COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Worcester County **SJC - 12023**

COMMONWEALTH
Appellee

v.

ELIAS SAMIA
Defendant-Appellant

On Appeal From A Judgment
and An Order
of the Superior Court

BRIEF OF APPELLANT

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ISSUES PRESENTED

I. Whether the admission of the threats and other "bad acts" of alleged joint venturers Trotto and Fredette, mainly as hearsay, was an abuse of discretion and prejudicial to Samia's case.

II. Whether the alleged joint venture allowing the Commonwealth to introduce hearsay and other testimony of bad acts by the joint venturers was impermissibly broader than the joint venture charged, the murder of Kevin Harkins, thereby allowing the jury to hear testimony of bad acts by the three men accused, starting with appellant's drug distribution and gun possession when he first met girlfriend Pamela DiCicco and ending years later with his arrest in March 1994 with cocaine and a gun in his possession.

III. Whether the testimony of Alan Dudley that he was told a few days after the dismantling of Samia's car that someone had been killed in it was too prejudicial to justice its admission to rehabilitate Dudley's credibility.

IV. Whether Officer Harney's testimony was improperly admitted because it was not proof of a joint venture which had ended with the disappearance of Kevin Harkins and because Harney claimed, without adequate foundation, to know that Samia was part of a drug distribution ring headed by Matteo Trotto.

V. Whether former girlfriend Pamela DiCicco's testimony about Samia having a gun and distributing drugs years before the Harkins disappearance was inadmissible as irrelevant to any alleged joint venture among Samia, Trotto, and Fredette.

VI. Whether Officer Moore's testimony that Samia repeatedly refused permission to search his car hours after the Harkins disappearance violated his rights under the Fourth and Fifth Amendments and Articles 12 and 14 of the Declaration of Rights.

VII. Whether the prosecutor's closing argument claiming corroboration of Denaris' testimony that Samia shot Harkins impermissibly stated that the shooting was reflected in testimony of other witnesses whose details were unknown to Denaris.

VII. Whether the conviction for first degree felony murder must be reversed because the jury instruction about the elements of aggravated kidnapping was not consistent with the statute in effect in 1994.

IX. Whether the trial judge erred in denying the new trial motion because trial counsel failed to adduce evidence that the pond into which Whalen claimed to have thrown some of the dismantled car parts was frozen solid on February 16, 1994.

X. Whether the cumulative effect of all the errors, particularly the piling on of "bad acts" by Samia, Fredette and Trotto, presented a substantial likelihood of a miscarriage of justice to be remedied under M.G.L. c. 278, sec. 33E.

STATEMENT OF THE CASE

The Grand Jury for Worcester County, on February 15, 2012, returned an indictment charging Elias Samia with the 1994 murder of Kevin Harkins. (R.A. 20).

Elias Samia was tried before a jury from October 14, to October 30, 2014 (Wrenn, J., presiding). (R.A. 5-6).

On October 30, 2014, the jury returned a verdict of guilty of first degree murder, on theories of premeditation and felony murder (aggravated kidnapping). (R.A. 21). On November 3, 2014, defendant was sentenced to life in prison, without parole. (R.A. 14). He filed his notice of appeal on the same day. (R.A. 22). The appeal was docketed in the Supreme Judicial Court on December 18, 2015.

Defendant filed a Motion for a New Trial, on March 19, 2020, supported by certified National Weather Service records of temperature and precipitation in Worcester in January and February 1994. (R.A. 23-28). On remand to the Superior Court, the trial judge held non-evidentiary hearings, on April 15, 2021, and June 25, 2021. He entered a Memorandum and Order denying the motion, on July 12, 2021. (Addendum p. 74)(R.A. 29). Defendant filed a motion to reconsider, supported by a scholarly article and informal calculations, on August

11, 2021. (R.A. 36-40). The Court denied the motion on October 28, 2021, which was docketed on November 1, 2021. (R.A. 41). Defendant filed his notice of appeal from denial of the new trial motion and that order on November 26, 2021. (R.A. 18, 43).

STATEMENT OF FACTS

Kevin Harkins worked and socialized in Suney's, a bar in Worcester. At about 10:30 P.M., on February 15, 1994, he walked out of the bar, leaving behind his Celtics jacket, keys, cigarettes, cash, and a partially consumed beer. (Tr. 4/61). He was never seen again. Nor was his body located.

The Commonwealth maintained that defendant Elias Samia was part of a joint venture[1] with John Fredette and Matteo Trotto, which culminated in the kidnapping and murder of Kevin Harkins, and disposal of evidence.

Background of Drug Dealing. Trotto sold large quantities of cocaine. In 1993, he supplied witness Donald St. Pierre with cocaine by the ounce. (Tr. 3/157)

Fredette was also a drug dealer. He was arrested on September 3, 1993,

1 Defendants Fredette, Trotto, and Samia were all tried separately. Fredette and Trotto were convicted of first degree felony murder based on aggravated kidnapping. Because the elements of aggravated kidnapping, as defined for the jury, did not exist in 1994, their convictions were ultimately reduced to second degree murder. Commonwealth v. Fredette, 480 Mass. 75 (2019), s.c., 97 Mass. App. 206, review denied, FAR-27437 (2020); Commonwealth v. Trotto, 487 Mass. 708 (2021).

dealing drugs to Robert Beahn, who was a regular customer, starting in 1993. Fredette was charged with trafficking. [2] (Tr. 5/70-72; 6/52). He believed that he had been set up by an informant. He suspected either Robert Beahn or Kevin Harkins, because Harkins was friendly with a vice squad policeman who worked off-duty as a bouncer at Suney's.[3] Fredette told St. Pierre that he would kill the informant. (Tr. 3/183). In fact, Donald St. Pierre had been the informant. (Tr. 3/170) Fredette also threatened to kill Harkins if he did not show up in court to give false testimony exonerating Fredette. (Tr. 3/183). St. Pierre claimed that he regularly heard Trotto, Fredettte and Samia talking about threatening Beahn and Harkins. He could not identify any occasion when Samia made the threats. (Tr. 3/205-208).

On the evening of the day that Fredette and Beahn were arrested and Fredette charged with trafficking, Trotto came into Suney's. He accosted Beahn, threatened him, and started choking Beahn with the drawstring from Beahn's sweatpants. (Tr. 4/55-56)(bartender Fournier); (Tr. 5/72-74)(Beahn)(Tr. 3/217)

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2 Beahn pleaded guilty to a lesser offense and was given two years probation. (Tr. 5/93)

3 St. Pierre testified that Fredette had said he suspected Beahn because he had been arrested with him. Fredette said "not to deal with Kevin [Harkins] because Kevin was friends with [vice squad policeman] Timmy O'Connor and he liked to talk to Timmy." The prosecutor asked "what was the significance of that, as far as John Fredette was concerned, that he told you? Over objection, the witness tested "[t]hat Robert could be the informant or Kevin could be the informant." (Tr. 3/182).

(Michael Davidson).

Samia was arrested on March 9, 1994, by vice squad Officer Brendan Harney. He took a "quantity of cocaine" from Samia. (Tr. 6/52) That was more than three weeks after Harkins' disappearance. Harney also testified, over objection, that Samia had a licensed handgun with him when arrested. Harney had seen him with a handgun before. (Tr. 6/71, 77, 86). The judge gave an instruction limiting the evidence of cocaine possession and of a gun "for the issues of joint venture as I have defined those for you." (Tr. 6/60, 76).

Harney investigated Trotto's drug dealing operation in 1993 and 1994. He was involved in the arrests of Fredette and Samia in 1993 and 1994. Relying only on his drug unit's "investigation", the witness testified, over objection, "Matteo [Trotto] was the main man. Under him was John Fredette and Eli Samia. There were also others involved." (Tr. 6/61-62).

St. Pierre testified that Samia possessed a licensed handgun, which he had with him each time St. Pierre saw him. (Tr. 3/211). Samia's former girlfriend, Pamela DiCicco, referring back to years before the Harkins disappearance, testified that Samia always carried a gun. (Tr. 4/42). According to St. Pierre, " I know they kept Eli around for the gun because he had a license." (Tr.3/211).[4]

4 St. Pierre made the statement on cross-examination as a non-responsive elaboration after answering the question, "So were you aware then that Matteo [Trotto], then, had guns?" (Tr/ 3/211). Defense counsel did not object or move to strike the answer.

In August 1993, St. Pierre was working off a drug debt, doing brickwork at a bar owned by Trotto. He observed Samia hand a gun to Fredette who said to St. Pierre that he should get out of there or Fredette would "break my face." (Tr. 3/167, 204). According to another witness, Michael Davidson, on another day at Trotto's bar, in summer 1993, he was working outside at Trotto's bar with Harkins and St. Pierre. At lunch inside, the witness observed Samia put his gun on the bar in Trotto's presence. Later, Trotto went outside, without Samia, pointed the gun at the men in the scaffolding, and said he was going "rabbit hunting". ("Rabbit" was Beahn's nickname; inferably, the alleged incident happened after Fredette's arrest.) (Tr. 3/217-218).

Fredette's Prosecution. Fredette was in Superior Court on February 14, 1994, for trial of the trafficking charge against him. Samia was with Fredette during his conversations with Beahn, who was also on trial that day. Harkins did not show up. Fredette asked Beahn to perjure himself; Beahn refused. Fredette pleaded guilty and received a four to six year sentence. He expressed an unspecified threat against whomever had set him up. Samia had his hand on Fredette's shoulder when he made the threat. (Tr. 5/96-97, 100-101). Fredette's sentence was stayed for four days. (Tr. 5/99).

Kevin Harkins' fear of Fredette and Trotto. Over repeated objection, the

Commonwealth adduced the following hearsay evidence showing that Harkins feared Fredette and Trotto. Each time, the Court preceded the testimony with a limiting instruction, that the statements were to be considered, not for their truth, but for the effect on Harkins' state of mind as he left the bar on February 15. (E.g., Tr. 5/77).

* Michael Davidson recounted the summer 1993 incident at Trotto's bar after Fredette had been arrested. Trotto took Samia's gun from inside the bar, pointed at Davidson, Harkins, and another, who were working on scaffolding. Trotto said he was going "rabbit hunting". (Tr. 3/217-218) Davidson, who had worked with Harkins on the building, testified that Harkins had told him, "Don't screw with [Trotto] because he'll kill you. He's that kind of person." (Tr. 3/220).

* According to Suney's manager, Daniel Kachadoorian, Harkins told him that Trotto and Fredette intended to beat Beahn, in order to extract a confession or to force him to identify the informant. (Tr. 5/58).

* Dawn Mayotte testified that Harkins had told her that he did not want to testify for Fredette and was afraid that Trotto would kill him if he did not. (Tr. 5/132).

* Without any foundation, St. Pierre testified that Harkins knew that Trotto had shot Bobby Booth at a sand pit and left him to die, and that Harkins also

believed that Fredette was a killer.[5] (Tr. 5/171, 176).

* Robert Beahn testified that, on an unspecified date, he saw Trotto and Harkins go into the back room at Suney's. After Trotto left, Harkins told Beahn that Trotto had said that, if anything happened to Beahn, his child would be taken care of for the rest of his life. Beahn asked, "You mean they're going to kill me over this?" Harkins replied, "Yes. They're pissed." (Tr. 5/74, 77).

Kevin Harkins' Disappearance. On the night of February 15, 2014, the day after Fredette's guilty plea, Kevin Harkins disappeared from Suney's. At about 10:30 or 11:00 P.M., bartender David Fournier saw Trotto look into the bar through the front door glass window. Harkins was drinking and playing pinball. Trotto stepped into the bar and gestured to Harkins to come over. The two went outside. Harkins left behind his Celtics jacket, some money, his keys, cigarettes and half a glass of beer. Harkins did not come back and the bartender locked up at 2:00 A.M. (Tr. 4/57-58, 61-62).

