COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss. No. 2019-P-0499

COMMONWEALTH OF MASSACHUSETTS

v.

TYKORIE EVELYN

BRIEF FOR THE DEFENDANT ON INTERLOCUTORY APPEAL FROM THE SUFFOLK SUPERIOR COURT

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JUNE 29, 2019

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TYKORIE EVELYN

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1. A seizure occurs when a defendant refuses to answer a police officer and that officer then takes steps to obtain an answer. Did the seizure occur here once a uniformed officer abruptly started exiting his marked cruiser after Evelyn rebuffed the other officer's questioning and kept walking? Does the "reasonable person" in the free-to-leave test encompass that person's race and age? Were Evelyn's behaviors, like turning away from the police, consistent with a black boy's desire to avoid a potentially painful encounter with white Boston police officers, or do they establish reasonable suspicion he was concealing a weapon?
2. Did the Court err in dismissing Dr. Sweet's testimony and the studies as unhelpful even though they exposed how police apply implicit and investigative bias rather than objective criteria when interpreting a black person's behavior? Did the Court err in finding that the officers' conclusions that Evelyn's behaviors (especially "blading") indicated weapon concealment were lay opinions? Did the Commonwealth prove any reliable methodology behind these opinions?
3. Is reversal or remand required since the Court did not reckon with the substantial, scientific record that explains (among other things) why

innocent black men might engage in avoidance behaviors, which police believe suspicious, but which are actually responses to stereotype threat?

STATEMENT OF THE CASE

On March 20, 2017, Tykorie Evelyn was indicted in Suffolk Superior Court upon one count of first-degree murder, in violation of G.L. c. 265, § 1, one count of unlawful possession of firearm, in violation of G.L. c. 269, § 10(a); and one count of unlawful possession of ammunition, in violation of G.L. c. 269, § 10(h). (Record Appendix (RA) I: 6-8).

On June 5, 2018, the defendant filed his motion to suppress evidence and request for a Daubert hearing along with affidavits of counsel and of the defendant as well as materials supporting admission of Dr. Dawn M. Sweet's expert testimony. (RA I:16,23-67). The defendant sought "to exclude all testimony by the police officers at the motion to suppress concerning any training as well as so called expertise in the characteristics of an individual carrying a firearm." (RA I:72; see RA I:23). The Commonwealth opposed a Daubert hearing and the exclusion of officer testimony. (RA I:68-69). It also requested that Dr. Sweet's testimony be excluded, mainly claiming that it was irrelevant. (RA I:69-70).

On September 7 and September 20, 2018, the Superior Court (Ricciuti, J.) heard testimony and evidence on the defendant's motion to suppress. (RA I:17-18).

Before testimony began, it declined to exclude Dr. Sweet's or the officers' testimony, but opted to "hear it all…[a]nd decide what I'm going to rely upon and decide what the suppression results should be." (T I:5)[1]. On September 26, 2018, the defendant filed his additional memorandum in support of his motion to suppress. (RA I:18,110-115). On October 22, 2018, the Court denied his motion to suppress. (RA II:108-144). The defendant timely filed his notice of interlocutory appeal. (RA II:145). On November 21, 2018, he filed his petition for interlocutory review in the single justice session of the Supreme Judicial Court. (RA I:21). On January 14, 2019, the Single Justice (Lenk, J.) allowed it. (RA I:21).

STATEMENT OF FACTS

I. Two white police officers surveil and pursue a black boy walking on the street in Roxbury after receiving notice of a shooting but no description of the suspects.

On January 9, 2017, Officer Joseph Abasciano and Officer Brian Garney were on patrol on a very cold night – the temperature likely in the single digits or no more than 15 degrees. (T II:15-16,21,107,158-159; RA II:105). In uniform and in their marked cruiser, the officers were tasked with serving restraining orders in the Roxbury/Dorchester area. (T II:107-108). Abasciano sat in the front driver's seat and Garney in the front passenger seat. (T II:25,113). They saw a minimal

[1] Suppression transcripts shall be designated as "T" followed by volume (I-II) and page number(s).

amount of people on the streets. (T II:21,112,156,158-159,169; RA II:105). Abasciano was familiar with the various gangs in this area including the rivalry between the Orchard Park and "VNF" gangs which operate at Dearborn and Eustis. (T II:11-14; see RA II:105). Shootings, stabbings and robberies had occurred in the area. (T II:14,171). A community center is also at 2 Dearborn Street. (T II:74).

Around 7:27 p.m., the shot spotter notified them, via Garney's computer or phone screen, that five shots had been fired at 2 Dearborn Street in Roxbury. (T II:17-20; RA II:41-42). They activated their lights and siren. (T II:20). From what they could gather from the busy radio traffic, the suspects were fleeing away from Adams Street. (T II:21,66,109). But in fact, the radio call had alerted them that the suspects were fleeing towards Adams Street. (T II:22,66-68,109-110,152; RA II:41,43). No description was given of the suspects or their clothing. (T II:73,76,138-139; RA II:42-45). Abasciano could not recall the number of suspects involved. (T II:65). They knew nothing else about the circumstances surrounding the shooting except that the victim was "critical" given two gunshot wounds to his stomach. (T II:40; RA II:41-46). They drove past and away from the scene of the shooting (around Dearborn/Eustis) since there were plenty of police already there. (T II:69-70,151-152; RA II:40). Near the scene (on Harrison/Eustis), they looked for cars potentially involved in the shooting. (T II:74-75). They ended up on Harrison Avenue where they did not see anyone. (T II:22-23; RA II:40). Boston

Medical Center is at Albany Street/Harrison Avenue. (T II:68).

Turning off their lights and siren, they looked for "anything and everything" including potential suspects. (T II:23,72). They headed towards the Orchard Park housing development which is primarily occupied by African-Americans and people of color and then towards the Madison Park housing development in the Ruggles area. (T II:72-73,110,121,153; RA II:80-85). Primarily African-American people live in this very densely populated, residential part of Roxbury. (T II:136). The "journey led" them to these housing developments where they were looking for anything out of the ordinary. (T II:155). Garney classified Orchard Park, Ruggles and the Madison Park housing development as a "high crime area." (T II:171). Abasciano took a left off Harrison Avenue onto Melnea Cass Boulevard. (T II:23; RA II:40).

At the intersection of Melnea Cass Boulevard and Shawmut Avenue, these two white officers saw a tall, young, black male walking by himself past 42 Dewitt Avenue, which is a few feet or yards from Shawmut, away from the scene. (T II: 76,147; RA I:26; RA II:69,124). This was approximately 7:40 p.m. or 13 minutes after the shooting was reported. (RA II:42,51,105). Garney thought it was out of the ordinary for this black boy, a stranger to him, to be out on the street since it was so cold. (T II:156). At 46 Dewitt Ave., Abasciano pulled the cruiser alongside him in this fairly well-lit area. (T II:26,82,128; RA II:40). They slowly followed

and watched the boy who was around a car width away beside the driver's side of the cruiser. (T II:25,31-32). Abasciano saw that, on this particularly frigid night, the boy was walking briskly with his hands in his jacket pockets. (T II:75,79). Garney did not note any briskness to the boy's walk, but testified the boy kept his hands tight to his body. (T II:113-114). The boy wore a black hoodie, black winter jacket, black pants, white sneakers, and a big red winter hat with a red pom-pom on top. (T II:75-76; RA II:57-67). "ROCKETS" labels were emblazoned in yellow on the front and back of his hat. (RA II:57,59-60,65-67). Pictures of the boy, later identified as Tykorie Evelyn, as he appeared that night, were admitted into evidence. (T II:48; RA II:57-67). Evelyn was 17 years old at the time. (RA I:26,29; RA II:103).

The officers knew nothing about the boy. (T II:99,156). Parked cars by the sidewalk occasionally obstructed their view of him. (T II:25-26). Their surveillance, beginning at 42 Dewitt Drive, was approximately 0.4 mile away from the Dearborn/Eustis scene. (T II:95; RA II:68-69). Google Maps estimates that a pedestrian can walk this path and distance in 9 minutes. (RA II:68-69).

On cross-examination, Abasciano testified that the boy was being "evasive" by not paying attention to him. (T II:77,95). However, he conceded that "evasive" is vernacular which the police commonly use and put in their reports. (T II:77). He also acknowledged that "evasive" could mean a number of things and that the boy

was free to ignore them and their cruiser. (T II:77-78). Abasciano and Garney never asked the boy to look at them and that, when Garney wrote in the report that the boy had "refused" to look at them, that was just the way they "phrase it." (T II:81,161).

The boy clutched something in his right pocket. (T II:24-25,114). Although Abasciano could not see what he was holding, he testified that "it appeared to me it – there were – it was the size – size and scope of what would – could potentially be a firearm."[2] (T II:26). Garney gave no such characterization which does not appear in the police report. (See T II:112-116,145,159-166; RA II:105-107). Garney could not see the outline of an object in the boy's pocket. (T II:139). Garney and Abasciano admitted that almost everyone now has cell phones which can be expensive and that it was not uncommon for people to carry cell phones and/or keys in their pockets. (T II:79,139). Abasciano also testified that the boy looked "very, very tense." (T II:26,80). Again, Garney gave no such characterization which does not appear in the police report. (T II:172; RA II:105-107; see T II:112-116,145,159-166).

Keeping his eyes straight ahead, the boy turned the right-side of his body, which was closer to the driver's side of the cruiser, to the left away from

[2] Although the Court mentions this testimony in its factual findings, it does not rely upon it in its reasonable suspicion analysis. (RA II:113-114,131-133).

Abasciano. (T II:27-28,161-162). Abasciano characterized this action as blading and "unnatural." (T II:27). According to Abasciano, "blading" means turning one's body away. (T II:90). Over objection, Garney characterized the boy's "blading" as turning his right side away from them "as if to conceal something that may have been in his pocket." (T II:113). At the same time, people are allowed to turn around and walk away from police. (T II:144). Their shared driving and pedestrian path also required them to turn left on the curved Dewitt Drive. (RA II:40,83-85).

According to Abasciano, the boy picked up his pace after the cruiser began shadowing him. (T II:27). Abasciano called out to the boy through his open window: "[H]ey, can I holler at you?" or "Hey, hey, my man, can I holler at you real quick?" (T II:28,163). Abasciano did not think this was a demeaning phrase to say to a young black man. (T II:85). The boy responded along the lines of: "Why?" or "For what?" (T II:28-29,163). Abasciano said, in words or in substance: "[L]isten…something just happened in the area and…we just wanted to see if you heard anything, saw anything." (T II:28). The boy responded, in words or in substance: "[N]o, why?" (T II:28-29). Abasciano responded: "I just wanted to see if you saw anything or anything" after which he continued following and surveilling the boy. (T II:29). The boy mumbled something which neither Abasciano nor Garney could hear. (T II:96,116). Neither officer asked the boy to repeat himself, to take his hands out of his pockets or to tell them if he had a gun in

his pocket. (T II:96-99,116). Abasciano acknowledged that the boy had a right not to talk to them and that they have had "a lot of situations where people would be concerned" about being seen talking to police. (T II:86,91). The boy also had the right to walk in any direction he wanted. (T II:91). "It was clear being apprised that he wasn't interested in talking to us[.]" (T II:96).

At this point, according to Abasciano, the boy's gait "appeared to open more" and he was "darting his eyes around" in "all other directions" except towards him. (T II:29). This behavior caused Abasciano to believe that the boy was about to flee. (T II:29). By contrast, Garney testified that his eyes kept straight ahead the entire time. (T II:161-162). The police report notes "evasive eye contact" but not eyes "darting around" – a phrase first introduced to Abasciano by the prosecutor during grand jury. (T II:88-89,172; RA II:106). Garney also did not describe the boy picking up his pace or opening up his gait by this point – details not relayed in the police report. (T II:172-173; RA II:105-107). At this point, due to the "totality of the circumstances", Abasciano believed that they were "dealing with potentially an armed suspect" (T II:29-30). Garney shared that belief. (T II:116).

Abasciano told Garney that it looked like he was going to run and that he should get out of the car. (T II:29-30,97-98,116). The point was not to just talk to the boy more but to address their belief that he was armed. (T II:97,116).

Abasciano testified that he would have conducted a frisk at this point and "[i]f it turned out to not be a firearm, we would have had a conversation." (T II:100-101). At around 100 Dewitt Ave., while only a car-width away from the boy, Garney opened his passenger door. (T II:31,128; RA II:40; see also T II:133). As soon as he did that, the boy ran. (T II:31,116,128,165-166). From the moment they began driving alongside the boy and the moment Garney left the cruiser, they had traveled a distance of around 100 yards or the length of a football field. (T II:26,32). The entire interaction was very quick. (T II:165).

Garney ran "as fast as he could" after the boy who was running onto Ruggles through backyards. (T II:32,117,128-129). He took a right on Ruggles, then another right down a small, dark back alleyway at the rear of 51 Ruggles. (RA II: 32,128; RA II:40). Garney lost sight of him for a couple of seconds when he ran around 111 Dewitt. (T II:118-119,125,129; RA II:40). Meanwhile, Abasciano drove in pursuit after the boy and alerted other officers on the radio. (T II:33). Abasciano and Garney saw the boy running with his hands firmly pressed in his pockets and not swinging his arms. (T II:33,119). The boy ran between buildings at Kerr Way. (T II:33,129; RA II:40,93-97). Abasciano tried to cut off his flight with the cruiser, left the cruiser in a yard, said "foot chase, foot chase, foot chase" on the radio, and ran up Kerr Way in an attempt to head off the boy. (T II:33,41; RA II:41,51,106). The boy had run about 40 yards to get to Kerr Way where he almost

ran into Abasciano. (T II:34). Abasciano testified he saw the boy, still in full sprint, try to draw an item out of his right pocket although the police report does not mention this detail. (T II:34-35; RA II:105-107). Abasciano then drew his firearm and commanded the boy to stop and show his hands. (T II:35; RA II:41). The boy ran by a parked car and reappeared with empty hands. (T II:35-36). The boy then ran to a gated area, stopped and lay flat on his stomach at 17 Kerr Way. (T II:36-38; RA II:40,100). While Abasciano was arresting the boy, Garney and another officer found the handgun on the sidewalk by a parked car at 22 Kerr Way. (T II:50; RA II:51-52,70-71). A cell phone was found in the boy's left pants pocket and seized. (RA II:106).

II. The officers' training and experience regarding their opinions about "blading" and other human behaviors.

From 2002-2006, Abasciano served as an infantry marine in the United States Marine Corps. (T II:6). He took tactics and firearms training through his service which included two tours in the Middle East. (T II:6-7). Abasciano graduated from the police academy in 2007 and then was employed by the Boston Police Department (BPD). (T II:8). From 2008-2009, he was out on another marine deployment. (T II:55). He had been assigned to the Roxbury/Dorchester area (or District 2) since 2012. (T II:10). However, he had to take leave from late 2014 until late 2016, or from 2012 to 2016, due to an injury. (T II:14-15,55). As a result of the time spent away due to either deployment or injury, Abasciano had an

approximate total of 4 ½ years of active police duty by January 9, 2017.

Through his service in the Marine Corps, Abasciano received training on weapons and was deployed to areas where people were armed. (T II:7). The BPD also gave him unspecified training "with regards to people concealing firearms and armed people." (T II:8). He did not receive this training from the Youth Violence Strike Force (YVSF). (T II:51-53). Instead, it involved "some still photos and a training" from Captain Murray, but no videos or films. (T II:53). The photographs depicted "groups of gentlemen" who displayed unspecified "body language" and "body behavior." (T II:53). Captain Murray "spoke at length on some of the indicators using different types of vehicles." (T II:53). He did not describe any particular training about "blading," only that he had learned of that term throughout various trainings and that it was "commonly used in police reports." (T II:89).

Although he claimed to have arrested or assisted other officers in arresting suspects, in the "double-digits," for possessing illegal firearms and to have written reports in the "double-digits" for such arrests up to January 9, 2017, the BPD produced only two police reports, from January 1, 2007 through January 1, 2012, in which Abasciano was involved with any firearm related incidents. (T II:9,54-56; RA II:72-79). Abasciano described no "blading" by suspects in any of his encounters or any method by which he distinguishes a person's unsuspicious

turning away of his/her body from a person's suspicious turning away of his/her body as if to conceal something. (See T II:8-10,53-62).

While on the Safe Street Team, Abasciano and/or other officers made a total of 1,750 Field Interrogation and Observations (FIOs) in just ten months in specific areas within Roxbury and Dorchester. (T II:57-58). They would conduct their FIOs at playgrounds and basketball courts among other places and the FIOs involved either making observations, talking to people or taking further action if, for example, a warrant "revealed itself." (T II:58-59). On a number of his own FIO reports, Abasciano wrote "investigate person" as the reason for conducting the FIO. (T II:60).

