testimony should not have been admitted. DaCosta alone claims that the armed assault with intent to rob merged with the murder such that his conviction violated his constitutional right **[**1075]** to be free from double jeopardy. DaCosta also raises several arguments pursuant to *Commonwealth v. Moffett, 383 Mass. 201, 208-209, 418 N.E.2d 585 (1981)*.[6] First, he argues that trial counsel was ineffective in not moving to sever the trials. Next, he claims that the judge should have given a manslaughter instruction. Finally, he claims that certain cell phone records should not have been admitted. We address each claim in turn.

1. *Extraneous influence*. "In [*Jackson, 376 Mass. at 800*], [the] court set forth procedures for courts to follow when a claim of extraneous influence on the jury **[***10]** is brought to the attention of a trial judge." *Commonwealth v. Tennison, 440 Mass. 553, 557, 800 N.E.2d 285 (2003)*. Where, as in this case, there is no question that the entire jury were exposed to extraneous material, the judge is required to conduct individual voir dire "to determine the extent of [each] juror's exposure to the material and its effects on the juror's ability to render an impartial verdict." *Jackson, supra at 800-801*. See *Commonwealth v. Blanchard, 476 Mass. 1026, 1027, 70 N.E.3d 471 (2017)*; *Commonwealth v. Mejia, 461 Mass. 384, 394-395, 961 N.E.2d 72 (2012)*; *Tennison, supra*; *Commonwealth v. Kamara, 422 Mass. 614, 616, 664 N.E.2d 825 (1996)*. The judge must then exercise her discretion to determine whether the jurors remain impartial and can disregard the extraneous information. *Commonwealth v. Womack, 457 Mass. 268, 281, 929 N.E.2d 943 (2010)*. Next, the judge must "determine whether juror exposure to extraneous information requires the declaration of a mistrial in order to protect the defendant's right to a fair and impartial trial, or whether a less drastic remedy is appropriate." *Blanchard, [*111] supra at 1028*. See *Womack, supra at 280-281*. "The judge has broad discretion to fashion an appropriate remedy, if one is necessary." *Blanchard, supra.*

It is undisputed that in this case, the judge did not conduct individual voir dire to determine precisely what each juror heard and whether it affected his or her impartiality. The Commonwealth concedes that this was error. Because the error implicates the defendants' right under the *Sixth Amendment to the United States Constitution* to trial by an unbiased **[***11]** jury, we must

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[5] DaCosta has joined the arguments contained in Rodrigues's brief "as applicable to him." See *Mass. R. A. P. 16 (j) (2)*, as appearing in 481 Mass. 1633 (2019) ("In cases involving more than one appellant ... any appellant or appellee may adopt by reference any part of the brief of another").

[6] Pursuant to *Moffett, 383 Mass. at 208*, "[i]f there is nothing to support a contention which the defendant, despite counsel's attempts to dissuade him, insists on pursuing, we think it preferable that counsel present the contention succinctly in the brief in a way that will do the least harm to the defendant's cause."

determine whether the error was harmless beyond a reasonable doubt. *Commonwealth v. Morales, 76 Mass. App. Ct. 663, 665, 925 N.E.2d 551 (2010)*. "[I]n determining whether a constitutional error was harmless, we ask 'whether the record establishes beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id. at 667*, quoting *Commonwealth v. Peixoto, 430 Mass. 654, 660, 722 N.E.2d 470 (2000)*. See *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*. For the reasons that follow, we are confident that the error did not contribute to the guilty verdict and did not require the declaration of a mistrial. See *Commonwealth v. Gallagher, 408 Mass. 510, 517, 562 N.E.2d 80 (1990)* ("Whether to declare a mistrial is within the trial judge's discretion").

First, Baptista's recorded statement that "[s]omebody got shot down the street" did not prejudice the defendants because that statement was cumulative of Baptista's trial testimony, "I spoke to the bartender and I told [her] somebody got **[**1076]** shot." Thus, that portion of the audio recording did not expose the jury to new information. See *Commonwealth v. Barbosa, 463 Mass. 116, 129-130, 972 N.E.2d 987 (2012)* (no prejudice from inadmissible evidence that is cumulative of other trial testimony). Moreover, the substance of the statement, that someone had been shot, was never a contested issue at trial. The defendants' suggestion that the jury may also have heard Baptista deny that he was the shooter is not supported by the record. **[***12]** [7] See *Commonwealth v. Colon, 482 Mass. 162, 167, 121 N.E.3d 1157 (2019)* ("defendant bears the burden of demonstrating an extraneous influence by a preponderance of the evidence"). Our review must "be focused on the jury in this case, not on [what] a hypothetical jury" may have heard. *Kamara, 422 Mass. at 616*. Simply put, the jury's brief exposure to Baptista's recorded statement that some- **[*112]** body had been shot "could not have tainted [their] verdict," *Gallagher, 408 Mass. at 518*, where the jury had already heard the substance of that statement, the accuracy of the statement was not contested, and the jury also heard eyewitness testimony from two cooperating coventurers.