On cross-examination, the witness acknowledged that he had met with police officer, and part-time bouncer, Timothy O'Connor, on March 2, 1994. Fournier stated he had given and signed a typed statement prepared by O'Connor. The witness had told O'Connor that, before his departure from Suney's, Harkins

5 Cross-examination did not bring out that St. Pierre had not testified about Harkins' knowledge of these crimes at the earlier Fredette trial. (Fredette Tr. 5/183-194).

had been playing pinball, drinking, and watching a Boston College basketball game on television. (Tr. 4/76-78).

Disposal of Samia's Car. At around 2 A.M. on February 16, Samia was driving his 1985 Impala, with Fredette as passenger. A Millbury police officer, Mark Moore, stopped the car for driving 10 mph above the speed limit. Samia produced his driver's license but said that he had sent his registration to his insurance company after having the vehicle repainted. He could not answer the officer's question why he would send the registration to an insurance company. (Tr. 3/253-257). Samia told him that they were coming from a local bar, which was in a location inconsistent with the direction of the car. The police officer asked "if he had any guns, drugs, tanks, dead bodies in his vehicle." It was a standard question to test a driver's reaction. Samia made no response. Over objection, the officer testified that he repeatedly asked for permission to search the car, which Samia refused. At the end of the 50 minute stop, the officer gave permission to leave. (Tr. 3/261-262, 264-265, 274).

Later that morning, at 5:30 A.M., James Whalen, an employee of Ace Auto Sales was called into work to assist in dismantling a car. At about 6:00 A.M., Trotto drove Samia's Impala into a service bay and closed the door. Trotto told Whalen to help get rid of the car and keep his mouth shut or he and his family

would never be safe. (Tr. 4/175-180). Whalen and another employee, Alan Dudley, dismantled the car. The parts were disposed of in several places, behind the building, and in a dumpster. Whalen and fellow employee Alan Dudley took two doors and other parts to Rusmart Auto Trim, another business operated by Ace's owner. The doors "we threw in the pond in the back of Rusmart." (Tr. 3/73,76; 4/181-183).

Whalen was questioned by police in 2005. At that time he denied being afraid. He first disclosed his actions disposing of the car in 2012. (Tr. 4/184).

Alan Dudley also worked on dismantling the car. He put the doors into a van and took them to Rusmart. The doors were put against a dumpster. Dudley did not throw them into a pond. (Tr. 3/76-77, 7/89-90). Over objection, the witness testified that Ace owner Walter Fitzsimmons told him a few days after the dismantling that a person had been shot in the car. (Tr. 3/95, 98-99, 101).

In 2005, eleven years after Harkins' disappearance, authorities recovered one car door, a rear quarter panel, and other items, from the pond behind Rusmart. (Tr. 3/120, 144) An expert examined the recovered door and quarter panel, comparing them with parts removed from a known 1985 Impala. She testified that the door and panel from the pond were consistent with the known 1985 Impala parts. The door and quarter panel were also consistent with other makes and models from the

mid-1980s. (Tr. 4/25-26, 218, 238-240). The parts were painted black, but traces of blue paint were evident in spots not painted. (Tr. 4/228-230).

The license plates for Samia's Impala were turned in to the Worcester office of the Registry of Motor Vehicles on February 16, 2004. (Tr. 6/83).

Fredette's and Samia's Alleged Admissions. Fredette had a son, Richard Denaris, who lived in Maine. Fredette had not had contact with him since he was four years old. (Tr. 4/106). Denaris's mother and aunt knew Samia. His aunt put him in touch with Samia in 2007. He spoke with Samia about doing construction work for him. Thereafter, he worked for Samia, who also got him into the roofers union to qualify for other jobs. (Tr. 4/110-114).

During the period when Denaris was working for Samia, Fredette arranged a meeting with Denaris and his half brother. There was one casual meeting to eat and play frisbee golf. In the next week or two, Samia brought Denaris to a private club to meet with Fredette and Denaris's cousin. On the way, they consumed marijuana and beer. At the club, Samia said he was not worried about getting pulled over by police; he was followed by them every day because of suspicions about "the guy in the paper", i.e., Harkins. Fredette told Samia to "shut up". (Tr.4/115-120).

They next went to Samia's parents' house. Fredette and the witness had a

"buzz" but Samia was "all right". Denaris asked Samia if he was "not worried about getting caught for the guy in the paper". Fredette said, "Eli, seriously shut up." (Tr. 4/120-121).

The following night, Denaris, Fredette, and Samia were at Samia's parents' house again. Denaris asked about Harkins and whether Samia was worried. Either then, or the night before, Samia said "no body, no case." Fredette said, "Eli, shut the fuck up." Samia said "he did what he had to do for his family"[6], i.e., Trotto, Fredette and himself. Fredette said that they had left "money and butts at the bar". Samia replied, "Hey, we do what we have to do." Fredette said "they could have just kicked his ass." Samia responded, "You and I were fucking him up, and it got out of control and I had to take the gun and shoot him." After the shooting, Fredette and Samia had gotten into a fight and Trotto had to break it up. (Tr. 4/122-124). Samia mentioned getting stopped by police later and "that the cop was lucky that he stopped searching when he did." Samia said he did not have the key to the trunk that night. (Tr. 4/124-125). He said that they buried the body in a shallow grave with lime. He also said that the "worst thing the judge could have done was give [Fredette] the furlough." (Tr. 4/125).

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6 According to Samia's former girlfriend, Samia, Trotto and Fredette were very close and considered each other "brothers". (Tr. 4/40). Denaris also testified that they considered themselves brothers. (Tr. 4/122).

Defense case. William Cleary[7] testified that he was John Fredette's cousin and had known Elias Samia for about 35 years. He had met Richard Denaris twice. The first time was when Mr. Samia and Denaris came to Maine to work on his roof. The second time was in Worcester. He did not remember the specifics of that the day. He thought it was late afternoon when they met. His routine when visiting Worcester was to meet at the Diamond Cafe. He remembered nothing unusual about the meeting of Samia, Fredette and him with Denaris. He was absent from the group only for bathroom breaks. They also went to a social club and then Mr. Samia's parents' home. He stayed with the group except for bathroom breaks. He remembered no conversation where Mr. Samia mentioned any of the incriminatory details testified to by Denaris. (Tr. 8/17-28).

Ayanna Thomas, Ph. D., testified in detail about studies establishing that eyewitness memory faded or changed over time. Factors included feedback from listeners, receipt of information from extraneous sources, such as a newspaper, and receipt of false information about the event in question, (Tr. 7/25-40).

A witness from Boston College, Matthew Lynch, testified that the Boston College's basketball team did not play on February 15, 1994 (Tr. 7/44), contrary to the statement which bartender Fournier gave on March 4, 1994, that Kevin

7 William Cleary was apparently the cousin "Scotty" referred to by Denaris. (Tr. 4/120).

Hawkins was watching that team play on the bar's television at the time he left the bar. The only Boston College game that week was on February 16. (Tr.4/44).

The Court declined to allow the defense to call Molly Collins as a third party culprit witness. According to the defense's proffer and a DVD of a statement given by Ms. Collins, she would testify to hearsay statements of one Peter Finnegan. Witness Collins maintained that Finnegan had told her that he was the driver when Kevin Harkins was killed in a car. Two unidentified individuals were in the back seat. One of them suddenly killed Harkins. They buried his body in a shallow grave off Route 2 in Athol. (Tr. 7/5). The Court ruled that the requirements to admit hearsay about a third party culprit had not been met. (Tr. 7/7-8).

Motion for New Trial. The motion for a new trial presented a certified copy of National Weather Service records for Worcester Airport in January and February 1994. (R.A. 23-28) Defendant claimed that the failure to present the evidence to the jury amounted to a substantial likelihood of a miscarriage of justice or ineffective assistance of counsel.

The purpose of the weather data was to demonstrate that the pond into which the Impala parts were allegedly thrown was frozen solid on February 16, 1994. The temperature records showed that the average maximum temperature between February 1 and 16, 1994, was 24.3 degrees. The average low temperature for that

period was 7.9 degrees. The only high temperatures above freezing were 40 degrees on February 5 and 33 degrees on February 6. The second half of January was also frigid. Between January 15 and 31, the temperature went above freezing only only six days. Nightly temperatures were well below freezing, with nine nights registering below zero temperatures. (R.A. 25-26)

Trial attorney Joan Fund acknowledged in her affidavit that she had not called an expert. She did not recall whether she had checked the weather history for the period. (R.A. 27-28).

The trial judge (Wrenn, J.) denied the motion on two grounds. First, he ruled that an expert was needed to interpret the raw data to determine whether the pond in question would have been frozen. Defendant's assertion that the data alone was sufficient was "entirely speculative." Second, he found that even successful impeachment of Whalen's testimony that he had thrown car parts into the pond on that date would not have offset other evidence tending to corroborate Whalen's account. (Addendum, pp. 79-80)(R.A. 34-35).

Defendant filed a motion for reconsideration, submitted a 1989 scholarly article, "Thin Ice Growth" by George D. Ashton. The article set out a formula for determining ice growth based primarily on temperature data. Defendant maintained that the much-cited formula substantiated his claim that the pond must

have been frozen enough that Whalen's testimony of hurling the parts into the water was false. Defendant represented that he would seek an expert to apply the formula in this case. (R.A.36-40) .

The Court denied the motion for reconsideration on grounds that it was not for reconsideration, but a new motion intended to cure a defect in the original submission. (R.A. 41) .

SUMMARY OF ARGUMENT

I. It was an abuse of discretion to admit "bad acts" of alleged coventurers Trotto and Fredette, including hearsay accounts of Harkins' fear of them, because the probative value of the testimony was marginally related to whether Harkins was involuntarily confined in a vehicle, and cumulative because, if the jury believed evidence that he was killed in a car during a struggle, the Commonwealth had proved unlawful confinement, the essential element of kidnapping. Moreover, the testimony was inadmissible because Harkins, who allegedly heard the threats, could be cross-examined. (p. 29).

II. The joint venture charged was the kidnapping and murder of Kevin Harkins. The Court abused discretion in admitting evidence, mostly hearsay, of a joint venture consisting of a drug distribution operation among appellant Samia

and his alleged coventurers, which extended from years before, when Samia met Pamela DiCicco, to weeks after the alleged kidnapping and murder venture had ended. The jury was given no guidance in defining the limits of the broader joint venture, which allowed Samia's "bad acts" of regular (licensed) gun possession and distribution of cocaine to prejudice the jury, and permitted testimony about Trotto's and Fredette's bad acts. (p. 38)

III. Appellant Samia's car was allegedly dismantled and disposed of the day after Kevin Harkins' disappearance. The Court abused discretion in permitting the prosecutor, on redirect examination, to bolster witness Alan Dudley's recollection of the car's disposal with his testimony that the salvage company's owner told him a few days later that someone had been killed in the car. The damning hearsay was too likely to be taken for the truth of its content and too prejudicial to be justified by its marginal value in countering cross-examination about the accuracy of Dudley's recollection of the specific car dismantled. (p. 45).

IV. Officer Harney arrested Elias Samia for cocaine distribution a few weeks after Harkins' disappearance. The Court abused discretion in admitting testimony about the arrest, including Samia's possession of a gun not linked to the alleged shooting. The alleged joint venture to punish Harkins had ended, the cocaine distribution was unrelated to the crime charged, and the gun testimony was

another of the repeated portrayals during trial of Samia as carrying a gun at all times. Secondly, the Court erred in permitting, over objection, Officer Harney's opinion that Samia was a part of a long-time drug distribution enterprise headed by Matteo Trotto, an opinion as to which there was an inadequate foundation. (p. 50).