Garney graduated from the police academy in June 2016 and then began working for the BPD. (T II:105). Thus, he had been an active police officer for approximately 6 months by January 9, 2017. (T II:105). By this date, he had not personally made any gun arrests though he had assisted "on a few." (T II:106). He received firearms training including a one-day training at the academy by the YVSF about people carrying illegal firearms. (T II:106). The YVSF gave its take on the way such people "carry themselves[.]" (Id.) During this lecture, he viewed the YVSF's Power Point headlined "Characteristics of Armed Gunmen Overview." (T II:134-135). The slides listed 14 such "characteristics" as follows:

1. High crime area
2. Prior criminal history
3. Weighted pocket
4. Bulge in pocket
5. Hyper vigilance (or "constantly scanning" one's surroundings)
6. Change of gait or direction
7. Running while clutching waist
8. Bladed stance
9. Nervous behavior
10. Evasive or inconsistent answers
11. Security checks (or repeatedly touching an object in one's clothing to assure its presence)
12. Repeated noncompliance (or disobeying an officer's request or command)
13. Breaking off from a group or area
14. Bending, leaning or reaching during a car stop

(T II:135-147; RA I:175-177). He also generally recalled a YVSF member showing videos demonstrating several of the above characteristics. (T II:134-135,148). He first heard the term, "bladed", at the academy. (T II:144). When defense counsel asked "[h]ypothetically, on turning away from you, am I

concealing something from you?", Garney responded: "You're trying to hide that part of your body from my view." (T II:144).

III. Dr. Sweet's testimony regarding the ability of police officers to detect concealed weapons based upon pedestrian behavior and the reliability of police training in this area.

Dr. Dawn Marie Sweet is an Iowa State University professor with a Ph.D. in human behavior and communications as well as expertise in nonverbal communication, threat detection and detecting deception. (T I:7-9; RA I:39). She received grant funding to research whether there are any reliable behavioral indicators to infer that a person may be concealing a weapon. (T I:15-16). In 2017, she published a peer-reviewed paper which described three experiments. (T I:16-18). See Sweet, Meissner, Dominick, Assessing Law Enforcement Performance in Behavior-Based Threat Detection Tasks Involving a Concealed Weapon or Device, Law and Human Behavior, Vol. 41, No. 5, 411-421 (2017) (hereinafter "Threat Study"). (RA I:49-67). These experiments involved lay people (in this case, college students) and police officers with varying levels of experience watching videos of mock people walking around in public. (T I:18-19,86,90; RA I:52-58). In the first video experiment, one of two white male targets with minimal experience handling a firearm chose whether to conceal carry a neutered but loaded 9-millimeter handgun and then walked across the street to a secured facility. (RA I:52-53,139). The lay people and officers then had to guess if that man was

concealing a weapon. (T I:16-17; RA I:52-53). Afterward, the researchers then obtained everyone's responses about their level of certainty as well as the nature of the target's behavior that triggered their guesses. (RA I:53). The other two video experiments involved lay people and officers guessing which, if any, of the two or three depicted men were carrying a "bomb" (a water bucket serving as its proxy). (T I:17-18; RA I:55-58).

The Threat Study concluded that, as far as the first experiment, police officers were slightly better than chance at determining whether the man was concealing a weapon. (T I:21-23; RA I:54). Her research further found no significant association between the experience of the officer and the accuracy of response. (T I:22; RA I:54). Job experience actually hindered officers' ability to accurately detect threats because they have investigative bias or bias towards seeing threats and deception. (T I:24; RA I:54,58-59). For all participants, the successful identification of concealment of a weapon was "quite poor" while correct rejection of non-concealment was high. (T II:21-23; RA I:53-54). Across all three video experiments, there was no significant difference between officers and lay people as far as their accuracy of response. (T I:102; RA I:58).

Currently, there is no systematic evidence-based training on detecting the concealment of a firearm or unstable device. (RA I:50-52). The body "remains an understudied communicative modality." (RA I:52). There is no scientific basis

behind the BPD's training on identifying characteristics of an armed gunman. (T I:71). Dr. Sweet's testimony disputed a number of the YVSF's Power Point factors as being associated with an armed gunman. (T I:42-63). For example, there is no scientific basis by which to infer that hyper vigilance or situational awareness is associated with deception or concealment. (T I:50). As a general manner, behaviors like fidgeting and averting one's gaze do not correlate with deception. (T I:27-28,46-47). Nervous behavior, like fidgeting, is ambiguous. (T I:52). Averting one's gaze is likely with increased stress and could mean any number of things including not wanting to engage. (T I:46-47,60,114-115). Across the board, in interracial interactions, African-Americans are less likely to make direct eye contact with someone especially if it is an authority figure. (T I:61). There is no study or research showing an association between flight from a police officer and deception or concealment. (T I:115-116).

A so-called "bladed stance" is not a characteristic of deception or concealment. (T I:50). There is no valid research supporting such an association. (T I:51,110-113). A report by the Naval Research Laboratory introduced the language of "bladed stance" and relied upon anecdotal, rather than evidence-based, research. (T I:51). The anecdotal research was based upon police officers convening and talking anecdotally about how it looked when someone was concealing a weapon. (T I:51-52). It has not been tested. (Id.) A bladed stance can

just as well mean that the person is not interested in engaging in a conversation with the officer or is possibly looking for a witness. (T I:118-119,122).

There is no research support that even a combination of these factors, such as one's eyes darting around, one's continuing bladed stance away from officers, and one's continuing clutch of an item, is a sign of deception or concealment of a weapon. (T I:54-60). There is no research support that an officer's fear for personal safety on the street makes that officer better able to identify a concealed weapon. (T I:108-109,121). In fact, such fear would probably limit that officer's ability since stress causes tunnel vision and memory loss. (T I:121).

Finally, Dr. Sweet explained stereotype threat "where a member of a particular group might exhibit certain behaviors…or discomfort for fear of being stereotyped in a negative way." (T I:43). That fear is based on the belief that others are looking at him or her as less than capable. (Id.) Black men, who have to engage with white police officers, will experience discomfort and stress since they would be aware of the "strong belief and discussions around black males as being criminals, as being dangerous, as…being a threat." (T I:45-46). That level of stress will diminish cognitive capacity, leading to, for example, speech hesitations, fidgeting and averting one's gaze. (T I:46). However, police officers are trained to interpret such behaviors as associated with deception. (T I:47). Research also shows that police officers have implicit bias against African-Americans. (T I:63).

For example, in one study, where a group of police officers were tasked with a video game about a reported armed robbery, they were more likely to perceive the black men as armed and dangerous. (T I:64-65).

IV. Reports and studies confirming stereotype threat and implicit bias by police, particularly the BPD.

The Court did not consider six research reports and studies, admitted as Exhibit 5, which discussed typical behaviors by African-American people in interracial interactions, triggering stereotype threat, as well as implicit bias by police officers (including the BPD) when they interpret and react to behaviors by African-American men. (See RA I:178-240; RA II:6-39). It instead relegated these studies to a footnote, stating that they were "unhelpful" because Dr. Sweet did not author them and "in her testimony, Sweet disclaimed studying the impact of race in the Threat Study." (RA II:124 at n.12). However, the Court did not reject their admissibility. (Id.) Also, although the Threat Study itself did not consider the factors of race and implicit bias by police officers, Dr. Sweet discussed these factors in her testimony. (Compare RA II:124-125 to T I:43-47,63-65). The reports and studies are as follows:

1. Trawalter, Richeson, and Shelton, Predicting Behavior During Interracial Interactions: A Stress and Coping Approach, Personality and Social Psychology Review, 13; 243 (2009)

This report synthesized numerous studies and papers and made the following conclusions about interracial interactions:

- During them, white and black people alike often feel anxious and uncomfortable. (RA I:179). In response, they exhibit behaviors like averting their gaze, fidgeting and speech disruption. (RA I:180,188,191). Because of their concerns about being targeted for prejudice, racial minorities "exhibit heightened physiological reactivity." (RA I:194).
- "The notion that individuals often appraise interracial contact as a threat is well documented…The proposition that individuals experience psychological stress during interracial contact is also well documented." (RA I:190).
- Interracial contact can "deplete cognitive resources, at least temporarily" of both white and black people. (RA I:190).

2. LaFrance and Mayo, Racial Differences in Gaze Behavior During Conversations: Two Systematic Observational Studies, Journal of Personality and Social Psychology, Vol. 33, No. 5, 547-552 (1976)

After conducting two experiments, this study concluded that our "claim to know a great deal about someone who has 'shifty eyes'" is unfounded. (RA I:205). These experiments, which involved filming black and white people conversing with each other, showed that black people did more "away-gaze" while listening to white people and "other-directed" gaze while speaking to white people. (RA I:207-208). The study also concluded that misconstruing a listener's averting gaze as

uninterested or as withholding information contributes to "tension in interracial encounters." (RA I:209).

3. Najdowski, Bottoms and Goff, Stereotype Threat and Racial Differences in Citizens' Experiences of Police Encounters, Law and Human Behavior, Vol. 39, No. 5, 463-477 (2015)

This report recounted the results of two studies regarding stereotype threat or the "concern about being judged and treated unfairly by police because of the stereotype." (RA I:211). In the first study, white and black participants were asked to rate on a scale (from "strongly disagree" to "strongly agree") whether they "worry that police officers might stereotype [him/her] as a criminal because of [his/her] race." (RA I:212). Black participants were significantly more likely than white participants to report stereotype threat. (RA I:213). In the second study, white and black participants were asked to imagine a hypothetical scenario where, around 10 p.m., he/she gets off a bus with a backpack full of ordinary things and sees across the way a police officer (race not given) who is watching him/her. (RA I:215). They were then asked to give open-ended responses to the questions: "How would you feel? What would you be thinking? How would you react?" (RA I:215). Black men were significantly more likely than white men to expect to be accused of wrongdoing and feel stereotype threat. (Id.) Also, as hypothesized, this study showed that black men may behave "suspiciously" in response to this stereotype threat. (RA I:217).

The researchers found that the "Black criminal stereotype can unconsciously and automatically influence what police officers see when they encounter Black citizens, how officers interpret what they see, and how they decide to act in response[.]" (RA I:211). Stereotype threat causes a pernicious feedback loop that influences interactions between police and black civilians. (RA I:211-212). Black people perceive they will be judged unfairly by police, which causes them to behave in ways[3] that police deem suspicious or deceptive, which then ironically confirms police officers' stereotype of black criminality. (RA I:212-214,220).

4. Johnson, Race and police reliance on suspicious non-verbal cues, Policing: An International Journal of Police Strategies & Management, Vol. 30 Issue: 2, pp. 277-290 (2007)

Researchers in this study viewed 2002-2003 video footage from the reality television show, Cops, and watched black and white people interacting with police officers. (RA I:229-230). The researchers then categorized these people by the frequency of their non-verbal behaviors and whether they had committed a crime. (RA I:231). African-American persons who were not involved in crime, more so than Caucasian persons, displayed increased speech disruptions, hand gestures and gaze aversion when talking with police. (RA I:231-233). African-Americans who

[3] These behaviors include "vigilance to threat-related cues" or vigilance to "cues from police officers about whether they will be accused of crime", "active monitoring efforts", increased nervous and anxious responses like blinking, fearful facial expressions, and aversion of gaze. (RA I:212,214).

had committed crimes were *less* likely to engage in such behaviors. (RA I:233-235).

Despite little evidence to support it, police perception that such behaviors are inherently suspicious has been reinforced by their formal training. (RA I:235-236). But, as this study concluded, non-verbal cues such as avoidance of eye contact and the like "are poor indicators of criminal involvement and are strongly influenced by the race/ethnicity of the individual." (RA I:226). These results were consistent "with the previous research…which found that police officers viewed the non-verbal behaviors of non-Caucasians more suspiciously than the non-verbal behaviors of Caucasians in mock interrogations." (RA I:235-236). "Therefore, the reliance on these non-verbal cues may be resulting in increased levels of undue suspicion by the police toward law-abiding African-American and Hispanic citizens." (RA I:236).

5. American Civil Liberties Union of Massachusetts (ACLUM), Stop and Frisk Report Summary (October 2014), available at https://www.aclum.org/stopandfrisk

This ACLU factsheet summarized the BPD's 2014 report which had compiled statistics on police-civilian encounters from 2007-2010. (RA II:6-7). These are the takeaways:

- "63% of Boston police-civilian encounters from 2007-2010 targeted Blacks, even though Blacks made up less than 25% of the city's

population." (RA II:6). The BPD especially targets "young men of color." (RA II:7).

- "Even after controlling for crime, Boston police officers were more likely to initiate police encounters in Black neighborhoods and to initiate encounters with Black people." (RA II:6).
- "Boston police essentially gave no justification for 75% of these encounters, simply listing 'investigate person' as the reason." (Id.)
- "…Blacks were more likely than whites to be subjected to repeat police-civilian encounters and to be frisked or searched, even after controlling for civilians' alleged gang involvement and history of prior arrest." (Id.)

6. Nix, Campbell, Byers, and Alpert, A Bird's Eye View of Civilians Killed by Police in 2015: Further Evidence of Implicit Bias, Criminology & Public Policy, Vol. 16, Issue 1 (2016)

Examining implicit bias by police, researchers in this study reviewed 990 nationwide incidents, as compiled by The Washington Post, of police killing civilians in 2015. (RA II:15-17). Among other categorizations, they divided up the deceased civilians by race and whether they were armed or unarmed at the time. (RA II:17-19). The result was that black people were found to have been more than twice as likely as white people to have been unarmed when killed by police. (RA II:23). Race thus had a significant association with a police officer's threat perception. (RA II:24-25). The study concluded that its findings suggest "evidence

of implicit bias in real-world scenarios." (RA II:28).

SUMMARY OF ARGUMENT

When Garney abruptly opened his passenger door after Tykorie Evelyn had been rebuffing the officers' surveillance and questioning, Evelyn was seized. Infra pp. 36-38. This action signaled that Garney would be detaining Evelyn for further questioning since Evelyn would not otherwise affirmatively answer their questions. Infra pp. 39-40. At that point, a reasonable person, walking alone at night while shadowed by two uniformed officers in a marked cruiser, would not have felt free to leave or further rebuff their questions. Infra pp. 38-39. At the latest, Evelyn was seized the moment Garney began chasing him while Abasciano drove in simultaneous pursuit. Infra pp. 40-41.

The "reasonable person" test for a seizure must account for that person's race and age – objective factors generally known to the police during any civilian encounter. Infra pp. 41-44. As recognized by the Supreme Judicial Court (SJC) in Commonwealth v. Warren, 475 Mass. 530 (2016), recent police killings of black men and the Boston Police Department (BPD)'s recent track record of disproportionately targeting young black men create a far different and painful reality for black men interacting with police on the Boston streets than it does for white people. Infra pp. 41-42. Age must also factor into this test. Infra p. 43. A reasonable adult may feel free to leave an officer's presence where a reasonable

child would not. Infra p. 43. Evelyn, as a black boy, would not have reasonably interpreted Garney's exit from his cruiser as a casual approach but as pursuit. Infra p. 44.

None of the circumstances or behaviors by Evelyn establish reasonable suspicion. Infra pp. 44-50. Evelyn was alone walking in a neighborhood that had "high crime" but also many innocent African-American people who lived there. Infra pp. 44-45. Evelyn was traveling away from the crime scene *and* away from the suspects' fight path. Infra pp. 45-46. Evelyn wore distinctive clothing where the caller gave no description of the suspects. Infra pp. 45-46. Evelyn was not close in geographical or temporal proximity to the shooting. Infra p. 46. Pressing his hands to his body while holding an object, which displayed no bulge, outline or heavy weight in his jacket pocket, is not unusual behavior on a frigid night. Infra pp. 48,50. Evelyn's brisk walk, his eye aversion, and his discomfort in answering a police officer's questions were exercises of his right to decline further contact with police. Infra p. 47. His turning away from them, or so-called "blading", and then running away were further exercises of that right to avoid police, which is especially pressing for a reasonable black boy to do when confronted with white, uniformed officers. Infra pp. 47-48.

The Court erred when it found Dr. Sweet's testimony, the Threat Study, and the other admitted studies unhelpful. Infra pp. 50-52. This evidence demonstrated

how the officers' training and experience were inadequate to identify behaviors consistent with concealing a weapon. Infra p. 51. When it comes to interracial police-civilian interactions, officers often apply implicit bias and investigative bias, rather than objective criteria, when interpreting behavior. Infra pp. 51-52,54-55. The BPD's own record in this regard proves that this is not a theoretical, but very real, problem which black men feel acutely. Infra pp. 49-50. The Commonwealth did not prove any reliable method behind the officers' proffered expert conclusions that certain behaviors (like Evelyn's "blading") indicated concealment of a firearm. Infra pp. 52-54. Since the officers invoked their specialized knowledge and opined beyond mere observation, they offered expert, not lay, opinions which must meet the reliability standard. Infra pp. 52-53. The Court's failure to reckon with the substantial record on these points further merits reversal or remand. Infra pp. 54-55.

ARGUMENT

I. None of Evelyn's behaviors in response to two white police officers shadowing him in a cruiser created reasonable suspicion of any crime at the point of seizure, which, from a reasonable black boy's perspective, occurred the moment Officer Garney opened his passenger door in pursuit of him.

The Commonwealth failed to establish that Evelyn's seizure, which occurred once Officer Garney began pursuit of him, was supported by reasonable suspicion. Thus, under the Fourth Amendment and Article 14, the firearm and all other

evidence and statements[4] gained as a result of this unconstitutional seizure, must be suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 487-488 (1963); Commonwealth v. Damiano, 444 Mass. 444, 449 (2005).

"In reviewing a denial of a motion to suppress, [the Court] accept[s] the judge's subsidiary findings of fact absent clear error, but conduct[s] an independent review of the judge's ultimate findings and conclusions of law." Commonwealth v. Washington, 449 Mass. 476, 480 (2007) (citation omitted). The Commonwealth bears the burden of demonstrating that the police officers acted lawfully in pursuing and seizing Evelyn. Commonwealth v. Shields, 402 Mass. 162, 164 (1988).