Second, the judge gave a curative instruction incorporating all of the defendants' suggestions. She instructed the jury in "forceful terms" to strike from their minds "whatever portion of the audio" they heard. We presume the jury followed those instructions. See *Tennison, 440 Mass. at 558*. Finally, we note that although the judge did not adhere strictly to the *Jackson* protocol, she did, through collective questions, seek to determine how much the jury had heard and whether they could disregard it. These efforts were consistent with *Jackson* and *Blanchard*, insofar as they were directed to the scope of the jury's exposure to extraneous matter and its impact. No juror **[***13]** indicated they heard more than what the foreperson stated they heard, and no juror expressed an inability to disregard that information

[7] Although the defendants now fault the judge for relying on the foreperson's unsworn representations regarding how much of exhibit 36 was played during the jury's deliberations, neither objected at trial to the foreperson not being sworn.

and remain impartial. Having observed the jury over the course of the ten-day trial, the judge was in the best position to assess the credibility of those responses. See *Tennison, supra at 560*. Further, the defendants ultimately declined the judge's offer to conduct individual voir dire when they brought it to her attention a second time. In these circumstances, in the absence of any evidence that the extraneous matter prejudiced the defendants, the judge's denial of the motion for mistrial did not "fall[ ] outside the range of reasonable alternatives." *L.L. v. Commonwealth, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014)*.

2. *Sufficiency*. The defendants challenge the sufficiency of the evidence that they knew a coventurer was armed. They also claim there was insufficient evidence that the murder weapon was a firearm, that is, that it had a barrel length less than sixteen inches. Finally, the defendants contend that the Commonwealth failed to offer sufficient proof that the maximum penalty for armed assault with intent to rob, the predicate felony for the conviction of felony-murder in the second degree, was less than life imprisonment. **[***14]** We analyze these claims to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of [these crimes] beyond a reasonable doubt (emphasis in original)." *Latimore, 378 Mass. at 677*, **[**1077]** quoting *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*.

[*113] a. *Knowledge of a gun*. The defendants' convictions of felony-murder required proof that they participated in an armed assault with intent to rob and that the victim's death occurred in the commission or attempted commission of that crime. *Commonwealth v. Cooley, 477 Mass. 448, 451, 78 N.E.3d 77 (2017)*. "The elements of armed assault with intent to rob are that the defendant, armed with a dangerous weapon, assault[ed] a person with a specific or actual intent to rob the person assaulted." *Commonwealth v. Rivera, 445 Mass. 119, 130 n.15, 833 N.E.2d 1113 (2005)*. Where, as here, the defendants were prosecuted on a theory of joint venture, knowledge that one of the coventurers was armed with a dangerous weapon was an element that the Commonwealth was required to prove. See *Commonwealth v. Britt, 465 Mass. 87, 99, 987 N.E.2d 558 (2013)*; *Commonwealth v. Gorman, 84 Mass. App. Ct. 482, 489, 998 N.E.2d 344 (2013)*.

DaCosta's argument on this point requires little discussion. There was ample evidence from which a rational juror could infer that DaCosta had knowledge of the gun. Mendes testified that the gun used in the robbery belonged to DaCosta, that it was placed in Mendes's trunk at DaCosta's **[***15]** direction, that he and DaCosta retrieved it from the trunk before the robbery, and that DaCosta used it to shoot the victim.

The sufficiency of the evidence supporting Rodrigues's knowledge that DaCosta was armed presents a closer question. Bearing in mind that "[p]roof beyond a reasonable doubt may be established by evidence that is entirely circumstantial, and the inferences a jury may draw from the evidence need only be reasonable and possible, not

necessary or inescapable," *Commonwealth v. Quinones, 78 Mass. App. Ct. 215, 219, 936 N.E.2d 436 (2010)*, we conclude that the evidence was sufficient.