V. The Court abused discretion in admitting, over objection, testimony by Samia's former girlfriend, Pamela DiCicco, that she had been with him for years before the Harkins' disappearance and he always had a gun with him, and, initially, supplied her with cocaine. (p. 54)

VI. Over objection, Millbury Police Officer Moore testified that, during his traffic stop of a car driven by Samia in the early hours of February 16, appellant Samia repeatedly rejected Moore's request to search his car. Evidence of the refusal violated appellant's Fourth Amendment and Article 14 rights against unreasonable searches. It also violated his Fifth Amendment and Article 12 rights not to incriminate himself. (p. 55)

VII. In closing argument, the prosecutor impermissibly told the jury that Denaris' testimony that Samia shot Harkins was corroborated by testimony by other witnesses that Samia always carried his licensed firearm. He also argued that Denaris' recounting that Fredette had said they should have just beaten Harkins was corroborated by testimony that at the time of his February 14 sentencing,

Fredette threat "if I ever catch the motherfucker that did this . . . the things I'm going to fucking do" excluded a wish to kill Harkins. (p. 57).

VIII. Appellant Samia's conviction for first degree murder based on the felony of aggravating kidnapping must be reversed because this Court has held in the Fredette appeal that the definition of aggravated kidnapping during the final charge included elements not in the relevant statute in 1994. (p. 62)

IX. The Court abused discretion in denying the new trial motion claiming ineffective assistance of counsel in not developing evidence that on February 16, 1994, the pond into which Whalen claimed to have thrown the car parts later retrieved was frozen solid. Moreover, there was a substantial likelihood of a miscarriage of justice from the failure to impeach Whalen's credibility on the entire incident with proof that he could not have thrown the parts into the pond. (p. 63)

X. This Court should reverse the conviction under M.G.L. c. 278, sec. 33E, because the cumulative effect of the foregoing errors resulted in a substantial likelihood of a miscarriage of justice. (p. 68).

ARGUMENT

I. IT WAS AN ABUSE OF DISCRETON FOR THE COURT REPEATEDLY TO OVERRULE OBJECTION TO HEARSAY ABOUT "BAD ACTS" OF FREDETTE AND TROTTO, ADMITTED TO SHOW KEVIN HARKINS' FEARFUL STATE OF MIND.

Over objection, five witnesses testified about events where Kevin Harkins either expressed fear of Fredette and Trotto, or said that he had heard others recounting past violence or threats by the two men.

Davidson. In summer 1993, Harkins was one of three working outside at Buono Fortuna, Trotto's bar. Inside the establishment, Michael Davidson saw Samia put a gun on the bar. Later, Davidson was outside on scaffolding when Trotto pointed a gun at the three working and said he was going "rabbit [Beahn] hunting". (Tr.3/217-218). After the incident, Harkins, who was also working, told Davidson not to "screw" with Trotto, that he would kill Davidson. (Tr. 3/220). The judge also instructed that the Trotto statement be considered, not for its truth, but for "its effect on Mr. Harkins' state of mind on the evening of February 15, 1994, when he allegedly left the Suney's Pub." (Tr 3/220). The judge also instructed the jury to follow his earlier instruction on statements of a joint venturer. (Tr. 3/218).

Kachadorian. Harkins told Suney's manager Kachadorian that Trotto and

Fredette intended to beat Beahn to find out whether he or someone else had informed on Fredette's drug sale plans. (Tr. 5/58). Over objection, the judge, at sidebar, admitted the statement as relevant to "Harkins state of mind when he leaves Suney's, *and does he enter a vehicle against his will*.[8] It's the issue of constructive force." (Tr.5/56)(emphasis added). He instructed the jury that the statement was not offered for the truth of the statement. That would be hearsay." Rather, it was relevant only to "the state of Mr. Harkins's mind on the night of February 15, 1994, when he allegedly left the Suney's Pub." (Tr. 5/57).

Beahn. Harkins told Beahn after Fredette's arrest that Trotto threatened to kill Beahn. (Tr. 5/77). The Court overruled objection after the prosecutor represented that the hearsay was offered "for Kevin Harkins' state of mind with regards to whether he would have gone in that car or not." (Tr. 5/75). The Court thereupon instructed the jury that the hearsay was to be considered only "for the effect on the state of mind of Kevin Harkins on the night of February 15, 1994, when he allegedly left the Suney's Pub." (Tr. 5/77).

Dawn Mayotte. Harkins told Dawn Mayotte that he was afraid that Trotto would kill him if he did not testify for Fredette. (5/132). The Court instructed the jury that the Harkins statement was not offered for its truth but only "for the

8 At the Samia trial, there was no testimony by anyone who saw Harkins enter a vehicle.

limited purpose of its effect on Mr. Harkins' state of mind when he allegedly left the Suney's Pub . . . .”(Tr. 5/132).

St. Pierre recounted, over objection, that Harkins knew about Trotto shooting a man in a sandpit and, generally, that Fredette was a killer. (Tr. 3/171, 176). The judge instructed that the testimony was not to be considered for the truth of the statements but for the effect on Harkins' state of mind upon leaving Suney's on February 15, 1994. (Tr. 3/176-177).

The statements, actions and reputations of Fredette and Trotto, summarized *supra*, were "bad acts" evidence. Such evidence is to be excluded as tending to show "bad character or propensity to commit the crimes charged", unless an exception to exclusion is established. See Commonwealth v. Crayton, 470 Mass. 228, 249 (2014). A common exception is for acts offered "to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or pattern of operation". See id., quoting Commonwealth v. Walker, 460 Mass. 590, 613 (2011). Here, the judge in each instance instructed the jury in similar terms that the evidence was admitted only "for the limited purpose of its effect on Mr. Harkins' state of mind when he allegedly left the Suney's Pub . . . .” (Tr. 5/132); see Crayton, 470 Mass. at 250.

The danger of admitting such a series of acts and statements, even with a

limiting instruction, was great. The testimony of Davidson, Kachadorian, Beahn, Mayotte, and St. Pierre, if incorrectly taken for its truth, showed that Trotto, in particular, was a violent and homicidal man, with his anger directed in this case at Fredette's betrayer. Fredette threatened violence as well. Their motive to punish Kevin Harkins was clear, whether he was suspected of being the "snitch", or because he had abandoned Fredette to his fate in court, or both. The hearsay testimony, if believed for its content, was compelling in support of the Commonwealth's theory that Harkins was the target of violence intended by Trotto and Fredette. It would follow that they were guilty of Harkins' disappearance. The Commonwealth had only to add proof that Elias Samia had joined them in abducting and killing Harkins.

Where "bad acts" evidence was admitted, the appellate court will review for abuse of discretion. Commonwealth v. Andre, 484 Mass. 403, 414 (2020); Commonwealth v. Horton, 434 Mass. 823, 827-828 (2001). An abuse of discretion occurs "where its probative value is not substantially outweighed by the danger of prejudice." Commonwealth v. Holliday, 450 Mass. 794, 815 (2008). "The judge must then consider and *articulate* 'the risk that the jury will ignore the limiting instruction and make the prohibited character inference' and use the evidence for an inadmissible purpose, such as propensity." Andre, 484 Mass. at 415 (emphasis

added)(quoting and citing cases).

Because defendant objected to each instance of bad acts evidence, the Court will review for "prejudicial error.". Commonwealth v. Cruz, 445 Mass. 589, 591 (2005). "An error is not prejudicial if it 'did not influence the jury, or had but very slight effect.'" Id., quoting Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994).

> "[W]e examine various factors, including the importance of the evidence in the prosecution's case; the relationship between the evidence and the premise of the defense; who introduced the issue at trial; the frequency of the reference; whether the erroneously admitted evidence was merely cumulative of properly admitted evidence; the availability or effect of curative instructions; and the weight or quantum of evidence of guilt." Commonwealth v. Dagraca, 447 Mass. 546, 553 (2006)(harmless error standard). See Commonwealth v. Rodriguez, 92 Mass. App. 774, 780 n.13 (2017)(Dagraca factors to be weighed under both harmless error and prejudicial error standards.) ("difference . . . is not of kind but of degree."),

"The critical question is whether the court fairly can say that 'the jury could not have been influenced by [the erroneously admitted evidence]'." Commonwealth v. Qualls, 425 Mass. 163, 170 (1997), quoting Commonwealth v. Schultze, 389 Mass. 735, 741 (1983). "The Commonwealth 'bears the risk of doubt when any exists as to the error being nonprejudicial.'" Commonwealth v. Carriere, 470 Mass. 1, 7-8 (2014).

At the Samia trial, the judge admitted the testimony as limited to showing the state of mind of Harkins as he followed Trotto out of Suney's. This Court

acknowledged in affirming Trotto's conviction that the evidence about his and Fredette's murderous threats and reputations was "highly prejudicial", and the question whether the trial judge abused discretion in admitting it was a "close one." Commonwealth v. Trotto, 487 Mass. 708, 728 (2021)[9].

In Qualls, 425 Mass. at 172-173, this Court noted the highly prejudicial impact of threats of murder by a defendant, if the jury were to consider the evidence beyond the confines of the victim's state of mind.[10] "The inadmissible testimony may very well have 'fulfilled the broad purpose of proving that threats on the deceased's life were made by the defendant[], and the jury were left to infer from this that the defendant[] desired his death and, in fact, accomplished it.'" Id. at 172, quoting Commonwealth v. DelValle, 351 Mass. 489, 492-493 (1966). The testimony poses a heightened danger where the identity of the murderer[s] was

9 Presented with different facts and different arguments, the opinions in Commonwealth v. Fredette, 97 Mass. App. 206 215-217, review denied, FAR-27437 (2020), s.c., 480 Mass. 75 (2019); and Trotto, 487 Mass. at 726-728, denied challenges to the "bad acts" testimony.

10 Decedent's "statements that he was afraid that the defendant would kill him could have been seen by the jury as 'prophecy of what might happen to him,'" . . . "His statements of fear were certainly 'a voice from the grave casting an incriminating shadow on the defendant.'" Commonwealth v. Qualls, 425 Mass. 163, 172 (1997) (quoting cases). In Qualls, the decedent's fear of the defendant was not communicated to him and was therefore inadmissible, as instructed, as evidence of motive. The judge also limited it to the decedent's state of mind, as in Samia's case. Id. at 167-170. Logically, the jury would not use proof of fear not communicated to defendant Qualls to attribute motive to defendant. The danger was that the content of the decedent's fears would be taken for the truth of the basis of the fears. See id. at 169, 172.

closely related. "To the jury, it must have been as simple as this: [the victim] feared being killed by [the defendant], and sure enough [the victim] was killed. Therefore, odds are good that it was done by [the defendant]. Thus the danger that the statement in question would be misused by the jury on the disputed issue identity is extremely high." Qualls, 425 Mass. at 172-173, quoting United States v. Brown, 490 F.2d 758, 778-779 (D.C. Cir. 1974). Contrast, Commonwealth v. Moseley, 483 Mass. 295, 302 (2019)("relatively innocuous statements" not unduly prejudicial).

The D.C. Circuit's opinion in Brown noted that limiting instructions in some cases cannot be expected to insulate the jurors from consideration of evidence for its probative value;

> "Ultimately the amount of reliance one is willing to place on the limiting instruction must necessarily depend on the degree of respect one holds for the jury's ability to make and maintain such fine distinctions. . . . While to a certain extent this is a policy question and a matter of opinion, the United States Supreme Court in such cases as Shepard [v. United States, 290 U.S. 96, 104 (1933)], and Bruton [v. United States, 391 U.S. 123, 132-133 & n.8 (1968], has clearly indicated it believes that there are sharp limits to to the capabilities of the jury to comply with special instructions as to highly incriminating evidence of this type. Therefore in extreme cases such evidence must be excluded in spite of the limiting instruction.:" 490 F.2d at 777-778."