A. Evelyn was seized when Officer Garney opened his door in pursuit of him.

Under Article 14, seizure occurs when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980); see Commonwealth v. Thinh Van Cao, 419 Mass. 383, 387 (1995).

[4] Although the particular motion to suppress, which is the subject of this interlocutory appeal, focused on suppression of the firearm itself as a result of this unconstitutional stop, if this Court were to allow suppression, Evelyn's cell phone, which was found in his pants pocket during his arrest, must also be suppressed as fruit of the poisonous tree. See Commonwealth v. White, 475 Mass. 583, 595-596 (2016) and (RA II:106).

Objectively, it is intimidating for anyone to be walking alone on a street at night with two uniformed police officers in a marked cruiser slowly shadowing and questioning him/her for the length of a football field. Despite Evelyn displaying his discomfort, the police kept following and surveilling him. Such circumstances "may be sufficiently intimidating that a reasonable person would feel compelled to respond to a police officer's question as he believes the officer would wish him to." Commonwealth v. Lopez, 451 Mass. 608, 610 (2008). This was not a casual conversation and Garney's opening of his door constituted an abrupt escalation. It "had compulsory aspects" even if Abasciano's "prior requests did not[.]" Commonwealth v. Jones-Pannell, 472 Mass. 429, 433 (2015). Compare Commonwealth v. Rock, 429 Mass. 609, 610-611 (1999) (defendants voluntarily stopped running after plain-clothed officers had been following them in their unmarked car; officer exited the cruiser and said, 'Guys, can I talk to you for a second?'").

After Evelyn made clear he did not want to engage with them, Garney's sudden opening of his door signaled police pursuit and detention. It would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Michigan v. Chesternut, 486 U.S. 567, 569 (1988). "Pursuit that appears designed to effect a stop is no less intrusive than a stop itself." Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981). Evelyn was

not stopping or answering an officer's questions in a way they liked so any reasonable person would believe that, by exiting the cruiser, the other officer was going to *make* him stop and answer their questions. Compare Commonwealth v. Narcisse, 457 Mass. 1, 3 (2010) (defendant engaged in conversation with police in cruiser; officer asked defendant and another man if they could wait on the sidewalk for further conversation; defendant agreed and officers exited cruiser).

A show of authority can be communicated by words *or* conduct. In Meneus, the SJC held that "[t]he police officer's response, pursuing the defendant as he backed away, communicated unequivocally that refusing to submit to the 'request' [to pat-frisk the group for officer safety] was not an option." Commonwealth v. Meneus, 476 Mass. 231, 235 (2017). In Barros, the defendant ignored the officer's first request of "Hey you…I want to speak to you." Commonwealth v. Barros, 435 Mass. 171, 172 (2001). After the officer exited the cruiser and said: "Hey you. I wanna talk to you. Come here.", this was the moment of seizure because the "second request ('Come here') had a compulsory dimension to it that his first request did not." Id. at 174. "Such a transformation can occur if the target…refuses to answer and the police take additional steps to obtain an answer." Id. at 175. Here, Garney's exiting the cruiser after Evelyn had rebuffed their questions and kept walking was that transformation. See Commonwealth v. Depina, 456 Mass. 238, 242 (2010) (after the defendant had reversed direction upon seeing the police,

he "was 'seized' by the police when, after the three officers converged on him on Emerson Street, Trooper Watson asked the defendant to 'come over here.'").

At the latest, officers seized him the moment Garney ran after him as fast as he could. The officers were simultaneously heading off Evelyn by foot and cruiser. See Thibeau, 384 Mass. at 764 (defendant seized when the officer activated his siren and pursued him in a marked vehicle) and Jones-Pannell, 472 Mass. at 433 (defendant seized when an officer "exclaimed 'Wait a minute!' and then began chasing the defendant"). Contrast Commonwealth v. Franklin, 456 Mass. 818, 819 & 824 (2010) (on a sparse record, after the defendant ran upon merely seeing an unmarked police car stop on the street, officers' running after him did not amount to seizure). Garney and Abasciano were little more than a car width away from Evelyn when pursuit of him began.

The Court located the seizure sometime while Garney's and Abasciano's pursuit of Evelyn "continued." (RA II:133). This was after Garney and Abasciano saw Evelyn running with his hands pressed in his pockets but before Abasciano saw Evelyn draw something out of his pocket (as the Court did not mention this finding in its analysis). Thus, the Court located seizure *before* Abasciano's command for Evelyn to stop (another finding it did not mention in its analysis). However, since the Court correctly found that the officers pursued Evelyn by chasing him (RA II:132-133), it was legal error for the Court to conclude that

Evelyn was seized only after the pursuit "continued" (whichever point in time that is). "[A] stop starts when pursuit begins." Barros, 435 Mass. at 174. The Court attempts to offset the nature of this chase by asserting that "the police had a basis to pursue Evelyn, at least initially because he may have been a witness to a brutal crime." (RA II:133). However, a seizure is a seizure whether the subjective intent is to force answers out of a suspect or witness. "Pursuit for constitutional purposes began when the officer[] left the police cruiser and began to chase the suspect[] on foot. At this time, the police were attempting to stop the defendant to effectuate a threshold inquiry." Commonwealth v. Williams, 422 Mass. 111, 117 (1996). Even if this Court adopts the "continued" pursuit approach, then the totality of circumstances, including the "running awkwardly" factor, still do not constitute reasonable suspicion. Infra pp. 49-50.

B. When analyzing whether a "reasonable person" would have felt free to leave, the "reasonable person" must encompass that person's age and race. Here, a reasonable black boy would not have felt free to leave or ignore a white police officer's abrupt exit that clearly signaled forced interrogation.

Michael Brown. Eric Garner. Freddie Gray. Laquan McDonald. Tamir Rice. Philando Castile. All black men killed by police in circumstances widely publicized before January 9, 2017. Their killings at the hands of police have seared the public conscience and particularly, the consciousness of black men and their parents who often give their sons "The Talk" on how to prepare for police

encounters. See German Lopez, "Black parents describe 'The Talk' they give to their children about police," Vox (dated Aug. 8, 2016), available at: https://www.vox.com/2016/8/8/12401792/police-black-parents-the-talk (last visited on June 25, 2019).

A "reasonable" black boy would then have a legitimate fear of police, leading to an equally legitimate belief that his freedom has been curtailed at an earlier point than a "reasonable" white man might believe. In Warren, when analyzing whether a black man's flight from police was suspicious, the SJC factored in the "reality for black males in the city of Boston." Warren, 475 Mass. at 540. See also Commonwealth v. Buckley, 478 Mass. 861, 876-877 (2018) (Budd, J., concurring). A "reasonable person" standard that recognizes a black boy's vulnerable status applies what the SJC has already held to be a uniquely black experience that is well-documented on the national and local level.

The fact that black boys perceive and experience police encounters far differently from and more frequently than white people must factor into the "reasonable person" standard. Doing so comports with this objective standard which construes a reasonable person from the *defendant's* position and considers the totality of circumstances. See Brendlin v. California, 551 U.S. 249, 258 (2007); Commonwealth v. Shane S., 92 Mass. App. Ct. 314, 322 (2017) (identifying seizure when "a reasonable person in the juvenile's position would not feel free to

leave."); and Mendenhall, 446 U.S. at 558 (the fact that the defendant was black and female were "not irrelevant" factors but "neither were they decisive" as to whether she had been seized by two white male officers).

The U.S. Supreme Court has held that age must factor into the nearly identical "reasonable person" test that applies to custody for purposes of Miranda. "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011). "[E]xtending [J.D.B.'s] holding to search and seizure cases would not be much of a stretch because the United States Supreme Court suggested long before it announced J.D.B. that a minor's age matters in evaluating whether the minor was seized." In re J.G., 228 Cal. App. 4th 402, 410-411 (2014), citing Kaupp v. Texas, 538 U.S. 626, 631 (2003).

The Seventh and Tenth Circuit Courts of Appeals as well as three other state appellate courts have also analyzed whether a reasonable child would have felt free to leave when deciding whether, under the Fourth Amendment, that child was seized. See Doe v. Heck, 327 F.3d 492, 510 (7th Cir. 2003); Jones v. Hunt, 410 F.3d 1221, 1226 (10th Cir. 2005); In re J.G., supra at 410-411; In re Juvenile Action, 186 Ariz. 213, 217 (1996); and In re I.R.T., 184 N.C. App. 579, 584 (2007).

Evelyn's African-American race and young age, both of which Abasciano and Garney knew at the time, are objective indicia by which to gauge the level of intimidation inherently felt by a black boy being shadowed and pursued by white police officers. BPD officers have a track record of stopping and frisking young, black men at a significantly higher rate than white people and often give only a vague "investigate person" as the reason. (See RA II:6). FIOs are a constant feature of a black's man's life in Boston. To ignore how a "reasonable black boy" would feel in an environment where police consistently target people like him is to ignore reality. See Commonwealth v. Lewis, 2014 Mass. Super. LEXIS 59 at *14-15 n.6 (April 29, 2014) (Krupp, J.) ("It is difficult to imagine innocent young black males in Boston…feeling free to disregard a police inquiry in the setting presented by this case; at least not without some consequences."). Even if this Court concluded that a reasonable grown, white man would feel that Garney was simply opening his door to continue a conversation on the sidewalk, a reasonable black boy would feel this white, armed officer was coming for him.

C. Evelyn's behaviors were consistent with a black boy not wanting to engage with white BPD officers where such encounter could result in unjust detention or worse.

1. "High crime" area filled with innocent African-American residents.

The Court paints this Roxbury area as a gang war zone without mentioning the fact that these are residential neighborhoods where primarily African-

Americans live. The shooting itself was near a community center. "[S]o-called high crime areas are inhabited and frequented by many law-abiding citizens who are entitled to be protected against being stopped and frisked just because of the neighborhood where they live, work, or visit." Commonwealth v. Johnson, 454 Mass. 159, 163 (2009). Garney and Abasciano had no information whether the shooting was gang-related or any information about Evelyn at all, much less gang affiliation or criminal history. As far as they knew, Evelyn was no different from anyone else living in Roxbury.

2. Gravity of the crime

A shooting that leaves a victim in critical condition is undoubtedly serious. But this Court may not "carve out a public safety exception based on this factor." Meneus, 476 Mass. at 239.

3. The suspects' opposite flight path from the boy's direction of travel which was around ½ mile from the crime scene.

"That the defendant was walking in a residential area before midnight [or here, before 8:00 p.m.] one-half mile from the scene of the crime does not make up for the lack of detail in the radio description, as it did not help to single him out from any other black male [or here, any other *person*] in the area." Commonwealth v. Cheek, 413 Mass. 492, 496 (1992). The police only knew that the suspects had run away and knew nothing else about the suspects or their clothing. They later saw a lone black boy about whom they also knew nothing. Even though this tall

boy was wearing a red hat with a red pom-pom on top, emblazoned with "ROCKETS" front to back, and large, white sneakers, his general height and his "distinctive clothing [were] fact[s] not mentioned by [the caller] in her description of the fleeing group." Meneus, 476 Mass. at 237.

Thus, "[t]he inference from such proximity adds little value to that calculus here…where the police had no information connecting the defendant…to the group [the witness] had seen running [away]." Meneus, 476 Mass. at 239. Here, Evelyn was walking on a street about ½ mile from the scene 13 minutes after the shooting. "Proximity is accorded greater probative value in the reasonable suspicion calculus when the distance is short and the timing is close." Warren, 475 Mass. at 536. The radio call alerted officers that "they" were running *towards* Adams Street. (See RA I:41; RA II:112-113). Yet Evelyn was first seen alone and walking away from Adams Street and thus in the opposite direction of the suspects' flight path. "The location and timing of the stop were no more than random occurrences and not probative of individualized suspicion where the direction of the perpetrator's path of flight was mere conjecture." Warren, supra at 536. Finally, that there was minimal pedestrian traffic is of "questionable value given the lapse of time and the narrow geographical scope of the search for suspicious persons." Id. at 537-538.

4. A black boy's tension at being surveilled by police and his discomfort in answering a white officer's questions.

First, "a defendant's nervous movements or appearance alone is insufficient" to create reasonable suspicion." Commonwealth v. Evans, 87 Mass. App. Ct. 687, 693 (2015) (citation omitted). Second, although he did not want to talk to the police, Evelyn still answered Abasciano's questions. Nothing about his answers was suspicious or evasive. "[O]ur law guards a person's freedom to speak or not to speak to a police officer." Meneus, 476 Mass. at 240. Evelyn's looking around during police questioning again evinces his attempt to avoid contact.

5. Turning away from the police or, as the BPD calls it, "blading."

Blading simply means turning one's body away from someone – here, a police officer. Any further leap that this act shows that the person is trying to conceal something and the even further leap that that something is a weapon is apparently based on "because the police said so." See infra pp. 51-54. See Commonwealth v. Bacon, 381 Mass. 642, 646 (1980) (a driver raising his hand to obscure his face upon seeing police cruiser could have been "coincidental, responsive to the cruiser's headlights, or purposeful."); Commonwealth v. Lewis, 84 Mass. App. Ct. 1114 at *2 (Unpub.) (Oct. 9, 2013) ("Put simply, the mere fact that the defendant turned his right side away from the officers, while knocking on the door in his attempt to be allowed entry to the residence, does not furnish reasonable suspicion[.]"); and Commonwealth v. Nieves, 94 Mass. App. Ct. 1112

at *5 n.6 (Unpub.) (Dec. 5, 2018) ("[e]ven if the defendant's turning his body is seen as his not wanting the police to see something on that side of his body, it hardly follows that the thing he was trying to hide was an illegal firearm.").

In DePeiza, by comparison, the defendant had a "straight arm gait" with his right arm pressed straight to right side with the other hand while his left hand held a phone to his ear and continually shielded his right side from the police in awkward motions. Commonwealth v. DePeiza, 449 Mass. 367, 368-369 (2007). In Garcia, the defendant, who also repeatedly looked over his shoulder, clutched his waistband, walked with a straight or "stiff" arm gait, *and* bladed away from police before fleeing them. Commonwealth v. Garcia, 88 Mass. App. Ct. 307, 311 n.2 & 311-312 (2015).

6. Holding an object with hands tight to body on a frigid night.

Neither officer saw an outline of a gun, a bulge or anything weighing down Evelyn's pocket. By contrast, in DePeiza, the officers saw "something heavy" in the defendant's pocket right before seizing him. DePeiza, 449 Mass. at 369. Neither officer knew what Evelyn was holding and thus, the object could have just as well been keys or a cell phone. Evelyn made no abrupt or quick movements with respect to his pocket or the object. Compare Commonwealth v. Fisher, 54 Mass. App. Ct. 41, 46-47 (2002) (defendant's quick motion either to or into his waist could be seen as either checking or drawing a weapon).

7. A black boy walking during questioning and then running away from an escalation with white police officers.

"The defendant was free to reject the police officer's multiple requests to speak with him, just as he was free to respond to the requests by increasing his pace." Jones-Pannell, 472 Mass. at 433. Garney's exit from his cruiser (at least) marked "the officers' escalating exercise of authority and control over" Evelyn because it signaled to Evelyn that he could no longer walk away from them or avoid their questions. Evans, 87 Mass. App. at 691. Garney's action thus prompted Evelyn to run away from this escalation.

Fleeing from white BPD officers does not evince consciousness of guilt where a black boy "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus." Warren, 475 Mass. at 540. The Court gave no consideration to that report's findings or those of any other report apparently because Garney and Abasciano did not testify to any explicit bias in deciding to approach and surveil Evelyn. (See RA II:113 n.2, 114 n.5, 129 n.15). The Court asserts that "Evelyn thus ran on his own, not occasioned by anything the police did[,]" and that he "inexplicably took off in flight away from the police, through no actions of the police[.]" (RA II:131-132). The BPD report, Warren, and the ample

record presented by the defense undermine this very assumption that only deception or consciousness of guilt could explain this boy's flight.

Finally, although running with arms pressed to one's body might look unnatural on a summer day, it is not unusual on a frigid night. At best, it would have given the police a hunch but no articulable basis to conclude that he was concealing a gun.

II. The officers' training and experience established no reliable method by which they could conclude that Evelyn was concealing a weapon. Dr. Sweet's testimony and the admitted studies exposed the perils in assuming that behaviors like a black boy "blading" away from white police officers indicate concealment.

Matters regarding the admissibility of expert testimony and evidence are reviewed for an abuse of discretion. See Canavan's Case, 432 Mass. 304, 312 (2000). However, the Court found Dr. Sweet's expert testimony admissible and admitted, without objection, the articles and studies as an exhibit during Dr. Sweet's testimony. Its legal conclusions that this evidence was "unhelpful" and that the officers offered lay, not expert, opinion must then be reviewed *de novo*. Under either standard, the Court erred, meriting reversal or remand.

The Court found Dr. Sweet's testimony "unhelpful" for three reasons which Evelyn will address in turn:

1. It concluded that, as a matter of law, there is "no requirement that conclusions drawn in the real world by police officers based on their training and

experience satisfy a scientific standard of proof." (RA II:135). This is true, but Dr. Sweet's testimony and the related research are helpful in determining whether officers' training and experience satisfy a *reliability* standard. The results of the Threat Study undermine police assumptions, which tend to become legal assumptions, about which behaviors indicate that a person is concealing a firearm. It also found that officers' investigative bias leads them to suspect the concealment of a weapon when there is none.