The Commonwealth's evidence established that both defendants discussed a plan to rob drug dealers during the week and evening preceding the murder and that they carefully planned the robbery to avoid alerting the victim. The jury could infer that this plan involved finding "a means ... to persuade the intended victim to part with his money." *Commonwealth v. Tracy, 27 Mass. App. Ct. 455, 457, 539 N.E.2d 1043 (1989)*. See *id. at 458* (jury could infer defendant's knowledge that codefendant was armed from fact that they "had spent the afternoon together prior to the robbery, a time when they had an opportunity to plan the undertaking"). That DaCosta called for a gun to be delivered, and that he and Mendes retrieved the gun from the trunk of the **[***16]** Nissan before the group left for Winsor Street, demonstrate that the coventurers **[*114]** anticipated resistance from the victim and recognized "the need for some means by which to overcome that resistance." *Commonwealth v. Netto, 438 Mass. 686, 703, 783 N.E.2d 439 (2003)*. We have repeatedly held that "[a] reasonable juror could conclude that a plan to rob a drug dealer would include a gun where the victim's resistance was reasonably anticipated." *Cooley, 477 Mass. at 452*. See *Commonwealth v. Cannon, 449 Mass. 462, 470, 869 N.E.2d 594 (2007)*; *Gorman, 84 Mass. App. Ct. at 488*; *Quinones, 78 Mass. App. Ct. at 219*.

"[T]he jury were [further] warranted in inferring that [Rodrigues] acted in concert with his companions" to use a gun in the course of robbing the victim based on evidence that he (1) took an active role in planning the robbery and **[**1078]** gave Baptista money to show the victim, (2) rode in the Nissan to Winsor Street with DaCosta, who had just retrieved a gun from the trunk, (3) got out of the Nissan at the murder scene with DaCosta, (4) reentered the Nissan immediately after DaCosta fired the fatal shots, (5) remained with DaCosta for the rest of the evening, and (6) intervened to assure DaCosta that Baptista would remain silent. *Commonwealth v. Brooks, 422 Mass. 574, 577, 664 N.E.2d 801 (1996)*. See *Cannon, 449 Mass. at 470-471* (jury could find beyond reasonable doubt that defendant participated in armed robbery where he failed to telephone 911 or render aid to victim, made no attempt to dissociate **[***17]** himself from his cohorts, and fled scene with them); *Commonwealth v. Blake, 428 Mass. 57, 64, 696 N.E.2d 929 (1998)* ("Joint venture may be proved by circumstantial evidence, including that the defendant was among those fleeing the scene"); *Commonwealth v. Evans, 390 Mass. 144, 151, 454 N.E.2d 458 (1983)* (sufficient evidence to support felony-murder conviction where there was "no evidence that the defendant had ceased his participation in the armed robbery at the time of the killing"). These actions are also evidence of Rodrigues's consciousness of guilt. "While a conviction may not be based solely on evidence of consciousness of guilt, ... indications of a defendant's state of mind, coupled with other evidence, can be sufficient to establish guilt" (citation omitted). *Commonwealth v. Vick, 454 Mass. 418, 424, 910 N.E.2d 339 (2009)*.

Viewing all the evidence in the light most favorable to the Commonwealth, a juror could reasonably infer that Rodrigues knew that DaCosta possessed a firearm.

b. *Barrel length*.[8] A conviction under *G. L. c. 269, § 10 (a)*, requires proof that the "pistol, revolver or other weapon" capable of **[*115]** discharging a bullet has a barrel length less than sixteen inches. See *G. L. c. 140, § 121* (defining firearm). "Whether a gun is a 'firearm' ... is a question of fact for the jury." *Commonwealth v. Sperrazza, 372 Mass. 667, 670, 363 N.E.2d 673 (1977)*.

The ballistician testified that the bullets that killed the victim came from a weapon capable of chambering **[***18]** nine millimeter caliber ammunition. Although nine millimeter ammunition is capable of being fired by a rifle or revolver, "[t]he very high majority" of weapons firing that ammunition are semiautomatic pistols like those carried by police officers. A revolver, like a pistol, is a "short firearm[ ]" whose barrels jurors can infer are less than sixteen inches. *Sperrazza, 372 Mass. at 670*. A rifle is longer, having "a barrel length equal to or greater than [sixteen] inches." *G. L. c. 140, § 121*.