Evidence of what Harkins said about his fear of Trotto and Fredette can be "highly prejudicial because it tends to show the state of the defendant's [Trotto's or

Fredette's] mind, not that of the declarant." Commonwealth v. Bond, 17 Mass. App. 396, 399, review denied, 391 Mass. 1103 (1984).

Moreover, to the extent that witnesses were simply repeating what Harkins had told them, the hearsay was inadmissible:

> "In these circumstances we hold that evidence of threats preceding a crime can properly come only from one who heard or witnessed them. It is only such a witness whose evidence can be tested under cross-examination on all the factors which may give life and credence to the threats of which he tells. Therefore, it was error to allow Pellegriti to testify to the deceased's declarations relating to threats made by the defendants to the deceased two days before the latter met his death." Del Valle, 351 Mass. at 495.

The foregoing ruling in Del Valle alone makes inadmissible witnesses' recollections of Kevin Harkins statements detailing threats and related statements. See Commonwealth v. Amaral, 482 Mass. 496, 505 (2019), quoting McCormick on Evidence § 245 (K.S. Broun ed., 7th ed. 2013).

In addition to the danger that the limiting instructions would not successfully insulate the bad acts evidence, if admissible, from being used substantively by the jury, the at best marginal relevance of the evidence was insufficient to justify admission. See Commonwealth v. Magraw, 426 Mass. 589, (1998)("The more circumstantial the evidence, the more likely it is that such evidence will adversely affect the defendant's case."); see Commonwealth v. Blow, 362 Mass. 196, 201

(1972)(quoting cases).

The issue in the case as to which the bad acts evidence was assertively relevant was whether Harkins was kidnapped, i.e., whether actual or constructive force was used to confine Harkins after he walked out of Suney's. See Trotto, 487 Mass. at 716. The relevance of Harkins' fear based on the bad acts evidence was marginal. The bartender at Suney's, David Fournier, testified that Trotto entered the bar, gestured for Harkins to come out, and Harkins went outside. No other witness observed what happened after that.[11] The alleged kidnapping occurred on the evening after Harkins had failed to go to court to help Fredette.

If Harkins was in fear of Trotto, that did not deter him from leaving the relative safety of the bar. The Commonwealth evidently would make the distinction that his fear would have kept him from voluntarily getting into the car[12] in which he was assertedly killed. But there was no evidence of a car being

11 If Denaris's testimony was to be believed, Samia described how a struggle with Harkins in the car led to his being shot. (Tr. 4/123-124) He was already in the car, inferably being confined by force. The relevance of his fear of Trotto had to do only with whether he was forced to *enter* the car. (See Tr. 3/176)(limiting instruction that bad acts evidence to be considered only "for the limited purpose of the effect of that information on the state of Mr. Harkins' mind . . . when he allegedly left the Suney's Pub . . . ."), i.e., whether constructive or actual force was used to make him enter the car.

12 Unlike the Trotto and Fredette cases, there was no testimony that a car was waiting outside Suney's or that Harkins was seen entering it. See Trotto, 480 Mass. at 711; Fredette, 480 Mass. at 78. In the Samia case, the judge's limiting instructions pointed only to Harkins' state of mind as he allegedly left the pub. He did not mention a car to the jury, but at sidebar he revealed that he considered entry into a car outside was part of his reasoning in weighing probative value against prejudice: "Harkins state of mind when he leaves Suney's, *and does he enter a vehicle against his will."* (Tr. 5/76) *(*emphasis added*).*

outside Suney's at the time. Wherever Harkins went after leaving, he never returned to Suney's. He was allegedly shot in Samia's car during a struggle. (Tr. 4/122-124)(Denaris). The inference that his will was overborne by someone at some point was inescapable. The Commonwealth's drumbeat of evidence about threats by Trotto and Fredette was cumulative of the inference that he must have been confined before or during his killing. The Commonwealth did not need the fear evidence to prove kidnapping. The Denaris testimony and the circumstantial evidence in the case satisfied the Commonwealth's burden of proving unlawful confinement in a car. The evidentiary value of the "bad acts" was small compared to the prejudice to the defendant if the jury were to weigh them against defendants.

II. THE COURT ERRED IN PERMITTING TESTIMONY OF A JOINT VENTURE AMONG SAMIA, FREDETTE, AND TROTTO GOING BACK YEARS, THEREBY ALLOWING TROTTO'S AND FREDETTE'S STATEMENTS AND THREATS TO BE ADMITTED AGAINST SAMIA.

An expansive concept of joint venture among Samia, Trotto and Fredette served as the basis for admission of many statements and actions by Fredette and Trotto from August 1993 until the disappearance of Kevin Harkins on February 15, 1994. The crimes charged, murder and kidnapping, were prosecuted as a joint venture. Going beyond the time frame of the crimes alleged, however, the

prosecutor maintained, at sidebar, that the joint venture among the three should be understood as “the relationship and the reliance on each other, as far as weapons and working together.” (Tr. 3/164). Overruling objection to the first offer of hearsay made by an alleged joint venturer, the Court, at sidebar, stated “it's not just the selling of the drugs; it's participating in the entire process of providing a gun, providing a car, providing assistance . . . .” (Tr. 3/166). At another point, the Court, at sidebar, described the putative joint venture as "being involved in a narcotics operation that took on a specific plan to find and eliminate the perceived informant . . . ." (Tr. 6/57).

At no time during trial, did the judge define joint venture as a hearsay exception for the jury. The Court gave instructions to the jury during trial about whether statements of alleged joint venturers may be considered by them. The most complete instruction preceded testimony on the fourth day of trial. The instruction did not define "joint venture". It simply repeated the term "joint venture" in the context of the foundational facts[13] which must be established before the jury could consider the hearsay. (Tr. 4/14-17). In the final charge, the jury was told that there must be (1) evidence other than the statements that a "joint

13 The jury needed to find "[f]irst, that other evidence apart from the statement in question demonstrates that there was a joint venture between the speaker and the defendant you are considering; Second, that the statement in question was made during the joint venture; And third, that the statement in question was made in order to further or advance the goal of joint venture." (Tr. 4/15-16).

venture" existed between defendant and the speaker; (2) the statements were made during the "joint venture"; (3) the statements were made "to further or advance the goal of the joint venture." (Tr. 8/117). At no time during the charge did the judge clarify the meaning or scope of the "joint venture" which would qualify as a hearsay exception.

On the other hand, in instructing the jury about joint venture as a theory of guilt, the judge used the term as requiring proof beyond a reasonable doubt "that [Samia] knowingly participated in the commission of the murder as part of a joint venture with Matteo Trotto and John Fredette." (Tr. 8/118). The instructions explained joint venture as defined in Commonwealth v. Zanetti, 454 Mass, 449, 470 (2009). Therefore, the deliberating jury in the Samia trial had two alleged joint ventures to assess: an undefined joint venture as a hearsay exception and a joint venture theory of the crimes charged.

Chronologically, Samia first appeared in the evidence with Trotto and Fredette on two occasions in late summer 1993 at Trotto's bar when he ostensibly lent his gun to each. (Tr. 3/200-204; 217-219). Samia next appeared chronologically at Fredette's guilty plea on February 14, 1994. (Tr. 5/100-101). He was not involved in the drug distribution and threats testified to between late summer and February at court. It was error to allow the jury to attribute all of the

co-defendants' statements in between to Samia.

Michael Davidson testified that Trotto entered Suney's after Fredette's and Beahn's arrest.[14] Trotto started choking Beahn with a sweatpants string around his neck. He said to Beahn that he would kill him if he had anything to do with Fredette's arrest. (Tr. 3/215-216). The judge instructed the jury that they must find the foundational elements of joint venture with Samia by a preponderance of the evidence before considering Trotto's statements. (Tr. 3/216). Davidson also testified that he was at Trotto's bar when Samia put his gun on the bar; Trotto later came outside, brandishing the gun, and saying he was going "rabbit hunting." (Tr.3/217-218).

St. Pierre testified, over objection, about the August 1993 incident at Trotto's bar when Samia handed his gun to Fredette, who told St. Pierre that he was not getting paid; that he was working off a drug debt to Trotto.[15] (Tr. 3/165-169). He also testified that Fredette said, after his arrest, that Beahn or Harkins could be the informant. Fredette told him that he would kill the informant. (Tr. 3/182-183). Fredette also told St. Pierre that Harkins was to appear in court in give false testimony in his behalf. (Tr. 3/183). St. Pierre testified that, after Fredette's arrest,

14 The incident was also described by bartender Fournier (Tr. 3/55); Beahn (Tr. 5/74);

15 St. Pierre acknowledge that, when he was interviewed by police in 1998, he did not tell them that Fredette had taken Samia's gun at Buona Fortuna. (Tr. 3/204-205).

all three men made threats about Harkins. But he was unable on cross-examination to identify any occasion when Samia made a threat. (Tr. 3/205-208).

Beahn testified that Fredette was angry after his arrest when the charge was upgraded to trafficking cocaine. Fredette also told him that he thought that Harkins was the informant because of his friendship with Officer Timothy O'Connor who worked part-time as a bouncer at Suney's. He also asked if Beahn was the informant and said that, if so, they could take care of it that day. (Tr. 5/71-72, 79-80).

"We recognize an exception to the hearsay rule whereby 'statements by joint venturers are admissible against each other if the statements are made "both during the pendency of the cooperative effort and in furtherance of its goal." ' " The trial judge is the gatekeeper for admissibility. Commonwealth v. Bright, 463 Mass. 421, 426 (2012)(quoting cases). The crucial terms, requiring limitation by definition in this case, are "cooperative effort" and "goal". The alleged concerted effort in this case was the kidnapping of Kevin Harkins and its "goal" was punishment of him for not coming to court to help Fredette, or for possibly being the informant. Such a narrow definition is warranted for several reasons.

This Court analyzed the law of joint venture as a hearsay exception in Bright, supra. "[E]ach venturer is treated as an 'agent for the other in all matters

relating to the common object. . . .'" Id., quoting Commonwealth v. Tivnon, 8 Gray 375, 381 (1857). The common object of a criminal joint venture is a "crime", and "offense". See Bright, 463 Mass. at 435, quoting Zanetti, 454 Mass. at 466. The question for both criminal liability as a joint venturer and the joint venture hearsay exception is "whether the declarant and the defendant knowingly participated in the commission of a crime together with the requisite intent." Commonwealth v. Rakes, 478 Mass. 22, 37-38 (2017). The exception for joint venturer hearsay is based in part on "their interests [being] sufficiently aligned." and the assumption that reliability will be enhanced by "[t]he community of activities and interests which exists among the coventurers during the enterprise . . . ." Commonwealth v. Wardsworth, 482 Mass. 454, 460 (2019), quoting Commonwealth v. White, 370 Mass. 703, 712 (1976).

The jurors were left to themselves to decide what the nature of the joint venture was. The range was potentially wide and vague. The prosecutor, at sidebar, maintained that the joint venture among the three should be understood as “the relationship and the reliance on each other, as far as weapons and working together.” (Tr. 3/164). The Commonwealth elicited testimony from several witnesses that Fredette, Trotto, and Samia considered each other "brothers". (Tr. 4/40)(DiCicco)(Tr. 4/122)(Denaris). Without a clarifying definition, the "joint

venture" was nearly so broad as to allow attribution to one "brother" the statements of another" brother", whether in furtherance of criminal activity or not.[16] Arguing in closing that the charged crimes were a joint venture, the prosecutor emphasized that Trotto, Fredette, and Samia were, in Samia's words, "family". (Tr. 8/90). The risk of all the testimony, and argument, about the "fraternal" relationship was "guilt by association" blurring the line. See Commonwealth v. Perry, 357 Mass. 149, 151 (1970). The joint venture, as an exception to the hearsay rule, could be taken by the jury to refer narrowly to the night of February 15-16, or broadly to the decades-long personal bond among the three -- or somewhere in between.