2. It concluded that "while validation of police observations by social science has potential value, that literature simply does not exist" and, as Dr. Sweet testified, "there are no studies, besides hers, that test whether police can reliably identify gun carriers, and none that have tested observations like the Gunman Characteristics are reliable indicators of deception or weapons concealment." (RA II:136). This point redounds to Evelyn's benefit. The Commonwealth produced no study or even a proposed methodology that, for example, distinguishes turning away from police to avoid contact from turning away from police to conceal a weapon.

3. It concluded "that the testing used in the Threat Study simply did not mimic the conditions that existed in this case such that its conclusions undermine the Court's conclusion that there was reasonable suspicion to stop Evelyn." (RA II:136). No study in this area will be able to mimic a real police investigation, but

that does not make the results unhelpful. Furthermore, the Court did not assess the value of studies which did analyze data and/or videos of real-life police-civilian encounters, demonstrating implicit bias by police and behaviors by innocent black people indicative of stereotype threat. (See RA I:229-230; RA II:15-17).

Finally, with respect to Garney's and Abasciano's opinions that Evelyn was holding a firearm in his pocket, it did not consider whether those opinions were based on a reliable method. To the extent the Court found they were merely offering "observations," the Court erred since the Commonwealth elicited their training and experience to support their conclusions that Evelyn was illegally concealing a weapon. See Commonwealth v. Canty, 466 Mass. 535, 542 n.5 (2013). It also erred in concluding that they were either offering lay opinion or not "true opinion" testimony. (See RA II:110-111). Lay opinion is limited to one that is:

> (a) rationally based on the witness's perception;
>
> (b) helpful to a clear understanding of the witness's testimony or in determining a fact in issue; *and*
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Section 702.

Mass. Guide to Evidence § 701 (emphasis added). See Canty, 466 Mass. at 542. As to § 701(a), the officers cannot make an interpretive leap that a person holding an

object, looking around, and turning his body away means that person is holding a concealed weapon where a lay person could not rationally make the same leap based on these observations alone. As to § 701(c), the officers invoked their "specialized knowledge" as applied to identifying persons illegally carrying firearms.

Thus, Garney's and Abasciano's proffered expert opinions must meet a reliability standard. See Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579 (1993) and Commonwealth v. Lanigan, 419 Mass. 15 (1994). As in other contexts, evidence presented at a suppression hearing must be reliable and trustworthy. See Abbott A. v. Commonwealth, 458 Mass. 24, 31 (2010).

The Commonwealth, as a proponent of this "expert" testimony, did not show that their training and experience qualified them to identify people who are concealing weapons or that they applied *some* reliable method when drawing certain conclusions about Evelyn's behaviors. "Observation informed by experience is but one scientific technique that is no less susceptible to Lanigan analysis than other types of scientific methodology." Canavan's Case, 432 Mass. at 313. "If the proponent can show that the method of personal observation is either generally accepted by the relevant scientific community or otherwise reliable to support a scientific conclusion relevant to the case, such expert testimony is admissible." Id. at 314. The Commonwealth proved neither. Abasciano's assertion

that he had made or assisted gun arrests in the "double-digits" was belied by the fact that the BPD only produced *two* reports where he was involved with a gun arrest. He also never explained whether he had viewed specific behaviors (like blading) leading up to these arrests and did not identify how many of these arrests involved pedestrian/street encounters. Garney, only six months on the job, attended a single YVSF lecture which purportedly relayed characteristics of armed gunmen. As Dr. Sweet explained in detail, these "characteristics" have no rhyme or reason other than police say-so.

III. The substantial record supporting implicitly biased policing and stereotype threat as influencing police-civilian interactions on Boston streets further requires reversal or at least remand.

The Court entirely dismissed Dr. Sweet's testimony as well as seven studies and articles regarding implicitly biased and racially discriminatory policing, behaviors caused by stereotype threat, discriminatory use of fatal force, and inadequate police training. This record is highly probative as to whether a black boy would feel free to leave, whether an innocent black boy would likely want to avoid contact with white police officers (and behave accordingly), and whether the police are objectively and reliably interpreting behaviors by black people. These are significant studies on pertinent topics which deserve a full reckoning. The fact that Dr. Sweet did not author them is irrelevant where they were admitted without objection and no reliability issues were raised. (See RA II:124 n.12).

In Warren, the SJC directed lower courts to tackle discriminatory policing at least when it comes to a black man's flight from police. Warren, 475 Mass. at 539. This ample record demonstrated racially biased (if only implicitly so) policing by the BPD, behaviors beyond flight that would be consistent with a black man feeling stereotype threat, and, in general, officers' tendency to perceive concealed weapons when there are none – a tendency that increases exponentially when they encounter black men. Evelyn does not need to prove the near-impossible - explicit bias by police - before the Court should consider whether the officers' opinions about Evelyn's behavior were reliable or potentially tainted by implicit bias and whether Evelyn's behavior was consistent with stereotype threat rather than consciousness of guilt.

Thus, this Court should reverse or at least remand to the Superior Court for further findings and further hearing so that it may fully reckon with the import of Dr. Sweet's expert testimony and expert studies regarding, among other things, a black person's behaviors triggered by stereotype threat as well as the competence of police to assess those behaviors. As the SJC indicated in Warren, analyzing police-civilian interactions under Article 14 can no longer be a color-blind, abstract affair.

CONCLUSION

This Court should reverse the Superior Court's order denying his motion to suppress and enter an order allowing it. Alternatively, it should remand the matter to the Superior Court for further findings and/or hearing.

Date: June 29, 2019

Respectfully Submitted,

TYKORIE EVELYN

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ADDENDUM

A. Constitutional Provisions

United States Constitution

Amendment Four

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.

Massachusetts Constitution

Article XIV

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.

B. Massachusetts Guide to Evidence Provisions

[See Following Page.]

ARTICLE VII. OPINION AND EXPERT EVIDENCE

Section 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is

(a) rationally based on the witness's perception;

(b) helpful to a clear understanding of the witness's testimony or in determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Section 702.

NOTE

This section, which is taken nearly verbatim from Fed. R. Evid. 701, reflects Massachusetts practice. See Noyes v. Noyes, 224 Mass. 125, 129 (1916); Commonwealth v. Sturtivant, 117 Mass. 122, 133, 137 (1875); Commonwealth v. Brusgulis, 41 Mass. App. Ct. 386, 390–391 (1996). "While an expert opinion is admissible only where it will help jurors interpret evidence that lies outside of common experience, a lay opinion is admissible only where it lies within the realm of common experience" (quotation omitted). Commonwealth v. Canty, 466 Mass. 535, 541–542 (2013). "The rule that witnesses in describing conduct should tell what they saw and heard does not foreclose the use of words of summary description." Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 647 (1961) (judge had the discretion to permit witnesses to use the words "boisterous" and "in an arrogant manner" in describing the actions of a person they observed). Accord Commonwealth v. Bonomi, 335 Mass. 327, 339 (1957) (condition of nervousness or happiness); Commonwealth v. Fuller, 66 Mass. App. Ct. 84, 91 (2006). See also Commonwealth v. Bonds, 445 Mass. 821, 830 (2006); McGrath v. Fash, 244 Mass. 327, 329 (1923) (witness permitted to testify that "all of a sudden this truck came around the corner on two wheels, and zigzagging across the street and appeared to be out of the control of the driver"); Commonwealth v. Rodziewicz, 213 Mass. 68, 69 (1912) (it was error to permit a police investigator to identify points of origin of a fire based simply on observations about condition of the burned structure).

Ultimately, the admission of summary descriptions of observed facts is left to the discretion of the trial judge. Kane v. Fields Corner Grille, Inc., 341 Mass. at 647 ("Trials are not to be delayed and witnesses made inarticulate by too nice objections or rulings as to the use of such descriptive words."). See Commonwealth v. Barbosa, 477 Mass. 658, 673–674 (2017) (witness may testify about time discrepancy between video surveillance footage and GPS data to explain "investigative significance" of evidence). A witness may not express an opinion about the credibility of another witness. See Commonwealth v. Triplett, 398 Mass. 561, 567 (1986).

Illustrations. When, due to the complexity of expressing the observation, such evidence might otherwise not be available, witnesses are permitted, out of necessity, to use "shorthand expressions" to describe observed facts such as the identity, size, distance, and speed of objects; the length of the passage of time; and the age, identity, and conduct of persons. See Commonwealth v. Tracy, 349 Mass. 87, 95–96 (1965); Noyes v. Noyes, 224 Mass. 125, 129–130 (1916); Ross v. John Hancock Mut. Life Ins. Co., 222 Mass. 560, 562 (1916).

Section 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

NOTE

Introduction. This section, which is based upon Fed. R. Evid. 702 and Proposed Mass. R. Evid. 702, reflects Massachusetts law. There are two methods by which the judge may satisfy his or her duty as the gatekeeper to ensure that expert witness testimony is reliable: (1) the "Frye" test, i.e., general acceptance in the relevant scientific community, or (2) a Daubert-Lanigan analysis. Commonwealth v. Powell, 450 Mass. 229, 238 (2007). See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 585–595 (1993), and Commonwealth v. Lanigan, 419 Mass. 15, 24–26 (1994).

It is important to distinguish between the words used to express the principle of Massachusetts law set forth in this section and the application of the principle in specific cases. As the following notes indicate, the framework used under the Federal rules and in Massachusetts is the same, and each approach is specifically described as flexible. The principal difference is that in Massachusetts, the trial judge satisfies his or her gatekeeper responsibilities under Subsections (b) and (c) once the proponent of the evidence establishes that it is generally accepted by the relevant scientific community. See Commonwealth v. Patterson, 445 Mass. 626, 640–641 (2005); Commonwealth v. Sands, 424 Mass. 184, 185–186 (1997). Compare Commonwealth v. Lanigan, 419 Mass. at 26 ("We accept the basic reasoning of the Daubert opinion because it is consistent with our test of demonstrated reliability. We suspect that general acceptance in the relevant scientific community will continue to be the significant, and often the only, issue."), and Canavan's Case, 432 Mass. 304, 314 n.5 (2000) ("Application of the Lanigan test requires flexibility. Differing types of methodology may require judges to apply differing evaluative criteria to determine whether scientific methodology is reliable. In the Lanigan case, we established various guideposts for determining admissibility including general acceptance, peer review, and testing."), with Daubert v. Merrell Dow Pharms., Inc., 509 U.S. at 594–595 ("The inquiry envisioned by [Fed. R. Evid.] 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission."), and Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) ("[T]he test of reliability is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case."). See also Kumho Tire Co. v. Carmichael, 526 U.S. at 150 ("Daubert makes clear that the factors it mentions do *not* constitute a 'definitive checklist or test.' [Daubert v. Merrell Dow Pharms., Inc., 509 U.S.] at 593. And Daubert adds that the gatekeeping inquiry must be 'tied to the facts' of a particular 'case.' Id. at 591." [Quotation and citation omitted.]); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. at 594 ("Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community[] may properly be viewed with skepticism" [quotation and citation omitted].).

Hearing. An evidentiary hearing is not always necessary to comply with Commonwealth v. Lanigan, 419 Mass. 15 (1994). See Palandjian v. Foster, 446 Mass. 100, 111 (2006); Vassallo v. Baxter Healthcare Corp.,

C. Unpublished Panel Decisions

[See Following Page.]

Commonwealth v. Lewis

Appeals Court of Massachusetts

October 9, 2013, Entered

12-P-985

Reporter
2013 Mass. App. Unpub. LEXIS 971 *; 84 Mass. App. Ct. 1114; 994 N.E.2d 819; 2013 WL 5538451

COMMONWEALTH vs. DOMINIQUE LEWIS.

Subsequent History: Appeal denied by Commonwealth v. Lewis, 466 Mass. 1109, 998 N.E.2d 342, 2013 Mass. LEXIS 939 (Mass., Nov. 21, 2013)

Core Terms

reasonable suspicion, armed, shield, conversation, carrying, firearm, door, officer's testimony, police witness, right side, give rise, endorsement, officers', backpack, credible, mirrored, probable, suppress, matters, nervous, porch, drop

Judges: [*1] Green, Grainger & Fecteau, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On appeal from his convictions on charges of carrying a firearm without a license and carrying a loaded firearm, the defendant claims error in the denial of his pretrial motion to suppress evidence seized from him as a consequence of a police stop and search of his person. We reverse.

The motion judge explained his order denying the motion in a margin endorsement stating the following: "After hearing and argument the motion is DENIED. I find based on the credible evidence offered by the police witnesses that probable cause existed to approach and detain the defendant. I find the experience and training of the police witness as to the characteristics of an armed individual mirrored the actions of the defendant, giving rise to reasonable suspicion that a crime was being committed by the defendant."[1] The testimony upon which the judge apparently based his finding was that of Officer Traft, who explained that armed gunmen will "shield their body, . . . shield [their] weapon away from someone," and that he developed the belief that the defendant was armed when the defendant (who was standing on the porch of a residence, [*2] "banging" on the front door in an effort to be allowed entry) turned his body so as to shield his right side from the officer. The motion judge's conclusion that the defendant's actions furnished reasonable suspicion to justify a stop was incorrect. Put simply, the mere fact that the defendant turned his right side away from the officers, while knocking on the door in his attempt to be allowed entry to the residence,

[1] The motion judge's endorsement did not otherwise explain the basis for his conclusion [*4] that probable cause, rather than reasonable suspicion, existed to stop the defendant. Beyond finding that the defendant's actions mirrored those described by the officer's testimony as characteristic of an armed individual, the judge made no additional findings of fact.

does not furnish reasonable suspicion that the defendant "had committed, was committing, or was about to commit a crime." Commonwealth v. Willis, 415 Mass. 814, 817, 616 N.E.2d 62 (1993). Contrast Commonwealth v. DePeiza, 449 Mass. 367, 371-372, 868 N.E.2d 90 (2007) (defendant's "straight arm" walk, together with nervous behavior and shielding of bulge in jacket pocket that appeared to hold a heavy object, at midnight in area of recent escalation in firearm violence, furnished reasonable suspicion to conduct a patfrisk). As we have observed, see note 1, supra, the findings of fact entered by the motion judge were remarkably sparse. However, we discern from the record no purpose to be gained by remanding the matter for the entry of supplemental findings, because even were we to assume that the motion [*3] judge would find credible all of the testimony by the officers who testified at the motion hearing, their testimony as to matters not incorporated in the judge's findings still does not give rise to reasonable suspicion. Those additional matters include (i) that the encounter took place in a high crime area; (ii) that the defendant, with whom they were familiar and typically found to be willing to engage with them in friendly conversation, declined the officers' efforts at cordial conversation on this particular occasion, explaining only that he needed to drop off a PlayStation he claimed to be carrying in a backpack; (iii) that the defendant appeared nervous; and (iv) that the defendant dropped the backpack which he claimed to contain the PlayStation. At most, the officers' observations, including the defendant's uncharacteristic reluctance to engage in conversation, supported a hunch that he was up to no good, rather than reasonable suspicion that he was engaged in criminal activity. See Commonwealth v. Thibeau, 384 Mass. 762, 763-764, 429 N.E.2d 1009 (1981). See also Commonwealth v. Stoute, 422 Mass. 782, 788, 665 N.E.2d 93 (1996).[2]

The judgments are reversed, and the verdicts are set aside. The order denying the defendant's motion to suppress is reversed, and a new order shall enter allowing the motion.

So ordered.

By the Court (Green, Grainger & Fecteau, JJ.),

Entered: October 9, 2013.

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[2]Our view of the case obviates any need to consider whether the officers were justified in reaching through the threshold of the door to grab the defendant and drag him back out onto the porch.

Commonwealth v. Nieves

Appeals Court of Massachusetts

December 5, 2018, Entered

18-P-216

Reporter
2018 Mass. App. Unpub. LEXIS 891 *; 94 Mass. App. Ct. 1112; 2018 WL 6332243

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

COMMONWEALTH *vs.* BENNY W. NIEVES.

Core Terms

firearm, pocket, reasonable suspicion, suppress, outstanding, cruiser

Judges: Milkey, Henry & Englander, JJ. [*1]

Opinion

A District Court jury convicted the defendant of unlawful possession of a firearm and unlawful possession of a loaded firearm. The firearm in question was found in the pocket of a coat he was wearing during a patfrisk performed by a Worcester police officer. On appeal, the defendant challenges the denial of his motion to suppress the firearm.[1] Because we agree with the defendant that the police did not have justification to conduct the patfrisk, we reverse the defendant's convictions and order that the complaint be dismissed.

Background. The factual recitation that follows is drawn from the judge's findings, none of which the defendant has shown to be clearly erroneous. See *Commonwealth* v. *Meas*, 467 Mass. 434, 440, 5 N.E.3d 864 (2014) ("In reviewing a decision on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of [the judge's] ultimate findings and conclusions of law" [quotations omitted]).

On September 12, 2014, at approximately 12:40 A.M., Officer Peter Roberge, a Worcester police officer, was on routine traffic patrol in the Kelly Square area. "[T]here have been many robberies, stabbing[s] and shootings" [*2] in Kelly Square, and it "is considered a high crime area of the city." Officer Roberge spotted the defendant and another man walking slowly toward a gas station (where, according to the officer's testimony, he observed the defendant purchase something). The officer knew the defendant from an arrest the year before, and he had some reason to believe that the defendant had a warrant outstanding for his arrest. In fact, there was no outstanding warrant, something that Officer Roberge could have learned had someone run the defendant's name through the warrant management system.[2] In lieu of radioing the station

[1] The defendant additionally argues that the trial judge erred in denying his motion to dismiss the criminal complaint based on police failure to preserve an article of clothing in which the firearm had been wrapped. We need not reach that argument.