The jury were entitled to conclude that the murder weapon was not a rifle from Baptista's testimony that he never saw a gun, either when DaCosta and Mendes entered the Nissan or when DaCosta got out. He only "saw the fire" when DaCosta shot the victim. Mendes confirmed that DaCosta was hiding the gun, and that he did not see it in DaCosta's hand when DaCosta got out of the Nissan or when he reentered after the shooting. "[T]he absence of any statement by either [Mendes or Baptista] of having seen a barrel" when the gun was under the seat in the Nissan or when DaCosta was holding it support an inference that the weapon was a handgun. *Commonwealth v. Naylor, 73 Mass. App. Ct. 518, 525, [**1079] 899 N.E.2d 862 (2009)*. Further, the jury could infer that the murder weapon was a handgun from Mendes's testimony that DaCosta demonstrated **[***19]** how he held the gun with one hand to shoot the victim. See *Commonwealth v. Manning, 44 Mass. App. Ct. 695, 707, 693 N.E.2d 704 (1998)*. In short, "[t]he jury [were] permitted to draw rational inferences from the evidence," *Tennison, 440 Mass. at 565*, and we agree with them that the evidence was sufficient to establish that the murder weapon was a firearm.

c. *Penalty for armed assault with intent to rob*. The defendants claim that their felony-murder convictions must be vacated because the Commonwealth presented no evidence of the maximum penalty for armed assault with intent to rob. We disagree. Criminal penalties are set by statute, and whether a felony can serve as a predicate for murder in the first or second degree is a question of law. The judge was not required to submit the issue to the jury. **[*116]** See *Commonwealth v. Scott, 428 Mass. 362, 364, 701 N.E.2d 629 (1998)* ("It is not the province of the jury to determine whether a felony is inherently dangerous"). The judge instructed the

[8] Although the defendants did not move for a required finding of not guilty on this charge, we address it because "findings based on legally insufficient evidence are inherently serious enough to create a substantial risk of a miscarriage of justice." *Commonwealth v. McGovern, 397 Mass. 863, 867-868, 494 N.E.2d 1298 (1986)*.

jury that armed assault with intent to rob "is a felony with a maximum sentence of less than life imprisonment," and her instruction was correct. See *Commonwealth v. Wadlington, 467 Mass. 192, 208, 4 N.E.3d 296 (2014)*. See also *G. L. c. 265, § 18 (b)* (maximum penalty for armed assault with intent to rob is twenty years). No more was required.

3. *Closing argument*. Next, the defendants claim that they were deprived of a fair trial when, during his closing **[***20]** argument, the prosecutor argued facts not in evidence, misstated the evidence, interjected his personal beliefs, vouched for Baptista's credibility, and sought to inflame the jury's passions. The prosecutor acknowledged that he "misphrased" his argument regarding Baptista's credibility when he said, "If [Baptista] just made [believable details] up on his own, I don't think he's capable of it." The prosecutor suggested that the judge instruct the jury that "[his] opinion of Mr. Baptista's credibility is irrelevant and should not be considered by the jury," and the judge did so. She also repeatedly instructed the jury that closing arguments are not evidence and that the attorneys "weren't there" and "don't know what happened." Having reviewed the entire record, we are not persuaded that the prosecutor's expression of his personal opinion regarding Baptista's credibility "was prejudicial to the point of requiring a reversal of the conviction[s]." *Commonwealth v. Wood, 469 Mass. 266, 286, 14 N.E.3d 140 (2014)*, quoting *Commonwealth v. Kozec, 399 Mass. 514, 523, 505 N.E.2d 519 (1987)*. The judge had already cautioned the jury to evaluate Baptista's testimony with care, and she gave a specific curative instruction regarding the prosecutor's improper comment. The jury are presumed to have followed her instructions. **[***21]** *Wood, supra.*

The defendants also claim error in the prosecutor's characterization of the evidence (1) that Rodrigues knew DaCosta was armed, (2) with respect to the victim's cell phone, and (3) regarding Rodrigues's position when he got out of the Nissan on Winsor Street. They claim that the prosecutor interjected his personal beliefs when he argued that "[c]ommonsense would tell me that if my friend was going to rob a drug dealer who might be armed, I wouldn't be in a big hurry to get out of that car when your friend does," and that he sought to inflame the jury's passions by arguing that DaCosta "acted like he just had fun" when he got back to the club after the shooting. The defendants objected to some, but not all, of these comments.

[*117] **[**1080]** After considering "the prosecutor's remarks in the context of his entire closing argument, the judge's instructions to the jury, and the evidence produced at trial," *Commonwealth v. Lyons, 426 Mass. 466, 471, 688 N.E.2d 1350 (1998)*, we discern no prejudicial error requiring reversal, much less one that created a substantial risk of a miscarriage of justice. See *Kozec, 399 Mass. at 518 n.8, 523*. The inferences argued by the prosecutor were supported by the evidence, and he was entitled to argue those inferences forcefully. See *Commonwealth v. Lewis, 465 Mass. 119, 129, 987 N.E.2d 1218 (2013)*. We assume that the **[***22]** jury possessed "[a] certain measure of ...

sophistication in sorting out excessive claims." *Kozec, supra at 517*. Finally, the evidence against the defendants was strong, and the judge repeatedly instructed the jury that closing arguments are not evidence.