Elias Samia was not tied by any evidence to an ongoing criminal conspiracy including his attendance at Fredette's court appearance.[17] Beahn testified that

16 The temporal and causal limitations on the expanse of a joint venture were reflected in Commonwealth v. Colon-Cruz, 408 Mass. 533, 544 (1990), quoting Commonwealth v. Lussier, 333 Mass. 83, 94 (1955)("[I]t was not essential that murder should be part of the original plan, if it was one of the probable consequences of the robbery which was intended to be effected by the use of a deadly weapon.") See also Commonwealth v. Devereaux, 256 Mass. 387, 395 (1926) (a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it . . . .") (quoting cases). Under this authority, if Samia lent his gun to Trotto or Fredette in August or September 1993 because they wanted to threaten Beahn in connection with his working off a drug debt, or possibly being an informant, the kidnapping and murder of Kevin Harkins in February 1994 for betrayal of Fredette were not the "probable consequences".of Samia's actions in summer 1993. If they were, then any criminal act by Trotto or Fredette in connection with their drug dealing would be attributable to Samia as a joint venturer.

17 As argued in Part IV, infra, Officer Harney's opinion that Samia and Fredette were part of a drug operation headed by Trotto was inadmissible. Insofar as the testimony might be taken by the jury to establish Samia's participation in such an organization, the error provided a

Samia put his hand on Fredette's shoulder as he vowed revenge for whoever betrayed him. (Tr. 5/99-100). That testimony is ambiguous as to Samia's state of mind. Attending a friend's criminal court appearance is not evidence that the defendant was a joint venturer in the crime charged. And, Samia's putting his hand on Fredette's was not an unambiguous sign of support for Fredette's rage against the informant. At least as likely, it was a calming gesture. Beahn added no details in his testimony which would be incriminatory of Samia's activities in court. The only specific acts of Samia testified to were twice in late summer, at Trotto's bar, letting Trotto or Fredette take his gun to threaten Beahn.

The prejudice from allowing the "joint venture" evidence was clear. The evidence portrayed Elias Samia as a bad man, closely bonded with other bad men, and therefore predisposed to aid them in any criminal endeavor, here the murder of Kevin Harkins.

III. THE COURT ABUSED DISCRETION IN ADMITTING, OVER OBJECTION, ALAN DUDLEY'S TESTIMONY THAT HIS EMPLOYER AT ACE AUTO CENTER HAD TOLD HIM AFTER THE IMPALA'S DISPOSAL THAT SOMEONE HAD BEEN SHOT IN THE CAR.

Alan Dudley testified that he worked with James Whalen dismantling an

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basis for a broad definition of joint venture to justify all the Trotto and Fredette hearsay as attributable to Samia.

Impala in February 1994. (Tr. 3/74-77). Over objection, Dudley testified that he left Ace Auto about three months later "because I didn't like what I heard about what was going on." (Tr. 3/77). In total, he worked for five or six months for Ace Auto. (Tr. 3/80).

Dudley first spoke in March 2012 to police and the grand jury about the dismantling. On cross-examination, the witness could not remember the date or day of the week when the car was disposed of. It was probably in February. He had taken apart about one hundred cars during his employment. He remembered the car as blue. At the grand jury, he had testified only to removing the doors and trunk lid. At the trial, he had testified to removing the engine, transmission and roof. He testified to remembering taking the VIN number off the car and putting it in the office, but that was standard procedure for every vehicle. (Tr, 3/79-86).

On redirect examination the prosecutor, over objection, elicited from Dudley the testimony that he remembered dismantling the car in question because a few days later his boss, Fitzsimmons, told him that someone had been shot in the car. The judge gave an instruction limiting the jury's consideration to the question of whether Dudley heard the statement and not for the truth of its content. (Tr. 3/99).

The admissibility of the Fitzsimmons hearsay is subject to the same strictures as the "bad acts" hearsay, as argued in Part I, supra. A hearsay statement

that someone had been shot in a car belonging to defendant Samia was the kind of "bad acts" testimony to be excluded, unless an exception to the hearsay rule was established. Crayton, 470 Mass. at 249. Here, the ostensible purpose of the statement about a shooting in the car was to counter cross-examination suggesting that Dudley's memory of the dismantling of a car twenty years earlier was not reliable. As noted supra, Dudley's memory was challenged about when he started working for the salvage company, which date and month he helped dismantle the car, his having dismantled about one hundred cars during his time at Ace Auto, minor difference in his grand jury and trial testimony about which parts he took off the car, and the color of the car being blue. (Tr. 3/81-88) It was also normal procedure to put parts in trash bags and dispose of them at the Rusmart dumpsters. (Tr. 3/90).

At the beginning of redirect examination, the prosecutor asked, "What did Walt Fitzsimmons [Ace Auto's owner] tell you about this car that made it particularly memorable.?" After objection by the defense, the prosecutor justified the question to rebut "12 , by my count, questions," suggesting that there was nothing memorable which would cause Dudley to remember the particular car at issue. The Court noted that "he's offering it for a stated non-hearsay purpose. So I accept that representation." After overruling objection, the judge gave a limiting

instruction to consider the statement only for the purpose "that this witness heard it, and then for whatever worth you have, but not for the truth of the matter contained in the statement." (Tr. 3/95-96, 98-99).

The prosecutor then asked, "Is it fair to say that taking apart this car was memorable because Walter Fitzsimmons told you that someone had been shot in this car?" The witness answered "Yes" and the Court overruled the objection. (Tr, 3/99). Fitzsimmons made the statement a few days after the dismantling. (Tr. 3/101).

This Court will review the admission of the Fitzsimmons statement for abuse of discretion, i.e., whether ts probative value is substantially outweighed by the danger of prejudice. See Holliday, 450 Mass. at 815. The Court must consider "the precise manner in which the evidence . . . is relevant and material to the facts of the particular case" and the risk that the jury will use it for an impermissible purpose, "such as propensity" despite the limiting instruction. Andre, 484 Mass. at 415.

The Fitzsimmons hearsay was relevant, providing a startling allegation which would more than tend to fasten Dudley's memory to the referenced car which he had helped take apart a few days before. However, there were already a number of circumstances brought out in direct examination which were unusual

about the car in question. When Dudley arrived at work at his usual time, he found Fitzsimmons, Whalen and another already working on the car. Usually, Dudley was the first to begin a dismantling and the others joined later. It was unusual for Fitzsimmons who worked only a few hours a day to be there so early. The car had been put in the dismantling bay, facing out. The procedure always was for the car to be facing in, to facilitate removing the engine with a hoist and put it on a rack. Instead a loader was used and the engine was placed on the side of the building. He helped take parts to be disposed of a Rusmart. (Tr. 3/74-77). What Fitzsimmons told Dudley a few days letter was relevant as merely corroborative of Dudley's memory of the car and its disposal.

The judge gave no indication of weighing the prejudicial effect against relevance. He said that the evidence was being offered for a non-hearsay purpose and "[t]here's no reason for the Court not to accept it." (Tr. 3/96). Balanced against the marginal relevance of what Fitzsimmons said, it was damning if the jury, contrary to the limiting instruction, took the statement for its truth. Fitzsimmons, who would know, directly said that the car was the scene of a murder. As was true with Fredette's and Trotto's threats and actions preceding Harkins' disappearance, the trial judge abused discretion in admitting testimony whose prejudice far outweighed its relevance. See Qualls, 425 Mass. at 172-173.

IV. OFFICER HARNEY'S TESTIMONY THAT HE ARRESTED ELI SAMIA ON MARCH 9, 1994, WAS NOT ADMISSIBLE BECAUSE THE ALLEGED JOINT VENTURE HAD ENDED. THE GUN AND COCAINE POSSESION TESTIOMNY WAS PREJUDIAL, AND HIS TESTIMONY THAT TROTTO RAN A DRUG OPERATION WITH FREDETTE AND SAMIA UNDER HIM LACKED FOUNDATION AND SHOULD HAVE BEEN EXCLUDED.

Retired Vice Squad Officer Brendan Haney investigated Trotto's alleged illegal drug business in 1993 and 1994. He was engaged in surveillance and making arrests as part of the investigation. He testified that he was involved in the September 1993 arrest of Fredette and, over objection, the March 1994 arrest of Samia. (Tr. 6/52). The Court ruled that the arrest of Samia was admissible as relevant to "defendant's state of mind, his intention, motive, or the existence of a plan or scheme in joint venture." The Court so instructed the jury. (Tr. 6/60). The March 9 arrest resulted from the witness's observation of Samia engaged in an apparent drug sale. (Tr. 6/66). Harney arrested Samia in his car and seized cocaine, a pager, and a gun. He had previously seen Samia in possession of a gun, and knew that he had a license to carry a firearm. The Court gave an instruction limiting use of the "bad acts" evidence to "the issues of joint venture as I have defined them for you." (Tr. 6/71-72, 76).

The witness also testified, over objection, that, from his and his unit's investigation, he knew that the hierarchy of Trotto's organization was "Matteo was the main man. Under him was John Fredette and Eli Samia. There were also

others involved." (Tr. 6/61-62). Subsequently, the witness testified that, on five occasions, he had observed Trotto, Fredette and Samia together at Trotto's bar, watching a workman. He observed Samia driving a blue Impala, which, at some point, was repainted black. (Tr. 6/63-64).

The witness also found in Samia's wallet a business card with a VIN written on it. The VIN led to information from the Registry of Motor Vehicles website that the VIN was for a 1985 Impala, owned by defendant, which had been stopped by police in Millbury at 2:10 A.M. on February 16, 2022. (Tr. 6/79-80). The witness also retrieved the license plates associated with the VIN from the RMV office in Worcester. (Tr. 6/80-83).

Officer Harney's testimony was erroneously admitted over objection for several reasons. The time of Samia's arrest on March 9, 1994, was several weeks after Harkins' disappearance. The alleged joint venture had to have ended by February 16, the date of the alleged dismantling of the car at Trotto's direction. There were no other subsequent events related to the joint venture or any effort to conceal the alleged crime. The Commonwealth argued that the joint venture was a secretive narcotics operation which continued after Harkins' disappearance. (Tr. 6/56-57). As argued in part II, supra, the alleged drug ring was not the joint venture charged and was open-ended, by the Commonwealth's theory, from before

Samia first met DiCicco to his arrest by Harney. The prejudice from that kind of open-ended joint venture was the admissibility it lent to the piling on of propensity evidence of long time gun possession and drug distribution to prove the very narrow criminal charge of joint venture to murder. See Commonwealth v. Winquist, 474 Mass. 517, 522–524 (2016); Commonwealth v. Colon-Cruz, 408 Mass. 533, 543 (1990). The drug distribution claim, unaccompanied by proof of conviction, served only to paint Samia as a criminal. The testimony about Samia having a gun when arrested was also objected to. It was well-established that Samia was a licensed gun owner who carried his weapon regularly.[18] (E.g., Tr. 3/167, 202-203 (St. Pierre); (Tr. 4/42) (DiCicco).

Samia's wallet, searched by Harney, yielded a business car with a VIN written on the back. That led to discovery of the Millbury stop on February 16 and the return of the license plates to the RMV that day. That relevant information could have been elicited without the testimony about viewing Samia allegedly distributing cocaine and having a gun at the time.