[2] Three months earlier, the defendant had been the victim of a shooting. Officer Roberge was aware that there had been an arrest warrant

for such assistance, Officer Roberge decided to stop the defendant to make inquiry of him. As the judge expressly found, "Officer Roberge admitted that the defendant was not doing anything unusual when he observed him walking, that he did not observe any furtive movements during that time, and that he had no reasonable suspicion that the defendant had committed any crime, but that he knew the defendant and wanted to inquire about the existence of the warrant."

Officer Roberge pulled his marked cruiser alongside the defendant while the defendant was crossing the street, and stopped [*3] him while he was standing on a traffic island. The officer told the defendant "he wanted to talk with him." At this point, Officer Roberge was joined by two other officers (whom he had radioed for backup) in a separate cruiser. Officer Roberge did not activate his cruiser's lights or siren (and there was no evidence that the other officers did do so either). The defendant and his companion meanwhile had been joined by a third person, so that there were three officers and three civilians.

Officer Roberge asked the defendant to remove his hands from his coat pockets, and the defendant complied by slowly withdrawing his hands, which he then kept by his side and near his pockets. The defendant also turned his body "so that he shielded the left side of his body from Officer Roberge."[3] Officer Roberge noticed that the defendant appeared nervous during this encounter and would not look him in the eye. "Believing that the defendant was in possession of a weapon," Officer Roberge ordered the defendant to place his hands on the roof of a cruiser and pat frisked him. During this, Officer Roberge discovered the loaded firearm in the defendant's coat pocket.

Discussion. For purposes of our analysis, [*4] we assume that the defendant was not seized when the police initiated their conversation with him, or even when the police ordered him to remove his hands from his pockets. See *Commonwealth v. Fraser*, 410 Mass. 541, 544, 573 N.E.2d 979 (1991). As the Commonwealth acknowledges, however, the defendant plainly was seized by the time Officer Roberge ordered the defendant to place his hands on the cruiser so that he could pat frisk him. The question, then, is whether at that point the police had "reasonable suspicion that [the defendant] ha[d] committed, [was] committing, or [was] about to commit a criminal offense *and* [was] armed and dangerous." See *Commonwealth v. Narcisse*, 457 Mass. 1, 9, 927 N.E.2d 439 (2010).

At the motion hearing (and on appeal) the Commonwealth sought to justify the patfrisk based only on the theory that Officer Roberge had gained reasonable suspicion from their interactions that day that the defendant was in unlawful possession of a firearm.[4] To support this theory, the Commonwealth relies principally on *Commonwealth v. DePeiza*, 449 Mass. 367, 868 N.E.2d 90 (2007), a case that the prosecutor characterized at the motion hearing as being "directly on point" and as involving facts "almost identical to the facts before us today." To be sure, there are some basic similarities between the facts here and those in *DePeiza*: both defendants were stopped in a [*5] high crime area, appeared nervous, and turned part of their bodies away from the police. *Id.* at 368-369. However, in *DePeiza* — a case that the Supreme Judicial Court itself characterized as "a close one" — there was significantly more evidence to support a reasonable belief that the defendant was unlawfully in possession of a firearm. *Id.* at 371. For example, the defendant in *DePeiza* had been seen walking with a stiff, "'straight arm' gait," which an officer with training on the subject testified was characteristic of someone walking with a concealed firearm. *Id.* at 368. Further, the police in *DePeiza* specifically observed that a pocket on the side that the defendant was shielding from the police appeared to have been weighted down by a heavy object.[5] *Id.* at 368. In light of the significant difference in the quantity and quality of evidence between *DePeiza* and the case before us, the

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pending for the defendant at that time, and he testified at the suppression hearing that the warrant was for "[a]ssault and battery and destruction of property." Further, although Officer Roberge had not checked the warrant management system the day of the stop to see whether the earlier warrant was still outstanding, he had not seen the defendant's name on the daily list of warrants issued, something he regularly checked. He also testified that he had not seen the defendant's name in any of the booking records, which indicated to him that the warrant was still active. In fact, the warrant in question had been cleared five days prior to the defendant's being stopped.

[3] The judge's finding on this point is not clearly erroneous, and Officer Roberge himself referred to the defendant's actions as "shielding" the left side of his body. However, it bears noting that on cross-examination, Officer Roberge agreed with defense counsel's characterization that the defendant "turned his body slightly away," and "just turned a slight turn."

[4] It appears uncontested that Officer Roberge had ample time at the scene to radio to have someone check the warrant management system to confirm whether the old arrest warrant remained outstanding. In any event, the Commonwealth does not argue, on the facts here, that Officer Roberge could seize and pat frisk the defendant based on a mistaken but good faith belief that there was an outstanding warrant. In fact, as the judge noted, citing *Commonwealth v. Maingrette*, 86 Mass. App. Ct. 691, 20 N.E.3d 626 (2014), the Commonwealth affirmatively forswore making such an argument.

[5] In holding that the police officer had sufficient reasonable suspicion to pat frisk the defendant, the court noted that the "most significant[]" evidence was that the defendant's right pocket "appeared to hold a heavy object" and that the defendant was shielding that side of his body from the police. *DePeiza*, 449 Mass. at 371-372.

comparison between the cases is not helpful to the Commonwealth.

We conclude that the defendant's nervousness when stopped by the police in a high crime area, coupled with his turning his body slightly away from the police, does not support reasonable suspicion that the defendant was illegally in possession of a firearm.[6] The police here [*6] had a hunch that the defendant may have been concealing an unlicensed firearm, but "[a] mere 'hunch' is not enough" to establish reasonable suspicion. *Commonwealth* v. *Silva*, 366 Mass. 402, 406, 318 N.E.2d 895 (1974). The motion to suppress should have been allowed.

Finally, in the unusual circumstances where it is beyond dispute that the defendant could not be retried if the firearm is suppressed, we order not only that his convictions be reversed, but that the complaint be dismissed. See *Commonwealth* v. *Gentile*, 466 Mass. 817, 832, 2 N.E.3d 873 (2014) (case remanded for dismissal where judge erred in failing to suppress certain evidence and the Commonwealth necessarily could not retry the defendant without such evidence).

Conclusion. The judgments are reversed, the verdicts are set aside, and an order shall enter dismissing the complaint.

So ordered.

By the Court (Milkey, Henry & Englander, JJ.[7]),

Entered: December 5, 2018.

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[6] Even if the defendant's turning his body is seen as his not wanting the police to see something on that side of his body, it hardly follows that the thing he was trying to hide was an illegal firearm.

[7] The panelists are listed in order of seniority.

D. Report: Boston Police Department Releases Latest Field Interrogation Observation Data (dated May 23, 2017)

(Available at: https://bpdnews.com/news/2017/5/23/boston-police-department-releases-latest-field-interrogation-observation-data (last visited on June 28, 2019)

[See Following Page.]

Boston Police Department Releases Latest Field Interrogation Observation Data

May 23, 2017

In keeping with his commitment to transparency, Commissioner Evans has released the latest Field Interrogation/Observation (FIO) data, which includes FIO information from June 2015 to December 2016. The release of this data follows the January 2016 release of similar data for FIO reports completed from 2011 through April 2015. Dr. Anthony Braga of Northeastern University, Dr. Jeffrey Fagan of Columbia University School of Law, and Professor John MacDonald of University of Pennsylvania are currently studying the FIO data from 2011 through 2016, and the Department expects the study's findings will be publically available later this year.

Like the prior study, the study of the 2016 data will examine how BPD officers are utilizing the FIO program. While the study is being completed, the Department cautions against the use of simple benchmark comparisonsof the racial distribution of Boston residents relative to the racial distribution of FIO subjects for purposes of determining racial disparities in BPD FIO practices. There are many other complicated factors, such as neighborhood crime, police deployments, and neighborhood social disadvantage, as well individual factors such as criminal history and known gang membership that are correlated with the racial distribution of FIO subjects. Determining racial disparities in BPD FIO practices requires complex statistical analyses before any firm conclusions can, or should, be drawn.

2016 FIO Data Summary:

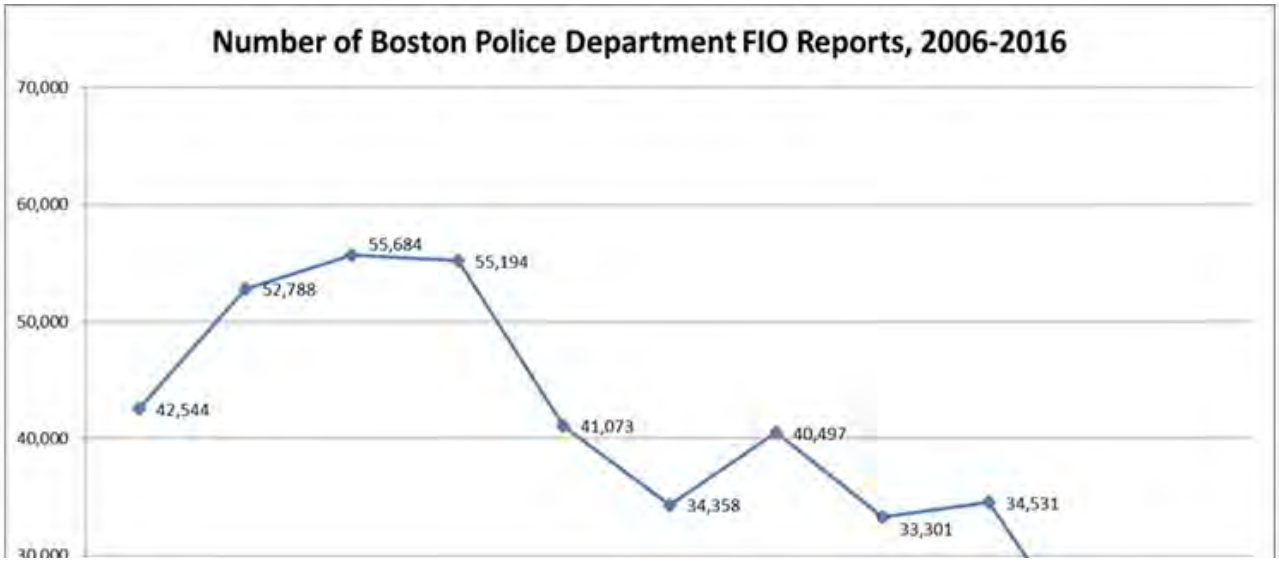
In 2016, BPD officers submitted 9,049 FIO reports involving 14,995 individuals.

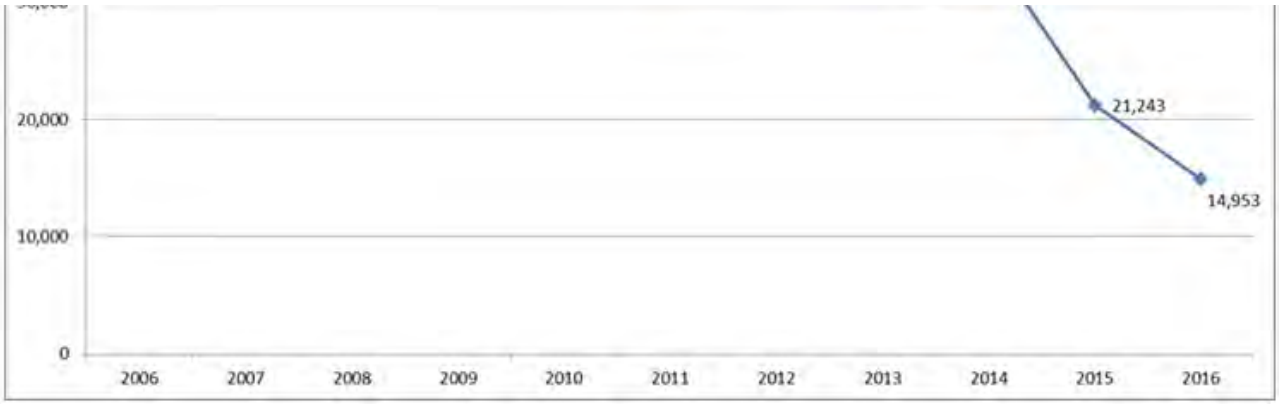
The total number of individual subjects in BPD FIO reports DECREASED by nearly 57% from 34,531 individuals in 2014 to 14,953 in 2016.

Additionally, since the high of 55,684 individuals subjected to FIO reports in 2008, the number of individual subjects in BPD FIO reports DECREASED by over 73% through 2016. See Table 1 below.

When reviewing this data, it is important to note that subjects of FIO reports are not always stopped. Specifically in 2016, 14.8% of the completed FIOs were mere observations. See Table 3 below.

Table 1.





The following tables highlight additional components and circumstances of BPD's 2016 FIO program.

Table 2. Circumstances of the FIO Encounter

	N=Subject	Percent
Stopped	5,689	62.5
Encountered	2,068	22.7
Observed	1,344	14.8
Total	9,101	100.0

Table 3. Basis of the FIO Encounter

	N	Percent
Probable cause	3,959	43.5
Reasonable suspicion	2,000	22.0

Encounter	1,940	21.3
Intel	1,202	13.2
Total	9,101	100.0

Table 4. Did the FIO Encounter involve at least one subject being frisked?

	N	Percent
Yes	2,676	29.4
No	6,425	70.6
Total	9,101	100.0

Table 5. Did the FIO Encounter involve at least one subject being searched?

	N	Percent
Yes	1,179	13.0
No	7,922	87.0
Total	9,101	100.0

Table 6. Stop Duration

	N	Percent
Five to ten minutes	3,604	39.6

Less than five minutes	1,730	19.0
Ten to fifteen minutes	1,328	14.6
Fifteen to twenty minutes	874	9.6
Other durations	807	8.9
Missing	758	8.3
Total	9,101	100.0

Table 7. FIO Subject Age

	N	Percent
17 & younger	1,239	8.3
18 – 24	4,681	31.3
25 – 34	5,167	34.6
35 – 44	1,623	10.9
45 & older	1,896	12.6
Missing	347	2.3
Total	14,953	100.0

Race and Ethnicity

With the implementation of the new RMS system, different Race and Ethnicity categories were used. The old RMS system limited BPD officers to a mutually exclusive selection of the FIO subject's race and ethnicity (White, black, Hispanic, Asian, Native American / Hawaiian / Alaskan / Pacific Islander, or other). The

new RMS designates Hispanic subjects in a separate ethnicity variable that is no longer mutually exclusive to other specific race categories. While this improvement allows the BPD to better document the race and ethnicity of FIO subjects, it makes comparing FIO subject race trends between the two systems more difficult. For example:

Table 8. Adjusted 2016 FIO Subject Race Using Old RMS Designations

	N=Subject	Percent
White	2,544	17.0%
Black	9,514	63.6%
Hispanic	2,215	14.8%
Asian / PI / Other	140	0.1%
Unknown / Missing	540	3.6%
Total	14,953	100.0%

While the 2016 FIO data shows an increase in the percentage of black FIO subjects between 2014 and 2016, a majority of the increase may be attributable to the ability for officers to include both race and ethnicity.

Table 9. 2016 FIO Subject Race

	N = Subject	Percent
Black	10,369	69.4
White	3,640	24.3

Missing / Unknown	793	5.3
Asian	120	0.8
Native American / Alaskan / Hawaiian / PI	31	0.2
Total	14,953	100.0

Table 10. 2016 FIO Subject Ethnicity

	N	Percent
Hispanic Origin	2,215	14.8
Not of Hispanic Origin	6,666	44.6
Missing / Unknown	6,072	40.6
Total	14,953	100.0

*NOTE: The number and content of records shared here in our preliminary analysis may differ slightly from official data provided on the City Data Portal. These files are extracted from live databases which may have records added or updated at any time. From the completion of this preliminary analysis, entries may have since been corrected or cleaned to ensure the most accurate information is available to the public.

For all current publically released FIO data, please click on the link below:

https://data.boston.gov/dataset/boston-police-department-fio

For additional information on BPD's FIO program and past analysis please visit the links below:

http://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results?rq=fio%20dATA

http://bpdnews.com/news/2016/1/7/commissioner-evans-continues-efforts-to-

increase-transparency-and-accountability-of-policing-activities-to-the-public?rq=fio%20dATA

Boston Police / 1 Likes Share

BPD FUGITIVE UNIT ARREST LAWRENCE ... COMMUNITY ALERT: BPD SEEK PUBLIC'S ...

E. The Superior Court's Order on Defendant's Motions to Suppress Evidence

[See following page.]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 17-190

COMMONWEALTH

vs.

TYKORIE EVELYN

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The defendant, Tykorie Evelyn, is charged with murder and firearm offenses arising from his seizure by Boston Police. Evelyn filed several motions, including (1) a motion to suppress all evidence obtained pursuant to a stop and arrest that occurred on January 9, 2016, and a request to permit expert testimony pursuant to Commonwealth v. Lanigan, 419 Mass. 15 (1994) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); (2) a motion to exclude any testimony from Boston police officers "which purports to provide an opinion concerning the significance of observations made of the defendant, which allegedly provided support for their decision to stop, seize and arrest him"; (3) and a motion to suppress all evidence from Evelyn's cellular telephone. The government opposed and moved to strike the testimony of Evelyn's purported expert.