4. *Individual and* Moffett *claims*. There is no merit to Rodrigues's claim that he was deprived of a fair trial when Baptista testified that he only implicated Rodrigues in the homicide "[b]ecause the police brought the paper." Baptista neither explained what paper he was referring to nor mentioned it again. Rodrigues cites no authority supporting his claim that Baptista's passing reference to "the paper" was error, nor has he articulated how this testimony created a substantial risk of a miscarriage of justice. Any inconsistencies in Baptista's testimony were the province of the jury. See *Commonwealth v. Rivera, 482 Mass. 259, 269, 121 N.E.3d 1251 (2019)*.

DaCosta's claim that his conviction of felony-murder should be reversed because (1) the underlying felony, armed assault with intent to rob, merged with the murder, and (2) the judge failed to instruct the jury on merger, is also unavailing. "The merger doctrine is inapplicable in cases where the purpose of the predicate felony is distinct from an intent **[***23]** to cause physical injury or death." *Commonwealth v. Holley, 478 Mass. 508, 520, 87 N.E.3d 77 (2017)*. See *Commonwealth v. Morin, 478 Mass. 415, 431, 85 N.E.3d 949 (2017)*. The doctrine does not apply where the predicate felony is a robbery because "[i]t is the first element of the crimes of robbery and armed robbery, namely the stealing or taking of property, that qualifies them for application of the felony-murder rule" (quotation and citation omitted). *Id.* The same reasoning applies to armed assault with intent to rob. Because the defendants' intent to rob was distinct from their intent to kill the victim, "the judge was not required to instruct the jury on merger." *Id.*

We briefly address the claims that DaCosta raises pursuant to *Moffett, 383 Mass. at 208-209*. DaCosta's trial counsel was not **[*118]** ineffective for failing to seek severance of the defendants' trials, because Rodrigues moved for severance and the judge denied the motion; where neither Rodrigues's motion nor the judge's decision have been included in the record, we cannot say that her decision was an abuse of discretion. See *Commonwealth v. Smith, 418 Mass. 120, 125, 634 N.E.2d 1380 (1994)* ("When criminal charges against two or more individuals arise out of the same criminal conduct, ... it is presumed that those individuals will be tried together" [quotation and citation omitted]); *Commonwealth v. Conceicao, 388 Mass. 255, 264, 446 N.E.2d 383 (1983)* ("It is not ineffective assistance of counsel when trial **[***24]** counsel declines to file a motion with a minimal chance of success").

The judge was not required to give a manslaughter instruction, because (1) the defendants were not entitled to one where the prosecution proceeded under a theory of felony-murder, see *Evans, 390 [**1081] Mass. at 151* ("Where the felony-murder rule applies, generally the defendant is not entitled to an instruction on manslaughter"); and (2) it would not have been warranted where, as here, "[t]he evidence provide[d] no

detail about the victim's supposed attack against the defendant[s]," *Commonwealth v. Garcia, 482 Mass. 408, 411, 123 N.E.3d 766 (2019)*. Finally, we discern no error in the judge's decision to admit DaCosta's cell phone records. "[E]vidence initially discovered as a consequence of an unlawful search may be admissible if later acquired independently by lawful means untainted by the initial illegality." *Commonwealth v. DeJesus, 439 Mass. 616, 624, 790 N.E.2d 231 (2003)*. The cell phone records introduced by the Commonwealth consisted of subscriber information, which "were obtained by means of a subpoena subsequent to" the decision allowing the motion to suppress. Such evidence is admissible. See *Commonwealth v. Jordan, 91 Mass. App. Ct. 743, 754, 81 N.E.3d 340 (2017)*.

Judgments affirmed.

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Commonwealth v. Rodrigues

Supreme Judicial Court of Massachusetts

December 23, 2019, Decided

No Number in Original

Reporter
2019 Mass. LEXIS 721 *; 483 Mass. 1107

COMMONWEALTH *vs.* ANTONIO RODRIGUES.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: Reported below as COMMONWEALTH vs. HAILTON DaCOSTA (and a companion case): *96 Mass. App. Ct. 105, 132 N.E.3d 1067 (2019)* **[*1]** .

Opinion

Further appellate review denied.

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