The second error during Harney's testimony was his assertion, over objection, that he knew from his surveillance, and that of his team, that Samia had been part of Trotto's operation. He gave no specific instances to support that claim. He merely had seen Samia hanging around Trotto's bar with Fredette and Trotto

18 Defendant objected to the introduction into evidence of the gun. (Tr. 5/152).

while they watched work being done on the building. (Tr. 6/63-64). On the basis of such a vague foundation, Harney named Samia as part of a criminal conspiracy headed by Trotto. Contrast Commonwealth v. Barbosa, 477 Mass. 658, 668 (2017) (police testimony about details of gangs sufficiently based on personal knowledge). Whether Harney was "expert" on Worcester's illegal narcotics businesses, or just a very experienced vice squad officer, does not affect the admissibility of his testimony. He crossed the line from "explanatory" testimony to "'conclusory' [testimony] or 'couched simply in terms of whether a defendant did or did not commit a particular offense'". Commonwealth v. Lowery, 487 Mass. 851, 871 (2021), quoting Commonwealth v. Tanner, 45 Mass. App. 576, 581 (1998).

The "particular offense" of a drug conspiracy was not part of the offense as charged. It was, rather, the linchpin for the Commonwealth's sweeping claim of a joint venture so broad that it was a font of damaging, otherwise inadmissible hearsay. The testimony was highly prejudicial because it was the only testimony that Samia, Trotto and Fredette were in a narcotics conspiracy. If the "joint venture" was a narcotics conspiracy, Harney's testimony put Samia in the middle of it. Otherwise, the Commonwealth had to rely on pieces of circumstantial evidence, not very persuasive: St. Pierre testified that Samia handed Fredette his gun to intimidate St. Pierre when he wanted to be paid for work done to pay a drug

debt to Trotto and gave his opinion that they kept him around for his gun (Tr. 3/211).

V THE COURT ABUSED DISCRETION IN OVERRULING OBJECTION TO TESTIMONY OF DEFENDANT'S FORMER GIRLFRIEND THAT WHEN THEY MET HE SOLD HER DRUGS FOR SEVERAL MONTHS.

Pamela DiCicco testified that she first met Eli Samia at Greendale's Pub and bought drugs from him. Over objection, the Court ruled that the testimony was offered, not for a "bad act' purpose, but to show "the context within which their relationship evolves." The judge thereupon instructed the jury that the alleged drug activity "is in no way relevant in any way to the indictments in this case. . . . The testimony is simply offered to you to give context to this witness's testimony, for no other purpose . . . ." She continued buying drugs from him for several months. After they began dating, he insisted that she not use drugs, and she stopped. (Tr. 36-39).

The prejudicial effect of the testimony "does not substantially outweigh the relevance." Holliday, 450 Mass. at 815. The judge's finding and instruction that the drug dealing gave "context" to the witness's relationship with Samia, and for no other reason, was of minimal relevance. It was another instance of the Court allowing in bad acts evidence indirectly bolstering the Commonwealth's theory of

the case. The witness did not testify that Samia was part of a drug operation with Trotto or Fredette, the alleged joint venture; it imperishably showed only criminal behavior, and regular (licensed) gun possession, propensity evidence. Andre, 484 Mass. at 415.

VI. IT WAS A VIOLATION OF DEFENDANT'S FOURTH AND FIFTH AMENDMENT RIGHTS AND DECLARATION OF RIGHTS ARTICLES 12 AND 14 FOR FORMER MILLBURY POLICE OFFICER MARK MOORE TO TESTIFY, OVER OBJECTION, THAT ELIAS SAMIA HAD REFUSED MOORE'S REQUEST TO SEARCH THE CAR DRIVEN BY SAMIA.

At about 2:00 A.M., on February 16, 1994, three hours or more after Kevin Harkins left Suney's, Officer Mark Moore stopped a "blue" 1985 Chevy Impala which was traveling 10 mph over the speed limit. He was joined by a back-up officer. Elias Samia was the driver and John Fredette the passenger. Samia did not have the registration, saying that he had sent it to the insurance company after having the car repainted. He could not explain why he did that. Samia said that he was coming from the Anchor Inn, which was inconsistent with the direction in which he had been driving. (Tr. 3/253-257, 261-262, 265).

Over objection, Officer Moore testified that he asked Samia for “consent to search his motor vehicle”. Moore testified that he “repeatedly” asked for permission and was not given permission. (Tr. 3/262, 264-265). The prosecutor,

in closing argument, alluded indirectly to Samia's refusal to allow Officer Moore to search. The prosecutor stated that Samia brought the car to Ace Auto because "[they] know what's inside the car. They know what can be found in the car. . . . They know why they need to get rid of that car." (Tr. 8/92).

Authority in numerous state and federal courts appears unanimous in ruling that use of a defendant's lawful refusal to allow a search of a constitutionally protected area as evidence of guilt is a violation of the defendant's Fourth Amendment rights. United States v. Runyan, 290 F.3d 223, 249-250 (5th Cir. 2002) (citing cases); Bosse v. State, 400 P.3d 834, 847-850 (Okla. Crim. 2017) (collecting and discussing cases). The testimony also violated Samia's rights under Article 14 of the Massachusetts Declaration of Rights against unreasonable searches. It also violated defendant's right under the Fifth Amendment and Article 12 of the Declaration of Rights, against compelled self-incrimination. See Bosse, 400 P.3d at 847; Commonwealth v. Jones, 481 Mass. 540, 542 (2019); Commonwealth v. Gelfgatt, 468 Mass. 512, 514 (2014).

Before a "[F]ederal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). The "essential question" in analyzing harmlessness beyond a reasonable doubt is "whether the error had, or

might have had, an effect on the jury and whether the error contributed to or might have contributed to the verdicts." Commonwealth v. Perrot, 407 Mass. 539, 549 (1990). As an appellate court, "we ask whether on the totality of the record before us, weighing the properly admitted and the improperly admitted evidence together, we are satisfied beyond a reasonable doubt that the tainted evidence did not have an effect on the jury and did not contribute to the jury's findings." Commonwealth v. Tyree, 455 Mass. 676, 701 (2010).

In this case, the impermissible testimony violating defendant's federal and state constitutional rights was highly prejudicial evidence of consciousness of guilt. The prosecutor did not mention the refusal in closing argument but it supported his argument that "[t]hey knew what was inside the car" (Tr/ 8/92), evidence of murder. The erroneously admitted evidence of refusal to search the car gave strong support to the Commonwealth's theory that the car was later disposed of because it evidenced a murder. It was not harmless error.

VII. THE PROSECUTOR'S CLOSING ARGUMENT IMPERMISSIBLY BOLSTERED DENARIS' CREDIBILITY BY FALSELY CLAIMING THAT DENARIS WAS CORROBORATED BY POINTS TESTIFIED TO BY FOUR OTHER WITNESSES WHOSE TESTIMONY WAS UNKNOWN TO DENARIS.

Richard Denaris was a key witness, testifying that Fredette and Samia

affirmed in his presence their roles in the kidnapping and murder of Kevin Harkins. His credibility was weak. He had prior convictions, violated probation, and was held in the Worcester jail pending trial for malicious destruction of property and breaking and entering. He knew that the three men accused of Harkins' murder were being held pending trial, so he did not fear for his safety. His get out of jail card was telling his story about Fredette and Samia to police. He played the card and was not only set free the same day but was brought into court and the charges were dropped. There was no corroboration of his story other than some publicly known details published in the Worcester Telegram, which he had read. (Tr. 3/107-110, 118-119, 127-129, 133, 136).

The prosecutor, in his closing argument, supplied the vital corroboration. He told the jury that Richard Denaris' testimony was credible because his testimony reflected the details of four incidents involving Samia which had been testified to by other witnesses, i.e., "the things he couldn't know about the evidence." (Tr. 8/87). The prosecutor's offending statements are set out below, in italics preceded by numbers:

> But think of how the things he says fits into the evidence, and the things he couldn't know about the evidence. What does he say about what Fredette says? They could have just beaten him up. Okay? Fredette isn't standing in court and saying, We're going to kill

him. He's saying, "Oh, the things I'm going to do to that guy."

Fredette isn't saying in the car -- about the car, I'm glad you shot him, Eli. He's saying, We could have just kicked the daylights out of him, or, We could have just continued beating him.

(1) How would he know that that's what Fredette is saying in court that day? How does he know that's what Beahn is going to say that Fredette said? There's no evidence he ever would have known that.

(2) How does Richard Denaris know that Pam DiCicco is going to come in and testify on the stand that Eli Samia's the one who carries the gun every day, except for family events.

[3] How does Richard Denaris know that Brendan Harney's going to come in and say that Eli Samia's the guy who had the gun on him when he was arrested? [4] How is Richard Denaris going to know *who the person that's going to have the gun and hand it to John Fredette is down at the Buona Fortuna?* How does he know these things? Because he is going to say that Eli Samia's the one who pulled the trigger. (Tr. 8/87-88).

Denaris testified that Fredette in 2008 said that they could have just beaten Harkins in the car. (Tr. 3/18). The prosecutor's argument seemed to be claiming that Denaris could not have known of Beahn's testimony; therefore Denaris' attributing to Fredette a wish only to have beaten Harkins gave credibility to his testimony.

Fredette's excited statement in court as he faced time in prison because of Harkins' non-appearance was not a threat limited to inflicting a beating. Beahn dramatically stood up, to show Fredette's reaction to his sentence, and testified that Fredette said "if I ever catch the motherfucker that did this . . . the things I'm going to fucking do." (Tr. 5/99). The prosecutor mischaracterized Fredette's reaction as a statement of intent to engage in a beating, and only a beating. Fredette was enraged, the threat was ominous, and could have implied an intent to kill, Further, the claim that Fredette's 2008 statement related back to his February 1994 threat is belied by the prosecution's evidence that, after Fredette's arrest, he told St. Pierre that he would kill the informant. (Tr. 3/182). Also after the arrest, Fredette told Beahn that if he were the informant, that they "we can get this taken care of today." (Tr. 5/80). And, after the arrest, Trotto went into Suney's, started choking Beahn with a drawstring, and threatened to kill him. (Tr. 3/215-216).[19] Harkins' perceived betrayal on top of the suspicion that he was the informant, would not be expected to provoke a threat limited to beating.

The prosecutor's mention of the several witnesses testifying to Samia's gun possession had a fanciful link to the Denaris testimony that Samia shot Harkins. Denaris saying that Samia possessed a gun took no imagination if he was telling a false story. A gun is a very common murder weapon. Denaris had worked and

19 Harkins told Beahn that Trotto would kill him if he were the informant. (T. 5/77).

socialized with Samia, who had had a licensed gun. (Tr. 3/211). The argument created non-existent corroborative links to the testimony of St. Pierre, Harney and DiCicco. The language used also risked being misunderstood as Denaris testifying to some knowledge of the events recounted by those three witnesses. His testimony did not refer to any of those incidents.

The prejudice from the prosecutor's claims was enormous. If the jury credited his assertions, they were highly persuasive correlations bolstering Denaris' credibility. Denaris saying that Samia admitted shooting and Fredette said a beating would be enough were not, as the prosecutor stated, "they were things he couldn't know about the evidence." (Tr. 8/87). Such corroboration would be the factor which eclipsed doubts about Denaris' credibility. The prosecutor was giving needed credibility to Denaris on the basis of implausible references to the other witnesses' testimony.

"Closing argument must be limited to discussion of the evidence presented and the reasonable inferences that can be drawn from that evidence." Rakes, 478 Mass. at 45 (quoting cases). As with the correlation with Beahn's testimony of Fredette's in-court threat, the argument about the corroboration from other testimony was not "reasonable and possible". The argument crossed "the fine line separating inference from speculation" and was impermissible. See id. at 45, 46.

VIII. IT WAS ERROR TO DENY THE MOTIONS FOR A REQUIRED FINDING OF NOT GUILTY ON SO MUCH OF THE MURDER INDICTMENT CHARGED FIRST DEGREE FELONY MURDER BASED ON AGGRAVATED KIDNAPPING.