An evidentiary hearing on the motions was conducted on September 7 and 20, 2018, and Evelyn submitted post-hearing memoranda on or about September 26, 2018.

In light of the arguments made by counsel and the facts presented, and for the reasons stated below, the Court rules as follows:

(1) Evelyn's motion to suppress all evidence obtained pursuant to a stop and arrest that occurred on January 9, 2016 is **DENIED**;

(2) Evelyn's related request to permit expert testimony pursuant to Commonwealth v. Lanigan, 419 Mass. 15 (1994) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) is **ALLOWED** for purposes of the suppression hearing. The Court declines to determine whether that testimony is admissible at trial;

(3) The Commonwealth's motion to strike the testimony of Evelyn's expert is **DENIED**;

(4) Evelyn's motion to exclude any testimony from Boston police officers "which purports to provide an opinion concerning the significance of observations made of the defendant, which allegedly provided support for their decision to stop, seize and arrest him" is **ALLOWED IN PART**, as the Court did not permit the officers to testify to true opinion testimony, but **DENIED** to the extent the motion sought to exclude the police officers from testifying about conclusions they reached based on objective facts, their training and experience, or from providing any related lay opinion; and

(5) Evelyn's motion to suppress evidence from and regarding Evelyn's cellular telephone is **DENIED.**

FINDINGS OF FACT

A. Seizure and Arrest

Boston Police Officer Joseph Abasciano testified. I fully credit his testimony.[1]

[1] As noted above, Evelyn moved to exclude opinion testimony from the percipient-witness police officers "concerning the significance of observations made of the defendant." The Court did not permit any expert testimony from the officers, but allowed them to testify as to what they saw and what actions they took based on

Abasciano has been a Boston Police officer for 11 years, although that experience has been interrupted by deployments overseas as an infantry Marine and by an injury which sidelined him from police work from late 2014 to December 2016. Abasciano has been trained and is fully is familiar with firearms, including handguns, through his experience with the Boston Police and with the Marines, including a seven-month deployment for combat tours in Iraq. He has received training with the Boston Police and Marines regarding the identification of individuals carrying concealed firearms, and has dealt with people in illegal possession of firearms on many occasions prior to January, 2017, participating in more than 10 arrests of suspects in possession of guns and has assisted others in such arrests on further occasions.

In 2012, Abasciano was assigned to District B2, and has been assigned there ever since. He is familiar with the geography of that area and the gangs that exist within it. As of January, 2017, he was aware that there has been gang activity in the area of Melnea Cass Boulevard, Dearborn Avenue and Eustis Street, where the Orchard Park and VNF gangs were active. He is also familiar with the Ruggles Street gang. Disputes between gangs would occasionally come to Abasciano's attention, and he was aware of a rivalry between gangs based on Ruggles Street and in Orchard Park/VNF. Dudley Street separated the territory of these two gangs. Active feuds have broken out with these gangs while Abasciano has served as a police officer in the area.

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those observations. Even had that testimony amounted to a lay opinion, it would not have been improper. See, e.g., Commonwealth v. Guillaume, 87 Mass. App. Ct. 1107 (2015) ("police officers may testify as lay witnesses where, as here, their testimony is based upon their own personal observations," citing Commonwealth v. Canty, 466 Mass. 535, 541 (2013)); Mass. G. Evid. §701 (2018) (lay opinion admissible where it is rationally based on the witness's perception; helpful to a clear understanding of the witness's testimony or in determining a fact in issue; and not based on scientific, technical or other specialized knowledge within the scope of Section 702).

Those feuds involved firearm and other forms of violence. Abasciano also received intelligence from other officers, often via email, concerning ongoing gang activity in Boston.

On January 9, 2017, Abasciano was working the 4 PM to 11:45 PM shift in a Rapid Response patrol wagon with his partner, Officer Brian Garney. Abasciano was driving the wagon, and the officers were primarily responding to priority one radio calls of crimes in progress. At approximately 7:27 PM, Abasciano and Garney received a ShotSpotter alert. ShotSpotter is a system which identifies firearm shots fired and directs the police to the general location of the sound of the shots. At the time, Abasciano and Garney were on Quincy Street approaching Colombia Road. The ShotSpotter notification, which Garney saw on the computer-aided dispatch ("CAD") screen in use on the computer in the patrol wagon or on his cellphone, stated that the shots occurred at Dearborn Street in Roxbury. Abasciano knew that the Orchard Park/VNF and the Ruggles Street gangs were active in that area. He turned the wagon around and headed toward that area.

First responders converged at the location of the shots and were reporting their findings via radio. Those reports reflected that there was a person shot near the intersection of Dearborn and Eustis who was severely injured and that three people had run from area, but no descriptions of them were given. The officers drove up Harrison Avenue and looked down Eustis toward the intersection with Dearborn. Based on the number of units that were there and the radio reports, Abasciano concluded there were enough police at the scene and decided to look in the area of the reported flight of the assailants. Abasciano believed the radio report was that the men were running down Eustis away from Adams Street, which would put them heading in the direction of Harrison Avenue and beyond. Although Abasciano later learned that he misheard the radio call

– the radio call was that the assailants were reported to have fled toward Adams Street on Eustis, not away from Adams Street – in the chaos of the calls, Abasciano understood the opposite. As a result, he drove up Harrison Avenue and took a left onto Melnea Cass Boulevard.[2] A map was introduced to illustrate the route that Abasciano and Garney drove that night. The lights and siren of the patrol wagon, which had been on as Abasciano and Garney began heading to the scene, were switched off.

The night was very cold, close to single digits. Abasciano was looking for vehicles quickly driving away from the scene, any victims or witnesses and anything else that stood out. He saw no pedestrians on Harrison Avenue. He took a left into Melnea Cass and drove toward the stop light at Melnea Cass and Shawmut. He saw no one on Melnea Cass until he got to that intersection, at which point Abasciano saw one person on the street, walking on Melnea Cass toward Dewitt Drive, a few yards from Shawmut Avenue. This was approximately a half mile from the shooting, and approximately 13 minutes after it was reported to police. The person, later identified as defendant Tykorie Evelyn, was walking in the opposite direction from the scene.

Abasciano took a left onto Shawmut and pulled up next to Evelyn. Photographs of Evelyn were introduced into evidence that showed at the time, Evelyn was wearing a dark overcoat, dark hooded sweatshirt, black pants, white sneakers and a white, orange and maroon knit hat with a pompom. Abasciano saw that Evelyn kept his hands in his pockets, and his right hand appeared to be clutching an object in his right jacket pocket, which Abasciano could not

[2] The defense suggested that officers took this route to approach the Madison Park housing project, which was in the direction of travel, and did so for racially discriminatory reasons. No facts support this claim.

identify but which was generally consistent with the size of a firearm. Evelyn was on Abasciano's side of the car, separated from Abasciano's car by a row of parked cars. Despite the fact that the patrol wagon pulled up next to him, Evelyn did not look over – in fact, it appeared to Abasciano that Evelyn was trying to ignore the officers. Evelyn was walking at a brisk pace. Abasciano continued to track and observe Evelyn, and did so for approximately 100 yards down Dewitt Drive. The street was fairly well-lit with street lights. Abasciano has responded to and made numerous firearms arrests in this area, and Abasciano was also aware there was active gangs in that area. During the 100 yards, Evelyn did not make eye contact or look over to the police at all, and kept his hands in his pockets. At one point, he began to blade[3] his body, moving the right side of his body, the side closest to Abasciano, away from the officers, turning his body to the left, which appeared unnatural to Abasciano. As the followed, Evelyn picked up this pace of walking and began looking in directions other than at the police.[4]

Abasciano, who had the window down, called out something like "hey, man, can I holler at you?"[5] In substance, Evelyn responded "for what?" Evelyn did not face the officers when he spoke and increased his pace of walking. Abasciano said that something had happened in the area and he wanted to know whether he had seen or heard anything. Evelyn mumbled something in response, but neither Abasciano nor Garney could understand it. Evelyn had still not made

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[3] Abasciano is familiar with this term both as a police officer and Marine. It means to turn one's body so that one side, usually the side where contraband is kept, is further away from an authority figure.

[4] The defense asked Abasciano whether he had undergone training put on by the Boston Police Youth Violence Strike Force in identifying individuals who are carrying concealed weapons. Abasciano did not recall ever having done so. Evelyn's argument premised on his criticism of that training are thus inapplicable as to the observations made by Abasciano on the night in question.

[5] The defense suggested that Abasciano used this phraseology for racially discriminatory reasons. No facts support this claim. Abasciano credibly testified that he used this expression frequently. Nothing suggests that this expression was used for, or resulted in, any form of racial discrimination.

eye contact with the officers, and his eyes began darting directions other than the location of the police, which suggested to Abasciano that Evelyn might flee (Abasciano had seen this behavior in the past, after which a suspect had fled). Abasciano stopped the patrol wagon and suggested to Garney that Evelyn appeared ready to run and he should probably step out, since they were in a poor position sitting in the car to protect themselves in the event Evelyn had a firearm and sought to use it. Garney opened the passenger side door to exit. When he did so, Evelyn fled.[6] Garney pursued him.

Garney ran after Evelyn up Shawmut Avenue onto Ruggles Street, as Evelyn ran through backyards. Abasciano called out the foot chase and location, and followed in the patrol wagon. Evelyn ran into a courtyard area on Dewitt Way. Abasciano knew that area. He parked the patrol wagon and ran up Kerr Way to head Evelyn off. At no point did Abasciano command Evelyn to stop. For a brief period, Evelyn disappeared on Kerr Way but reappeared on Kerr Way, running awkwardly with his hands in pockets, with parked cars between Abasciano and Evelyn which obstructed Abasciano's view of him.

Evelyn and Abasciano almost ran into each other. When they did, Evelyn tried to draw an item out of his right pocket while still running. Abasciano was concerned he was pulling a firearm, so he drew his firearm and commanded Evelyn to stop and show his hands. Evelyn ran a few more feet but eventually stopped near 17 Kerr Way, showed his hands, which held nothing, and laid flat on ground with his hands exposed. Garney then arrived and handcuffed Evelyn.

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[6] As discussed below, the officers' intent as to why Garney opened the wagon door is irrelevant to the Court's assessment of whether Evelyn was thereby seized, as that intent was not shared with Evelyn.

A pat frisk of Evelyn revealed that whatever Evelyn had in his right pocket was now gone. Shortly thereafter, Abasciano and other officers walked back over the route Evelyn had just taken and saw a firearm between two cars on the sidewalk, past which Evelyn had run and within throwing distance of where Evelyn was stopped. As noted below, a cellular phone was also found in Evelyn's possession.

Officer Brian Garney also testified. I fully credit his testimony. Garney has been a Boston Police Officer for three years, and has served on patrol since 2016. As of January 2017, Garney had not made arrests himself but has assisted on a few. On the evening of January 9, 2017, Garney was in the patrol wagon with Abasciano. It was a very cloudy, cold night, close to the single digits in temperature, and a little windy. Garney heard the shots fired alert, and, like Abasciano, erroneously thought the radio reports alerted officers that the suspects had fled up Eustis away from Adams Street. They then bypassed the crime scene itself and drove to Melnea Cass and Shawmut Avenue. Garney did not believe they saw anyone during the drive until he and Abasciano saw Evelyn on Dewitt.

Evelyn was a tall (about 6 feet) black male wearing a red hat, black "hoodie," black jacket and black pants. Garney knew the area to be high-crime and that it was the site of ongoing gang-related violence. As they drove closer to him, Garney noted that Evelyn kept eyes straight forward and did not look at the officers. The officers did not command him to look at them, but Garney described Evelyn's demeanor as refusing to look at the police. Evelyn also kept his hands tight to his body and in his pockets, did not swing his arms, and appeared to clutch something, but Garney could not see the outline of what it was.

After Abasciano called out to him, Evelyn kept looking forward, made no eye contact with the officers, and kept his hands in his pockets, tight to his body. Evelyn looked around but not at the police. The police were shadowing Evelyn, driving just behind him while trying to converse with him. After Abasciano asked if he could "holler" at Evelyn, Garney recalled Evelyn asking "for what?" Evelyn did not refuse to speak with the police. When Abasciano asked him whether he saw or heard anything, Evelyn said something Garney could not hear, and Garney was unsure whether Evelyn answered the question or not. He bladed his body away from the police as he continued walking, but did not ask the police to leave him alone. The police made no commands to Evelyn, did not tell him to stop, and did not activate the patrol wagon's sirens or lights.

Shortly after Evelyn mumbled his response to Abasciano, Garney started getting out of the patrol wagon. Evelyn broke into a full sprint as soon as Garney tried to open the wagon door and get out of the vehicle. Garney followed, and noticed that Evelyn kept his hands his pockets, which struck Garney as unnatural. Garney made no statements and issued no commands to Evelyn as he followed him. Evelyn veered off the roadway and ran across front lawns and down a small, unlit back alley on Ruggles Street, and then onto another dark alley. Garney paused there, as he was concerned that Evelyn as leading Garney into an ambush and that Evelyn had a firearm, especially since, during his run, he kept his hands in his pockets, which was consistent with securing a weapon. Garney lost sight of Evelyn for a few seconds, but resumed the chase when he heard Abasciano call out to Evelyn to stop. Garney ran toward Abasciano's voice.

Photographs were introduced evidencing the route of Evelyn's run. Evelyn ended up in the vicinity of 17 Kerr Way, where he was arrested.

During his academy training, Garney was trained by officer of the Youth Violence Strike Force, otherwise known as the Gang Unit, on potential evidence that showed a person was possibly carrying a concealed firearm. These factors included the manner in which the person carried himself or herself, how he or she walked, and what he or she did with his or her hands, such as keeping his or her hands close to the body. Garney recalled a PowerPoint presented by the Gang Unit on this, a paper copy of which was introduced into evidence. It listed several factors as "Characteristic of Armed Gunman Overview" (hereinafter, "Gunman Characteristics"), including presence in a high crime area; prior criminal history; weighted pocket; bulge in pocket; hypervigilance; change in gait or direction; running while clutching waist; bladed stance; nervous behavior; evasive or inconsistent answers; "security checks" (checking one' body to confirm the presence of a firearm); repeated noncompliance; breaking from a group of area; and bending, leaning or reaching during a car stop.

As applied to this case, some of the Gunman Characteristics pointed to Evelyn having a gun, while others did not. Those which suggested Evelyn held a gun included: high crime area (the encounter occurred in around Ruggles and Kerr, which Garney described as a high-crime area); weighted/bulge in pocket (Evelyn had something in his hands in his pockets, with his hands tight to his body); hypervigilance (Evelyn appeared very aware of his surroundings, constantly scanning)[7]; running while clutching waist (Garney said that Evelyn ran running while clutching something in his pocket in his abdomen area)[8]; bladed stance (Evelyn turned his body

[7] The police report did not state that Evelyn's eyes were "darting" around, but it stated that Evelyn "appeared to be looking for an avenue of escape" when he spoke with the officers, which describes the same observation.
[8] The defense argued that this was not at the "waist," but the distinction does not appear to make a difference, as the factor is focused on efforts to control a firearm concealed on the persons' body and not secured in a holster.

away to conceal a side of body); nervous behavior (Evelyn appeared nervous); evasive or inconsistent answers (Evelyn's mumbling in response to the Abasciano's question whether he saw anything was evasive); and breaking from group or area (Evelyn fled from the area).[9] Those Gunman Characteristics which did not suggest a gun included criminal history (neither Garney nor Abasciano knew whether Evelyn he had a prior criminal history or, for that matter, gang membership); change in direction (Evelyn did not change direction); security checks (Evelyn did not make security checks, although he clutched something in his pocket); repeated noncompliance (Evelyn did not fail to comply with any requests, as none were made); and bending, leaning or reaching during a car stop (there was no car stop).

The defense called Dawn Marie Sweet. Sweet is a professor of Communication Studies in the Department of Psychology at Iowa State University, and hold a Ph.D. in Communication from Rutgers University. Sweet is a researcher who focuses on deception, threat assessment and nonverbal communication, and studies detection of threats by examining non-verbal behavior – body movements, gazes, facial expressions, voice tone and tenor – which are associated with threatening acts, and the extent to which behavior leads to detection of concealment of object on a person. Sweet has studied and written in the field, including for scholarly, peer-reviewed journals, and contributed to research that was used by others in testimony before the House of Representatives on evaluating a Transportation Security Administration efforts to use body movements to detect deception or threat.[10] After the September 11th attacks, Sweet became

[9] In addition, as noted above, Abasciano testified that Evelyn changed his gait while he was talking with the police. In his cross-examination, Garney conceded the police report did not state this observation, but the Court credits it, as it is consistent with the report's statement that Evelyn was looking for an avenue of escape when he spoke with the officers and took off running when Garney tried to get out of the wagon.

[10] Sweet's role in this research was to review interviews of study participants and to assign a code to their gestures.

interest in studying threat detection and methods to determine weapon concealment and identify threats. Sweet teaches nonverbal communication at Iowa State, and since 2011, has worked with the sworn officers of the Iowa State Police Department to use her research in detecting threats in crowds, like that which assembles for home Iowa State football games.

Sweet stated that prior studies had found that nonverbal cues often used to identify deception correlated not with deception but with anxiety, such as fidgeting, averting gaze, and flushing, and that studies that correlated these factors with deception were split in their results, but which suggested they may not be reliable diagnostic indicators of deception. Sweet recognized that there was little research into whether behavioral clues accurately detect whether an individual actually possessed a weapon (a firearm or bomb), and she began examining that issue as a researcher. She won two grants to further that research, including an $11,000 grant from Motorola Solutions Foundation for a project entitled "Recognizing Hostile Intent Through Nonverbal Communication in Emotionally-Charged High-Risk/High-Consequence Situations." This grant funded Sweet's research, published in 2017 in the peer-reviewed journal, Law and Human Behavior, entitled "Assessing Law Enforcement Performance in Behavior-Based Threat Detection Tasks Involving a Concealed Weapon or Device" (hereinafter, "Threat Study").[11] The Threat Study was introduced into evidence, as was a disc containing recordings used to derive its results. Sweet testified that she believed that the Threat Study was the only published research of its type to analyze whether police can effectively identify persons concealing weapons.

[11] Sweet, et al., "Assessing Law Enforcement Performance in Behavior-Based Threat Detection Tasks Involving a Concealed Weapon or Device," 41 Law and Human Behavior 411 (Oct. 2017).

In relevant part, the Threat Study used eight videos which depicted one of two males who served as the targets, both of whom had minimal experience holding or concealing a weapon. The targets walked approximately 100 yards in daytime along a public street toward a camera. The targets were not pursued, approached or questioned by anyone on the walk. The targets were dressed in street clothes, but wearing jeans, not sweatpants or athletic wear. In two trials each, the targets concealed a 9 mm Glock firearm in the small of their backs and in the waistband of their jeans. In the other two, the targets did not carry a gun at all. The targets were instructed to walk normally without raising suspicion and were told that sheriff's deputies were monitoring them as they entered the building to decide whether they were carrying a firearm. The targets were also told that they could earn up to a total of $125 for bringing in a firearm undetected, but that they would be penalized if they were caught by losing rewards they had earned by previous successful non-detection.

Police officers and student volunteers viewed the tapes and were asked which of the targets were carrying a weapon and the level of certainty. The participants in the Threat Study were 51 police officers and 56 students. The police officers were sheriff deputies, patrol officers and detectives with varying levels of law enforcement experience. They were not asked how many times they had stopped suspects and made gun arrests, and there was no data showing whether any had interacted with suspects who had allegedly just committed a homicide. The students were psychology and communications undergraduates who earned credit for participating. The students were not asked whether they were studying human behavior, which Sweet conceded would probably have an effect on the study's results. The students were also not asked whether they had interacted with people illegally possessing firearms or had a license

to carry firearms. The participants viewed each video and then made a binary judgment whether the target was or was not concealing a firearm, to provide a confidence rating from 50 to 100 percent, and list behavioral indicators they perceived to be indicative of concealment or non-concealment. The participants did not view the targets live, only by video.

The Threat Study concluded that both officers and the student controls performed greater than chance in discriminating threat. While successful identification of the target when concealing was "quite poor," the correct rejection of a non-concealing target was high (as high as 75%), which "suggest[ed] that [participants] were more likely to report non-concealment across trials." There were no significant differences between officers and civilians on accuracy. Further, the Threat Study found no significant association between officer's experience and accuracy, but did find a negative correlation between officer's experience and response criterion, which "suggest[ed] that officers with greater experience were more likely to perceive 'concealment' on the part of the target...leading to more frequent perception of threat across trials."

The Threat Study recognized that it was a "first step toward understanding officers' ability to detect a concealed weapon," and that further research was needed to determine which behaviors suggest weapon concealment, such as "deviations in gait patterns, arm movements, and gross movement patterns related to one's own bodily awareness of the concealed object." Moreover, the Threat Study recognized its results could not be directly applied to real-life incidents in high-crime, urban environments where the consequences of finding a weapon are high and where police are trained and experienced in detecting such threats:

> it is quite difficult for researchers to genuinely replicate the limbic responses that could affect nonverbal behavior in a high-risk, high-consequence situation [and] ... that the impact of these consequences for being identified as concealing are unlikely to produce the same degree of physiological stress as is likely to be evidenced in real-world settings (e.g., loss of freedom...). ...[T]here is good evidence to suggest that one's expressive nonverbal behavior is influenced during periods of increased emotional arousal and those underlying neurological processes influence movement...We encourage researchers to further develop experimental paradigms that model a limbic system response induced by concealment of a weapon or threatening device, and to explore the limitation of movements related to the characteristics of a concealed object or device (e.g., weight, size, stability, etc.) and the location of concealment on his or her person. Of course, real-world stimuli come with their own set of limitations that must be considered, including...consequences associated with detection...Our initial studies also failed to consider several environmental, contextual, and personal factors that could influence judgments of concealment, such as the setting (e.g., an urban vs. rural environment), features of the target (e.g., gender, age, race, etc.), or characteristics of the object being concealed (e.g., weight, seize, stability, etc.). Future research should address the potentially significant impact that such factors may produce on biased responding and detection accuracy. It should also be noted that our samples were drawn from a region of the Midwest in which the population is primarily Caucasian (91.8% according to census data), [and] the crime rate is low...Although the officers who participated in this study routinely receive tactical training, threat assessment training, and interview/deception detection training, they do not receive equivalent guidance in identification of concealment or threat behaviors. Future studies should consider assessing the performance of officers in areas where crime rates involving weapons are much higher and the threat of attack to people and infrastructure is heightened, as well as those who may receive more substantive training in behavioral detection of threat.

In her testimony, Sweet conceded that the risk/reward system used in the Threat Study did not mimic the risk/rewards of an actual illegal gun possession case where the target faced prosecution if found to be in possession of a gun – especially if that gun linked the possessor to a murder. Sweet testified that she was not interested in a scenario in which the target just killed someone, or where the participants faced safety concerns themselves in confronting the target, which she conceded changed the dynamic. She noted that the research was flawed in that it

could not replicate real world, high risk situations, and that the setting of the interaction, the gender and race of the target, and the characteristic of the object being concealed were all relevant variables. Sweet also noted that she did not consider the racial background of the participants because it was not relevant, as she was not interested in implicit bias that may have existed.[12] She rather simply wanted to test whether the presence of a gun could be reliably detected.

Sweet also briefly reviewed the Gunman Characteristics and commented that some of the Characteristics, like a bladed stance, are not supported by research as being indicative of gun possession, and others, like hypervigilance, have no defined meaning in her field. Indeed, her testimony was that, as aside from anecdotal evidence, there was no published, peer-reviewed research other than the Threat Study which tested behaviors to determine whether they were reliable indicators of deception or weapon concealment. Accordingly, when Sweet was asked a hypothetical that summarized the facts of this case and the observations made by police as alleged by the government– which she testified was the first time she had heard the alleged facts of this case – Sweet testified that there was little research that supported the conclusion that Evelyn, a young African American male, was acting deceptively or possessing a weapon because his hands were pressed tightly to his body grasping an object, with his head down, looking around and making no eye contact with police, walking straight forwardly and fairly quickly, responding "for what?" to the request by a white police officer to "holler at you real quick," or

[12] Evelyn introduced a number of studies (Ex. 5) which he claimed Sweet had relied on concerning interracial interactions, but the Court finds them unhelpful. None were authored by Sweet, and in her testimony, Sweet disclaimed studying the impact of race in the Threat Study.

that after the request, his eyes darted around, his demeanor changed, he "bladed" his body away from the police, or that he clutched an item in his pocket more intensely. Indeed, Sweet testified that there were no studies that showed that running from the police was indicative of deception or concealment, or even necessarily showed that the runner did not want contact with the police. However, Sweet conceded that anecdotal experience as to markers for weapon concealment could be tested and perhaps validated. Sweet did not testify that the Gunman Characteristics were not indicative of someone carrying a weapon, just that that there was no research supporting that conclusion.

B. Cell Phone

Evelyn moves to suppress a number of pieces of information from or regarding his cellphone, and grounds his request on the search warrant affidavit submitted in furtherance of a request to search the contents of the phone for:

> Snapchat instant messages and videos, and other third party communication applications such [as] Facebook, Facebook Messenger, Twitter, hangouts, Whatsapp, GPS location information in the phone, cellular phone images and video depicting clothing; specifically an reddish/orange, yellow knit winter hat which appeared to have been worn by the possible suspect, Tykorie Evelyn on the night of the murder (January 9, 2017)."

Specifically, Evelyn seeks to suppress the following:

Subscriber Information: Evelyn claims the Commonwealth improperly obtained subscriber information for his cellular phone through an administrative subpoena.

SnapChat Video: Evelyn argues that the police obtained from his cellphone a video created using a cellphone application called SnapChat.

Probation Data: Evelyn argues that the police improperly obtained his cellphone number from the Probation Department.

Number Confirmation: Evelyn claims the police used the probation-supplied cell phone number to call Evelyn's phone, and thereafter improperly "opened" the phone to see the number from which the police placed the call in the caller identification screen of the cellphone.

Unauthorized Forensic Examination: Evelyn claims that police forensically examined the cellphone before any search warrant was issued.

Lack of Probable Cause and Delay: Evelyn moves to suppress the search performed pursuant to a warrant of his cellphone because there was no probable cause reflected in the warrant and the warrant was not obtained for eight weeks after the seizure of the cellphone, an allegedly improper delay.

The search warrant affidavit states as follows:

At approximately 7:27 PM on January 9, 2017, a ShotSpotter activation and call alerted police to a shooting at 2 Dearborn Street in Roxbury. The victim at the scene, Khisean Desvarieux, suffered bullet wounds, and was produced dead at 7:42 PM. At the scene, five .380 caliber ballistic cartridge casings were recovered. A witness later reported four young, black males running from the area after the shooting.

At approximately 7:40 PM, Abasciano and Garvey came upon Evelyn walking in the opposite direction from the crime scene. Evelyn refused to make eye contact with the officers when they attempted to speak with him. Evelyn was also clutching an object in his pocket, which appeared unnatural to the officers. The officer asked if they could "holler" at Evelyn, who asked "for what?" as he refused to make eye contact and bladed his body to the left, concealing what was clutching in his right pocket. When Evelyn mumbled something inaudible in response to the officer's question whether he saw or heard anything, Evelyn appeared to be looking for an

avenue of escape, and immediately began to run when Garney opened the passenger door of the patrol wagon. Garney chased Evelyn through backyards and elsewhere, and while he ran, Evelyn kept his hands in his pockets. When Evelyn attempted to remove something from his pocket, the officer told Evelyn to "show me your hands" and placed him in custody.

Garney found on Evelyn a black Android cellphone in his left pants pocket ("the cellphone"). Other offices found a gun in the immediate area of the arrest. The gun matched the caliber of the shell casings found at the scene of the shooting. Thermal imaging showed that the gun had been recently discharged. Later ballistics analysis indicated that the spent shell casings found at the scene appeared to have been discharged by the gun that was recovered in the immediate area of Evelyn's arrest.

The Boston Police Regional Intelligence Center reported that Evelyn was an active member of the Ruggles Street gang, and that the victim was an active member of the Orchard Park/VNF gang. Officers were aware of recent gang-related violence between these two gangs.

Evelyn was transported to Boston Police headquarters and photographed. Photographs of Evelyn taken at the time were introduced into evidence, which showed Evelyn wearing a red, yellow and white knit winter hat and long black coat. A witness described one of the men seen near the shooting as African American and wearing a long black coat.

On January 10, the affiant obtained from another officer a SnapChat video[13] from an individual who appeared to be of Evelyn and who used the name "Tykorie Evelyn Ruggles." The video was created at 6:27 PM on the night of the murder, and depicted the person,

[13]The affidavit did not state that the Snapchat video came from the cellphone; rather, it stated that another officer provided the video to the affiant, who had possession of the cellphone.

apparently Evelyn, wearing a knit hat like the one Evelyn was wearing when he was arrested an hour later. In the video, the person who appeared to be Evelyn said that "we out here" and that "we never ever play this s—t."

On January 16, the affiant obtained Evelyn's contact telephone numbers from the Probation Department of the Boston Municipal Court. One of the numbers was (857) 505-6506. The affiant called the number, and the cellphone rang and showed the missed number on its screen as the affiant's telephone number.[14]

On January 17, an administrative subpoena was issued for the cellphone, seeking "call, data and text details (non-content) for January 1 to January 17, 2017." On February 6, 2017, a response was received from T-Mobile, which showed no calls or texts at the time of the murder.

The affiant, Melvin Ruiz, a Boston Police detective with almost thirty years of experience and ten years of experience in the Homicide Unit, stated that based on his experience, cellular telephone like that seized from Evelyn can communicate via SnapChat and may reflect usernames from that and similar applications.

RULINGS OF LAW

A. Seizure and Arrest

The first issue in this case is to determine when Evelyn was seized for constitutional purposes. "[N]ot every encounter between a law enforcement official and a member of the public constitutes an intrusion of constitutional dimensions requiring justification." Commonwealth v. Stoute, 422 Mass. 782, 789 (1996). "A person is seized by the police only

[14] Nothing suggested that the affiant opened or manipulated the cellphone in any way to make this observation.

when, in light of all of the attending circumstances, a reasonable person in that situation would not feel free to leave." Stoute, 422 Mass. at 786, cited in Commonwealth v. DePeiza, 449 Mass. 367, 369 (2007).

Evelyn was not seized when the police officers approached him. Evelyn was the only person the officer's saw anywhere near the scene of a violent murder. The officers' approaching him to ask whether he saw anything was lawful. See Illinois v. Lidster, 540 U.S. 419, 425 (2004) (citations omitted) ("the law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime. '[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen'"); Commonwealth v. Murdough, 428 Mass. 760, 763 (1999) ("officers may make inquiry of anyone they wish and knock on any door, so long as they do not implicitly or explicitly assert that the person inquired of is not free to ignore their inquiries").[15] Further, under these facts, Evelyn was not seized when the officers in the patrol wagon shadowed him in their attempt to talk with him. Commonwealth v. Powell, 459 Mass. 572, 577 (2011), citing Commonwealth v. Franklin, 456 Mass. 818, 822 (2010) ("[W]e have held that the police may follow in a cruiser someone whom they observe engage in suspicious conduct to further their investigation ... at a rate of speed sufficient to keep him in sight... absent some additional assertion of authority, by direct verbal communication ('stop') or otherwise

[15] Whether the police actions amounted to a Terry stop is evaluated under a standard of objective reasonableness. See, e.g., Commonwealth v. Buckley, 478 Mass. 861, 865-68 & n. 11 (2018) (police conduct in conducting a traffic or Terry stop under the Fourth Amendment and art. 14 is judged by a standard of objective reasonableness). There is thus no cause to examine subjective motivations of the police. That said, there was no evidence to suggest that the officer's approach to Evelyn was based on his race, as suggested by the defense.

(blocking, use of flashers)"). The officers' questions to Evelyn did not suggest criminal activity by Evelyn, and neither officer ordered Evelyn to do anything, including answer their questions. See DePeiza, 449 Mass. at 370-71 (collecting cases) (no seizure where police use conversational tone in interacting with a suspect and did not order suspect to stop and answer questions; even request to keep hands out of pockets did not transfer encounter into a seizure where request was not sufficiently coercive or intimidating); see also Commonwealth v. Narcisse, 457 Mass. 1, 5–6 (2010) (no seizure where officers pulled alongside defendant and got out of vehicle, asking defendant's name and what he was doing in vicinity); Commonwealth v. Gomes, 453 Mass. 506, 510 (2009) (no seizure where police got out of vehicles quickly without activating blue lights and approached defendant as he stood in a doorway); Commonwealth v. Lopez, 451 Mass. 608, 610–614 (2008) (no seizure where two uniformed officers in marked patrol cruisers followed defendant on bicycle late at night; one officer emerged from cruiser, and asked, "Can I speak with you?").

Garney's attempt to exit the patrol wagon did not amount to a seizure, either. Nothing suggested that Garney intended to seize Evelyn by exiting the wagon. Evelyn had not refused to speak to the officers, and Garney's opening of the patrol wagon the door was unaccompanied by any command that Evelyn stop and speak to the officers. Nor did Garney's merely exiting the vehicle fairly suggest that he was going to pursue Evelyn on foot, as there was little cause to do so at that time. See Commonwealth v. Resende, 474 Mass. 455, 460–61 (2016) ("officers' exit from their vehicle with their State police identification and weapons visible, followed by … asking the defendant for his name, was not itself a stop or seizure in the constitutional sense"). This was not a case, then, that opening the door would have communicated to a reasonable

person that he was then compelled to submit to police authority. Cf. Commonwealth v. Meneus, 476 Mass. 231, 235 (2017) (citation omitted) (police pat frisked member of a group, and pursued the defendant as he backed away from the police, thereby "communicat[ing] unequivocally that refusing to submit to the 'request' was not an option [which] ... added a 'compulsory dimension' to the encounter, transforming it from consensual to obligatory ... imped[ing] the defendant's freedom of movement," which was then a seizure); Commonwealth v. Barros, 435 Mass. 171, 176 (2001) (circumstances including police statement, "Hey you. I wanna talk to you. Come here," amounted to a seizure). Further, Garney's opening of the door was appropriate from an officer safety perspective. Evelyn thus ran on his own, not occasioned by anything the police did. Garney's chase did not constitute a seizure because nothing he did – such as issue a command, block Evelyn's path or demonstrate authority – caused Evelyn's flight. See, e.g., Powell, 459 Mass. at 578 ("This case is similar to Commonwealth v. Franklin, supra at 819–823, 926 N.E.2d 199. In that case, the defendant's flight was not prompted by anything the police did. When Officer Blas began following the defendant on foot, he had not exercised any show of authority or commanded the defendant to stop; and the officers had not blocked or impeded the defendant's path").