Defendant Samia was indicted for the murder of Kevin Harkins. The Commonwealth's theories were deliberate premeditation and felony murder, based on aggravated kidnapping. The jury convicted of first degree murder on both theories. (Tr. 11/5). The judge instructed the jury that, for first degree felony murder, the alleged underlying felony was aggravated kidnapping. An element of that crime to be proved was that the offense was committed "while armed with a dangerous weapon and inflicted serious bodily injury . . . ." (Tr. 8/128).

Alleged joint venturer John Fredette was also convicted of first degree murder on a theory of felony murder based on aggravated kidnapping. In reviewing his conviction, this Court noted that the aggravated kidnapping alleged in the indictment was based on M.G.L. c. 265, §26, third par. (kidnapping "while armed with a dangerous weapon and inflict[ing] serious bodily injury thereby upon another person"). That paragraph was not added to the statute until 1998, four years after the alleged 1994 Harkins kidnapping. A first degree murder verdict based on the 1998 addition of par. 3 cannot stand. Commonwealth v. Fredette, 480 Mass. 75, 86-88 (2018).

Fredette was convicted of first degree murder only on the theory of felony murder. This Court remanded for the trial judge to choose between reducing the verdict to second degree murder and ordering a new trial. In the Samia case, defendant was convicted also on a theory of premeditation. Without waiving his arguments for a new trial, reducing the verdict is the appropriate remedy.

IX. THE TRIAL JUDGE ERRED IN DENYING THE NEW TRIAL MOTION BECAUSE WEATHER DATA CONCLUSIVELY SHOWED THAT THE POND INTO WHICH WHALEN CLAIMED TO HAVE THROWN THE CAR DOOR AND PARTS WAS FROZEN SOLID, DESTROYING THE CREDIBILITY OF HIS BELATEDLY DISCLOSED ROLE IN ALLEGEDLY DISMANTLING SAMIA'S IMPALA.

The weather data summary (R,A, 25-26) establishes that a hard freeze had preceded February 16, 1994, the day on which witness James Whalen claimed that he and Alan Dudley had thrown two doors and possibly "some other stuff" into the small pond behind Rusmart. (Tr. 4/183). The average maximum temperature, from February 1 through 15 was 24.3 degrees. The average low temperature for the same period was 7.9 degrees. The only temperatures above freezing were 40 on February 5, and 33 on February 6. The pond must have had a thick layer of ice on February 16. (The high temperature was 27 on that day)(R.A. 26).

James Whalen testified that "we" threw two doors and possibly other parts, "in the pond". He did not say that the parts were thrown onto the ice. He and

Dudley "[j]ust whipped them into the water." They threw them far enough "to be submerged". Whalen recalled the car as being black, having been repainted from blue. (Tr. 4/175, 183, 196-197). Alan Dudley had a differing recollection. He remembered a blue car, not black. He testified that the parts were left behind Rusmart against a dumpster. He did not throw the parts into the pond. (Tr. 3/77, 83, 89-90). In July 2005, fire department divers retrieved from the pond a car door and rear quarter panel. (Tr. 3/112, 115, 144). The Commonwealth's expert testified that the parts were consistent with the make and model (1985 Impala) of Samia's car. But they were also consistent with other makes and models from the mid-1980s. (Tr. 4/238).

The Whalen testimony should have been impeached with the weather records showing that it was impossible for the pond to have been ice-free on February 16. Without Whalen, the parts in the pond were not linked to Samia's car. The expert's testimony would therefore be without foundation.

Further, Whalen's credibility in general would have been undermined. He testified that he recognized Eli Samia's car from having worked on it. (Tr. 4/172-175). Whalen's linking the dismantled car to Samia and his testimony linking the car parts found in the pond, would have been undermined by his false recollection that he threw car parts into a frozen pond.

Trial counsel, Joan Fund, has submitted her affidavit. (R.A. 27-28). She does not recall whether she checked on the temperatures in the weeks before the alleged disposal of the car parts into the pond. In any event, she did not introduce evidence of weather conditions to contradict Whalen's testimony. There was no tactical reason to explain her omission.

In a first degree murder appeal, the Supreme Judicial Court will apply the standard of substantial likelihood of a miscarriage of justice to issues not preserved at trial:

> [T]he statutory standard of § 33E is more favorable to a defendant than is the constitutional standard for determining the ineffectiveness of counsel. In deciding this case, therefore, we need not focus on the adequacy of trial counsel's performance. In reviewing each claim of the ineffectiveness of trial counsel, therefore, we shall consider whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion." Commonwealth v. Wright, 411 Mass. 678, 682 (1992).

Stated differently: "Where there has been an error in a trial resulting in a conviction of murder in the first degree, 'a new trial is called for unless we are substantially confident that, if the error had not been made, the jury verdict would have been the same.'" Commonwealth v. Tavares, 471 Mass. 430, 441 (2015) (quoting cases).

For purposes of review under the United States Constitution, the standard of

ineffective assistance of counsel was defined in Strickland v. Washington, 466 U.S. 668, 691, 694 (1984). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Failure to do so leads to the second question, prejudice: " The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

> Both the Massachusetts and Federal Constitutions require defense counsel 'to conduct an independent investigation of the facts.' . . . While defense counsel need not investigate every possible lead, any decision not to investigate or to limit an investigation must be supported by reasonable professional judgment. . . . Absent a reasonable investigation, defense counsel lacks sufficient information to evaluate his or her strategic options and to make decisions in the best interests of the client." Commonwealth v. Perez, 484 Mass. 69, 74 (2020).

Defendant did not need to present expert testimony, as the trial judge ruled. (R.A. 34) The temperature data for the month preceding February 16 could only have led to a thick layer of ice on a small pond. That inference was within the jury's competence to draw, without the testimony of an expert. See, e.g., Commonwealth v. Colin C., 419 Mass. 54, 59-60 (1994).

In the present case, the dismantling and disposal of the alleged Samia car

was very significant circumstantial evidence that Samia's vehicle was involved in the homicide. Key to that evidence was the retrieval of a door and panel from the pond into which Whalen claimed that he and Dudley had thrown them. The expert sealed the inference by testifying that the parts were consistent with the known parts of a 1985 Impala. Had counsel adduced evidence that the pond had to have been frozen, the Whalen testimony would have been conclusively contradicted.

There was no reasonable or tactical basis for not investigating and proving the frozen condition of the pond on February 16. Worcester weather in the first half of any February was likely very cold. Ponds in central Massachusetts are often frozen at that time of year. Failure to undermine Whalen's credibility "was likely to have influenced the jury's conclusion" Wright, 411 Mass. at 682 The Court cannot be "substantially confident" that, without the error "the jury verdict would have been the same." Commonwealth v. Tavares, 471 Mass at 441-442. Moreover, under under the Sixth Amendment, there was a "reasonable probability that . . . the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

X. THIS COURT SHOULD EXERCISE AUTHORITY UNDER M.G.L. c. 278, §33E, TO ORDER A NEW TRIAL BECAUSE THE CUMULATIVE EFFECT OF "BAD ACTS" EVIDENCE AND DAMNING STATEMENTS OF "JOINT VENTURERS" TROTTO AND FREDETTE POSED A SUBSTANTIAL LIKELIHOOD OF A MISCARRIAGE OF JUSTICE.

Reviewing a first degree murder conviction, this Court is mandated by M.G.L. c. 278, §33E, to "consider the whole case, both the law and the evidence, to determine whether there has been any miscarriage of justice." Commonwealth v. Gunter, 459 Mass. 480, 485-486 (2011), quoting Dickerson v. Attorney General, 396 Mass. 740, 744 (1986). In the present case, if none of the errors argued individually merit reversal due to insufficient prejudice, the cumulative effect of the errors should be considered. The inquiry should be informed by this Court's treatment of cumulative errors noted in a post-appeal new trial motion decision. Commonwealth v. Rosario, 477 Mass. 69 (2017). The Court there stated that the reviewing court "may need to look beyond the specific, individual reasons for granting a new trial to consider how a number of factors act in concert to cause a substantial risk of a miscarriage of justice and therefore warrant the granting of a new trial." A "confluence of factors combined" may lead to a miscarriage of justice. Id. at 77-78. Under the "substantial likelihood of a miscarriage of justice" standard, the test of prejudice would be whether the combination of "error[s] was likely to have influenced the jury's conclusion." Commonwealth v.

Nieves, 429 Mass. 763, 766 (1999)(quoting cases).

In the present case, as argued in parts I and II, the Commonwealth used the hearsay exceptions for threats, violence and drug-related activity of Trotto and Fredette to persuade the jury that Harkins was their victim. The prosecution tied Samia to them, not by his own actions toward Harkins, but by impermissible testimony about his role in cocaine distribution. Officer Harney was allowed to testify about Samia's arrest for cocaine distribution after the alleged joint venture had ended. He gave the unsubstantiated opinion that Samia was a part of a drug dealing operation, with Trotto above him. (part IV). Former girlfriend Pam DiCicco testified about him providing her with drugs, long before the events of 1993-1994. (part V). Alan Dudley testified to Fitzsimmons' claim that someone had been shot in the dismantled car. (part III). Officer Moore's testimony about Samia's repeated rejection of requests to search the trunk gave rise to the inference that he was hiding something, exploited by the prosecutor in closing argument to suggest that there had been a body or evidence of a homicide being hidden. (part VI). The absence of evidence to show that the pond must have been frozen was a lost opportunity seriously to undermine Whalen's credibility. (part IX). The prosecutor's closing argument improperly attributed corroboration of Denaris by the details testified to by other witnesses. (part VIII).

Finally, the prosecution's evidence showed that Samia always carried a (licensed) firearm with him. From the time of DiCicco's relationship with him to the arrest by Officer Harney, the trial was peppered with objected-to references to Samia's regular gun possession. (E.g., Tr. 3/167, 202-203) (St. Pierre); (Tr. 4/42) (DiCicco).) The time frame of his carrying a licensed gun spanned years. It far exceeded the limitation that testimony about gun possession should be limited to "a reasonable time of the crime charged . . . . " Perez, 460 Mass. at 695. The cumulative effect of that testimony painted Samia as a potentially violent drug dealer with no evidentiary link to the alleged shooting of Harkins.

Taken together, the hearsay exceptions and other errors used by the Commonwealth produced marginally relevant, but damning testimony against defendant Samia. It was a case of "piling on" of bad acts and propensity evidence with very thin relevance to justify it. The other errors argued in this brief added more prejudice, with a cumulative effect of a substantial likelihood of a miscarriage of justice.

CONCLUSION

It is urged that the judgment of conviction be reversed. In the alternative, it is urged that the judgment of guilty of first degree felony murder be reduced to second degree murder.

Respectfully submitted,

ELIAS SAMIA

__Richard J. Shea_____

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June 2022

ADDENDUM

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Commonwealth of Massachusetts
County of Worcester
The Superior Court

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CRIMINAL DOCKET#: WOCR2012-00178

Commonwealth

vs.

Elias Samia

VERDICT SLIP

1. ( ) Not Guilty

2. (✓) Guilty- MURDER, FIRST DEGREE c265 s1

("/(Theory of Deliberate Premeditation

(t""(Theory of Felony Murder (Aggravated Kidnapping)

3. ( ) Guilty - MURDER, SECOND DEGREE c265 s1

( ) With Malice

( ) Theory of Felony Murder (Kidnapping)

Dated 10/ ! / /2014.

Joanna E. Wagner
FOREPERSON OF JURY

VERDICT OF THE JURY returned and affirmed this 30 th day of October, 2014.

Attest: Karen A Zona
Assistant Clerk

Daniel Wrenn
Associate Justice of the Superior Court

Jennifer Witaszek
Court Reporter

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
CRIMINAL ACTION
NO. 12CR00178

COMMONWEALTH

vs.

ELIAS SAMIA

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

Following a jury trial, the defendant, Elias Samia (defendant), was convicted of murder of one Kevin Harkins (Harkins). Before this court is the defendant's motion for a new trial pursuant to Mass. R. Crim. P. 30(b). The defendant alleges that his trial counsel was ineffective by choosing not to introduce historical weather data that purportedly would have impeached a key witness's testimony at trial and resulted in a different verdict. For the following reasons, the defendant's motion is DENIED.[1]

FACTUAL BACKGROUND[2]

The case against the defendant and his co-defendants, Matteo Trotto ("Trotto") and John Fredette ("Fredette") had been developed over a period of some twenty years. Harkins, who worked at Suney's ("Suney's") Pub in Worcester as a bartender and bouncer, was last seen on February 15, 1994. The investigation of the co-defendants arose from allegations that they were in

[1] The court finds that the defendant's claims can be decided on the papers, supplemented by oral arguments of counsel, because he did not raise a substantial issue warranting an evidentiary hearing. See *Commonwealth* v. *Goodreau,* 442 Mass. 341, 348 (2004).

[2] The court notes that the defendant's counsel did not provide it with the transcript of the trial. The court therefore relies on representations of counsel and the court's memory of the trial with regard to the facts of the case.

the illicit drug business together and were very close friends.. During the investigation, the Worcester Police Department (WPD) began to suspect that their illicit enterprise was connected to Harkins' disappearance.

The police arrested Fredette for trafficking in cocaine based on the information provided by Donald St. Pierre ("St. Pierre"), who used to purchase cocaine from Trotto and Fredette. Fredette expressed a belief that Harkins provided the information to the police about Fredette's drug enterprise, because Harkins was friends with Fredette's arresting officer, Timothy O'Connor. Fredette told St. Pierre he was going to kill the informant. Fredette also told St. Pierre that Harkins was going to give false testimony in court for him, and that if Harkins did not show to do so, Fredette would kill him.[3]

On February 14th, Harkins tailed to appear at Fredette's trial. As a result, Fredette took a plea deal that same day, pleading guilty to cocaine distribution.[4]

On the evening of February 15th, Harkins was seen inside Suney's drinking beer and playing pin ball. There was testimony at trial that Trotto came into the bar that night and motioned to Harkins to come outside with him. Harkins walked out with Trotto, leaving his cigarettes, some money, his keys, half a glass of beer, and his Celtics coat. He did not return to the bar that day. He was supposed to work at Suney's at 12 p.m. on February 16, 1994 but did not show up for work that day.

In the early morning hours of February 16th, a Millbury police officer stopped a black 1985 Chevy Impala for exceeding the speed limit.[5] The car was registered to Samia. There were two

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[3] Harkins was a drug dependent person. He received cocaine from Trotto in exchange for testifying at Fredette's trial. He was terrified of testifying but was afraid that Trotto would kill him if he did not.

[4] Fredette did not start his sentence on that date as the trial judge stayed the sentence execution until February 18, 1994.

[5] The license plates were for a blue 1985 Chevy Impala, but it was repainted black.

occupants in the car; Samia was the driver and Fredette was the passenger. Samia told the officer that they were coming from a local bar, which was in a location inconsistent with the direction of the car. The police officer asked Samia "if he had any drugs, guns, dead bodies in his vehicle," a standard question to test a driver's reaction. Samia did not respond. The officer then asked him for permission to search the car, which Samia refused. The officer allowed Samia to leave and went to his address in Millbury, He stayed there for one hour, but Samia did not return in that time. He never saw Samia's car again.

At 5:30 a.m. on February 16, 1994, James Whalen ("Whalen"), an employee of Ace Auto Sales in Charlton ("Ace"), was called into work to assist in dismantling a car. When he arrived, he noticed a black 1985 Chevy Impala that he recognized as Samia's.[6] Trotto showed up at Ace shortly thereafter. He told Whalen to get rid of the car and keep his mouth shutor he and his family would never be safe.

Whalen and other employees dismantled the car. The parts were disposed of in several places, including behind the building and at another garage where they were cut up into smaller pieces. The doors were taken to Rusmart Auto Trim ("Rusmart"), another business operated by Ace's owner. Whalen and his co-worker Alan Dudley ("Dudley") threw two doors into a small pond behind Rusmart, Because the doors were heavy, they could not be thrown far, but it was enough if they were submerged. Whalen estimated that the doors were put in the water within about ten feet of the shore.

Dudley also worked on dismantling the car. He remembered putting the doors into a van and taking them to Rusmart. He stated that the doors were left next to a dumpster. He testified that

[6] Whalen recognized the sticker he had put on the carburetor when he worked on the defendant's car. The car paint job was also distinctive because when the car was painted black over blue, the outside was black but the doorjambs remained blue.

dismantling the car stood out in his memory because the owner of Ace told him that someone had been shot in the car.

On March 9, 1994, the defendant was arrested as a result of the narcotics investigation. As part of the investigation, the police linked the 1985 Chevy Impala to the defendant. The police also learned that the defendant turned in the license plate from the Chevy Impala to the Registry of Deeds on February 16, 1994.

In 2005, eleven years after Harkin's disappearance, authorities recovered one car door, parts of a roof, a hood, and the right rear quarter panel of a vehicle, among other parts, from the pond behind Rusmart. An expert examined the recovered door and quarter panel in comparison to parts removed from a known 1985 Impala. She testified that the door and panel from the pond were consistent with the known 1985 Impala parts.

Richard Denaris ("Denaris"), Fredette's son, testified that, in 2008, Fredette, Samia, and himself came upon the topic of Harkins' disappearance during a conversation. Over Fredette's repeated directives to him to "shut up," the defendant started talking about the "guy in the paper." The defendant said that he did what he had to do for the family. Fredette then stated that "they could have just kicked his ass," to which the defendant replied, "You and I were fucking him up and it got out of control, and I had to take a gun and shoot him." The defendant said that Trotto was driving on the night of Harkins' disappearance, and that he did not have a key to the trunk because the car had just been painted ..He mentioned getting stopped by the police later and "that the cop was lucky that he stopped searching when he did." The defendant said that Harkins' body was buried in a shallow grave using lime so that the pigs would get whatever the lime did not dissolve.

DISCUSSION

Massachusetts Rule of Criminal Procedure 30(b) permits a judge to grant a new trial, but only if "it appears that justice may not have been done." "Judges are to apply the rule 30(b) standard rigorously and should grant such motion only if the defendant comes forward with a credible reason that outweighs the risk of prejudice to the Commonwealth." Commonwealth v. Kolenovic, 471 Mass. 664, 672 (2015). "Where a new trial is sought based on a claim of ineffective assistance of counsel, the burden of proving ineffectiveness rests with the defendant." Id. at 673, quoting Commonwealth v. Montez, 450 Mass. 736, 755 (2008).

"Under the familiar Saferian test, a defendant is denied constitutionally effective assistance of counsel if the representation fell 'measurably below that which might be expected from an ordinary fallible lawyer,' and that the performance inadequacy 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" Kolenovic, 471 Mass. at 673, quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).[7] "An available ground of defense is 'substantial' for Saferian purposes where we have a seriousdoubt whether the jury verdict would have been the same had the defense been presented." Commonwealth v. Millien, 474 Mass. 417, 432 (2016). The standard for ineffective assistance of counsel is quite high. "Where ... trial tactics are challenged, a defendant must show that the choice made by counsel was 'manifestly unreasonable.'" Commonwealth v. Anderson, 398 Mass. 838, 839 (1986) (citation omitted). "The manifestly unreasonable test . . . is essentially a search for rationality in counsel's strategic decisions, taking into account all the circumstances known or that should have been known to counsel in the exercise of his duty to provide effective representation and not whether counsel could

[7] "[Article] 12 of the Massachusetts Declaration of Rights provides broader protection than do the Sixth and Fourteenth Amendments." Commonwealth v. Richard, 398 Mass. 392, 393 (1986). "[I]f the Saferian test is met, the Federal test is necessarily met as well." Commonwealth v. Fuller, 394 Mass. 251, 256 n.3 (1985).

have made alternative choices." Kolenovic, 471 Mass. at 674-675 (citation omitted).

In the motion for a new trial, the defendant contends that his trial counsel was ineffective because of her failure to introduce historical weather data showing that a "hard freeze" in the weeks preceding February 16, 1994 would have frozen the surface of the pond into which Whalen had thrown parts from the defendant's car on the morning after Harkins' disappearance. He contends that Whalen's testimony should have been impeached with the weather records showing that it was impossible for the pond to have been ice-free on February 16th. The defendant submitted an affidavit from trial counsel, Joan Fund, in support of the motion for a new trial, together with a certified copy of the National Weather Service's summary of temperature, precipitation, and other meteorological data for Worcester, Massachusetts, from January 1, 1994 to March 31, 1994. In her affidavit, trial counsel stated that she did not recall whether she had obtained weather records for the time frame in question. She offered no tactical reason for her failure to obtain such records or to call an expert to determine if the pond was frozen solid at that time.

The court finds that the defendant's claim lacks merit. First, the Commonwealth correctly points out that that the defendant's assumptions regarding the state of the pond on February 16, 1994, and his assertions that "[t]he pond must have had a thick layer of ice on February 16" and "[p]onds in central Massachusetts are often frozen at that time of year," are entirely speculative. There is no evidence or affidavit indicating that an expert could make such a determination. Commonwealth v. Gonzalez, 443 Mass. 799, 811 (2005). Claims of ineffective assistance "must be shown by specific instances of attorney incompetence, not by mere speculation ..." Id. (internal quotations and citation omitted).

Second, evidence that a "hard freeze" in the weeks preceding February 16, 1994 would have allegedly frozen the surface of the pond would not have affected the jury's verdict in light of the

overwhelming evidence linking Samia to the car involved in Harkins' disappearance. The jury heard that Trotto ordered Whalen to destroy the car threatening to kill him and his family if he did not comply. The jury heard evidence that the defendant canceled the car's registration and turned in its license plates on the day of Harkins' disappearance. The jury also learned that Whalen, who recognized the car as Samia's, and Dudley took the car apart and dumped several of its parts into the pond. The car parts found in the pond, including a door and quarter panel, were consistent with the type of car the defendant had been driving when Harkins disappeared. Further, the location where the parts were found in the pond was consistent with Whalen's testimony as to where he disposed of the parts. Accordingly, there is no reason to believe that, had the defendant's trial counsel introduced the weather records, the outcorne of the trial would have been different causing any prejudice to the defendant, See Millien, 474 Mass. at 432.

In conclusion, this court does not find that any lack of effective assistance of counsel deprived the defendant of his rights guaranteed by the United States Constitution or the Massachusetts Declaration of Rights. The defendant's motion is therefore denied.

ORDER

For the reasons set forth above, it is ORDERED that the defendant's motion for a new trial is DENIED.

Dated: July 12, 2021

Daniel M. Wrenn
Justice of the Superior Court

U.S. Const. Amend. IV:

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

U.S. Const. Amend. V:

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

Mass. Declaration of Rights, Art. 12:

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

Mass. Declaration of Rights, Art. 14:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a

civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

CERTIFICATE OF COMPLIANCE
MASS.R.APP. 16(k)

I certify, pursuant to Mass.R.App.P. 16(k), that the foregoing Brief of Appellant conforms to all relevant rules of court. In particular, the brief was produced using a proportionately spaced Times New Roman 14-point font, and,subject to a motion to file a non-conforming brief, the word processor count of the brief from the Issues Presented through the Conclusion is 13,890.

CERTIFICATE OF SERVICE

I certify that, on June 21, 2022, I served a copy of the foregoing, by E-filing, on Ellyn H. Lazar, Assistant District Attorney, 225 Main Street, Worcester, MA 02108.