By the time Evelyn was seized at the end of his run, the totality of the facts established reasonable suspicion. Walking away from police officers may not alone create reasonable suspicion. See Commonwealth v. Warren, 475 Mass. 530, 538-39 (2016) ("because flight is viewed as inculpatory, we have endorsed it as a factor in the reasonable suspicion analysis," however, "[w]here a suspect is under no obligation to respond to a police officer's inquiry, we are of the view that flight to avoid that contact should be given little, if any, weight as a factor

probative of reasonable suspicion"); Commonwealth v. Grandison, 433 Mass. 135, 139 (2001), citing Commonwealth v. Thibeau, 384 Mass. 762, 763-764 (1981) (defendant's decision to suddenly turn left and flee when pursued held not sufficient to provide reasonable ground for a stop); see also Commonwealth v. DaSilva, 66 Mass. App. Ct. 556, 560 (2006) (flight from police not enough to create reasonable suspicion by itself). However, here, Evelyn's flight was not the only relevant fact.

In this case, the police had no description of the assailants in the murder, but the evidence showed that Evelyn was the only person on the street in a high-crime area walking away from the area of a murder on an extremely cold night and that the police initially queried Evelyn as a potential witness, not a suspect. Evelyn was a half-mile from the shooting some 13 or so minutes after it took place, a distance he could have traversed in his brisk walk. Warren, 475 Mass. at 536 ("proximity of the stop to the time and location of the crime ...is accorded greater probative value in the reasonable suspicion calculus when the distance is short and the timing is close"). Evelyn refused make eye contact with the police and clutched something tightly in his hand. He searched for an avenue of escape when the police asked to speak with him and bladed his body away from the police.[16] He inexplicably took off in flight away from the police, through no actions of the police; and ran awkwardly while holding something more intensely

[16] Evelyn cites Sweet's testimony suggesting these observations are not reliable as indicators of guilt, but Sweet did no testing of these factors, but only summarized studies completed by others and which were not relied upon as references in the Threat Study. Further, the studies were duplicative of case law which already noted that avoidance of the police is not necessarily evidence of guilt. See, e.g., Warren, 475 Mass. at 539 ("where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department ... report documenting a pattern of racial profiling of black males in the city of Boston").

close to his body. Under these facts, the police had a basis to pursue Evelyn, at least initially because he may have been a witness to a brutal crime. As the pursuit continued, however, its length and the fact that Evelyn ran awkwardly as he held something close to his body established reasonable suspicion that Evelyn was engaged in some form of criminal activity, potentially the murder that caused he police to want to speak with Evelyn in the first place. Evelyn was properly seized. See Commonwealth v. Sykes, 449 Mass. 308, 314–315 (2007) (stop of defendant based on reasonable suspicion when, in high crime area where large group had congregated, defendant attempted to avoid contact with police and clenched waistband while he ran); Commonwealth v. DePeiza, 449 Mass. 367, 373 (2007) ("The officers' suspicion that the odd way of walking was a sign of a firearm was not a mere hunch, but was the result of the application of their experience and training at the police academy to their detailed observations of the defendant"); cf. Commonwealth v. Wright, 48 Mass. App. Ct. 912, 913 (1999) (no "reasonable grounds or suspicion to justify a Terry [v. Ohio, 392 U.S. 1 (1968)] detention" existed where "[t]here had been no report of a crime or of a weapon. The officers had observed no motion suggestive of drug dealing or other crime. The defendant's evasion of the police by walking away did not by itself suffice to create articulable suspicion. ... Viewed objectively, nothing more happened in this case than that a youth in a high crime area put his hand in his pocket and walked away upon seeing the police") (citations omitted). Lastly, shortly after Evelyn was stopped, the police retraced his steps and found a firearm. The police thus had probable cause to arrest Evelyn for unlawful possession of a firearm.

The Court reaches this conclusion despite Sweet's testimony.

Preliminarily, for the purposes of deciding the suppression motion, the Court found Sweet's testimony to be admissible. See Mass. G. Evid. §702 (2018) (expert testimony admissible where the expert's scientific knowledge will assist the trier of fact; is based on sufficient facts or data; is the product of reliable principles and methods; and the expert reliably applied the principles and methods to the facts of the case). In this regard, the Commonwealth's claim that Sweet's Threat Study is not sufficiently scientific is in error. "In making a determination of whether expert testimony is sufficiently reliable to be admitted before a trier of fact, a judge must conduct 'a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Commonwealth v. Lanigan, 419 Mass. 15, 26 (1994), quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592–593 (1993); see Mass. G. Evid. § 104(a) (2018) ("The court must decide any preliminary question about whether ... evidence is admissible"). In doing so, the Court "initially considers a nonexclusive list of ... factors [including] 'whether the scientific theory or process (1) has been generally accepted in the relevant scientific community; (2) has been, or can be, subjected to testing; (3) has been subjected to peer review and publication; (4) has an unacceptably high known or potential rate of error; and (5) is governed by recognized standards.' " Commonwealth v. Camblin, 478 Mass. 469, 475–476 (2017), quoting Commonwealth v. Powell, 450 Mass. 229, 238 (2007); see also Mass. G. Evid. § 702 (2018). A trial judge has "broad discretion to determine how to assess the reliability of expert testimony." Palandjian v. Foster, 446 Mass. 100, 111 (2006). "[I]f the process or theory underlying an expert's opinion lacks sufficient reliability or an expert cannot provide a reliable factual basis for his conclusions, the trial judge must

exclude the opinion from reaching the trier of fact." Commonwealth v. DiCicco, 470 Mass 720, 729 (2015), citing Lanigan, 419 Mass. at 25–26.

In this case, Sweet's methodology was to use testing techniques that have been generally accepted in her scientific community, are themselves subject to testing and are governed by recognized standards. Her analysis, evidently the first of its kind, was nonetheless subject to peer review and publication. While social science testing of this type is subject to error, no evidence showed that Sweet's techniques had an unacceptably high known or potential rate of error. Further, the Court finds that Sweet's Threat Study was relevant to the issues before the Court; the Commonwealth's objections to it went to the weight the Court should give her study, not to its admissibility. See, e.g., Commonwealth v. McNickles, 434 Mass. 839, 849–50 (2001). For purposes of ruling on the suppression motion, the Court concludes that Sweet's Threat Study, and her related testimony, were admissible. The Court, however, makes no finding as to whether the same result should be reached at trial should Evelyn seek to call Sweet.

While admissible, the Court finds Sweet's Threat Study to be unhelpful here, for three reasons.

First, based on the Threat Study, Evelyn essentially argues that the standard of proof that police must follow in determining whether there is reasonable suspicion must be based on observations that have been validated by social science principles. That is not the law. There is no requirement that conclusions drawn in the real world by police officers based on their training and experience satisfy a scientific standard of proof. See, e.g., Commonwealth v. Barbot, 92 Mass. App. Ct. 1118 (2017) (objective reasonable suspicion can be premised, in part, on conclusions based on specific and articulable facts which are drawn by trained and experienced

officers); Commonwealth v. Silva, 440 Mass. 772, 784 (2004) (citations omitted) ("police officers' expertise and experience may be considered as a factor in the probable cause determination").

Second, while validation of police observations by social science has potential value, that literature simply does not exist. Indeed, Sweet testified that there are no studies, beside hers, that test whether police can reliably identify gun carriers, and none that have tested observations like the Gunman Characteristics are reliable indicators of deception or weapons concealment. Sweet's testimony thus described weaknesses in her field in failing to measure the effectiveness of police success in weapon detection, and did not show that the officers' reliance on the Gunman Characteristics is in error. And in this case, the record shows that the observations of Evelyn made by Abasciano and Garney that suggested to them that Evelyn was concealing a weapon were, in fact, reliable.

Third, the testing used in the Threat Study simply did not mimic the conditions that existed in this case such that its conclusions undermine the Court's conclusion that there was reasonable suspicion to stop Evelyn. Sweet admitted, and the Threat Study expressly recognized, that it was unable replicate real-world circumstances, particularly in a high-stakes/high-consequence situation in an urban environment involving officers trained and experienced in weapon detection. The targets in the Threat Study simply and calmly walked easily with a gun tucked in the small of their backs without fear of consequences if they were caught with the weapon. That test bore no relationship to this situation, where a person was walking briskly from the scene of a brutal murder, evidently with the murder weapon on him, and was approached by police under circumstances where the consequences of detection were

extraordinarily high. Sweet's conclusions, then, do not undercut the finding that the observations made by the officers here objectively established reasonable suspicion.

B. Cellular Phone

Subscriber information: Evelyn argued that an administrative subpoena was inappropriate to obtain subscriber information for the cellphone, claiming that the Commonwealth needed to pursue a search warrant and establish probable cause to obtain such information, and that there was no probable cause to conclude the telephone had been used in connection with a crime. Evelyn's argument is in error as a matter of law; a search warrant was unnecessary to obtain this information. See Commonwealth v. Jordan, 91 Mass. App. Ct. 743, 754, review denied, 477 Mass. 1112 (2017) ("To the extent the order can be understood as suppressing subscriber information or call records, which were first obtained by an administrative subpoena, there was no basis for suppression," citing Commonwealth v. Augustine, 467 Mass. 230, 243-244 & n.27 (2014) (no constitutionally protected privacy interest in telephone billing records and call details)).[17]

[17] After the hearing in this case, Evelyn filed a response to the Commonwealth's memorandum concerning the search of the cellphone and claimed, for the first time, that the Commonwealth had not met the standard for issuing an administrative subpoena, citing G.L. c. 271, §17B, and Commonwealth v. Vinnie, 428 Mass. 161, 178 (1998), abrogated on other grounds, Com. v. Paulding, 438 Mass. 1 (2002) ("We previously have not construed G.L. c. 271, § 17B ...[and] hold that a defendant may move to suppress telephone records acquired by administrative subpoena and a judge should allow such a motion if it is shown that a district attorney had no reasonable grounds for belief that the target was using the telephone for an unlawful purpose"). This argument was available to Evelyn before the hearing and was not made, and thus was waived. Even had it not been waived, this claim would have failed. As noted below, the police had reasonable grounds to believe the cellphone was used for an unlawful purpose. The cellphone was seized 15 minutes after a murder from a person whose gun matched the shell casings found at the scene. The victim was a member of a gang in a feud with Evelyn's gang and a SnapChat video created an hour before the shooting, apparently depicting Evelyn wearing the same hat he was wearing at his arrest, could be seen as a threat to commit the crime. Under these facts, the police had reasonable grounds to believe the phone was used in connection with the crime, such as to create the SnapChat video.

SnapChat Video: Evelyn argues that the police copied from his cellphone a video created using a cellphone application called SnapChat, but adduced no evidence to show that this is the case. Evelyn's claims thus fails on the facts.[18] In addition, Evelyn failed to allege facts to demonstrate he had a subjective expectation of privacy in the SnapChat video. See Commonwealth v. Pina, 406 Mass. 540, 544 (1990), citing Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) ("For a search to have taken place, the defendant must have had a subjective expectation of privacy, and that expectation must have been one that society recognizes as objectively reasonable"); Commonwealth v. Netto, 438 Mass. 686, 697 (2003) (citations omitted) ("the burden is initially on the defendants to demonstrate that they had a reasonable expectation of privacy ...It is not the Commonwealth's burden to show that there was no such reasonable expectation of privacy at that time. Thus, if the record is unclear ...it is the defendants—not the Commonwealth—who have failed to meet their burden of proof, as they are the ones who must show that a 'search' in the constitutional sense occurred").

Probation data: Evelyn argues that the police improperly obtained his cellphone number from the Probation Department because G.L. c. 276, §100A protects the confidentiality of juvenile probation records. This argument is in error. G.L. c. 276, §100A protects "the person's court appearance and court disposition records" after a person had submitted a form requesting the records be sealed. Section 100B o that statute extends that protection to juvenile records. Evelyn did not claim he requested his records be sealed, and even if he had, his telephone

[18] In his post-hearing response, Evelyn claimed, for the first time, that the SnapChat video discussed in the affidavit was not clear enough to allow the affiant the conclude that the video appeared to depict Evelyn, and that the affiant "should testify pursuant to Franks v. Delaware, 438 U.S. 154 (1978)." Evelyn waived this claim and, even had he not, he did not adduce any evidence to support it.

number would not have fallen within the scope of the information to be sealed. Even if it did, Section 100D allows any "criminal justice agency" to have "immediate access" to any such records.

Number Confirmation: Evelyn claims the police used the probation-supplied cell phone number to call Evelyn's phone, and thereafter "opened" the phone to see the number from which the police placed the call in the caller identification screen of the cellphone. No facts support the claim that the police did anything more than observe the screen of the cellphone to see that it recorded the calling number as the missed call. Cf. Commonwealth v. Entwistle, 463 Mass. 205, 217 (2012) (officer's observation of the dates of photographs taken on the digital camera was not in plain view because he had to "turn on" the camera in order to determine the dates of the photographs). And the facts here do not support the conclusion that the police calling a lawfully-obtained telephone number and observing whether a lawfully-obtained cellphone rang in response is a search. At least on this record, doing so was similar to testing a key seized from a defendant in a lock to determine whether it fit, which the Supreme Judicial Court has found did not violate a defendant's rights. See Commonwealth v. Alvarez, 422 Mass. 198, 209–10 (1996) (citations omitted) ("We conclude, however, that using a key to conduct a warrantless search of a lock tumbler did not violate the defendants' constitutional rights. 'Although the owner of a lock has a privacy interest in a keyhole—enough to make inspection of that lock a 'search'—the privacy interest is so small that the officers do not need probable cause to inspect it." … the police did not violate any constitutional rights of the defendants by inserting a key into the lock … and turning it to see whether it fit. Given the nature of the lock mechanism, which was

accessible from a common hallway, any expectation of privacy in the contents of the lock tumbler was minimal").

Unauthorized Forensic Examination: Evelyn claims that police forensically examined the phone before any search warrant was issued. Evelyn adduced no evidence to support this claim; while he claimed a report reflects this examination, no such report was adduced.

Lack of Probable Cause and Delay: Evelyn moves to suppress the search performed pursuant to a warrant of his cellphone because there was no probable cause reflected in the warrant and the warrant was obtained eight weeks after the seizure of the cellphone.

Evelyn argued that "there was no information that [the] cellular telephone contained evidence of the murder," citing Commonwealth v. White, 475 Mass. 583, 589 (2016). White held:

> Before police may search or seize any item as evidence, they must have a substantial basis for concluding that the item searched or seized contains evidence connected to the crime under investigation. In other words, the government must "demonstrate[ ] ... a 'nexus' between the crime alleged" and the article to be searched or seized. "The nexus 'need not be based on direct observation.' ... It may be found in the type of crime, the nature of the [evidence] sought, and normal inferences as to where such" evidence may be found. While police "need not make a showing beyond a reasonable doubt, ... '[s]trong reason to suspect is not adequate.' "
>
> The experience and expertise of a police officer may be considered as a factor in the [nexus] determination. Nonetheless, where the location of the search or seizure is a computer-like device, such as a cellular telephone, the opinions of the investigating officers do "not, alone, furnish the requisite nexus between the criminal activity and the [device] to be searched" or seized.
>
> Rather, police first must obtain information that establishes the existence of some particularized evidence related to the crime. Only then, if police believe, based on training or experience, that this particularized evidence is likely to be found on the device in question, do they have probable cause to seize or search the device in pursuit of that evidence.

White, 475 Mass. at 588–90 (citations, internal punctuation, footnotes omitted).

White is distinguishable. In that case, the police seized the cellphone without any particularized evidence to believe it contained evidence of the crime. White, 475 Mass. at 590. Here the cellphone was properly seized incident to Evelyn's arrest, as reflected above.

The warrant also established probable cause. An inquiry as to the sufficiency of the search warrant application always begins and ends with the "four corners of the affidavit." Commonwealth v. Barbosa, 92 Mass. App. Ct. 1114 (2017) (Rule 1:28 decision), citing Commonwealth v. O'Day, 440 Mass. 296, 297 (2003). When reviewing a warrant for probable cause, a judge must determine whether, based on the affidavit in its entirety, the magistrate had a substantial basis to conclude that a crime had been committed, that the items described in the warrant were related to the criminal activity, and that those items would probably be located in the place to be searched. O'Day, 440 Mass. at 298.

In this case, the affidavit established probable cause to believe that a murder occurred using a .38 caliber firearm; that the victim was a member of a gang in conflict with Evelyn's gang; and that the murder weapon was found near Evelyn after he fled from police less than fifteen minutes after the shooting. The affidavit also established probable cause to believe the cellphone contained evidence of the murder. An hour before the murder, a SnapChat video was posted by "Tykorie Evelyn Ruggles," reflecting the defendant's name and his gang affiliation, and depicted a person the police believed to be Evelyn. At the time, Evelyn's gang was in an active conflict with the victim's gang. The video could be understood as a real-time threat issued by Evelyn – it showed Evelyn wearing the hat he was wearing an hour later, after his arrest, stating that "we" are "out here" and did not "play," suggesting that Evelyn and others were in the

street in active pursuit of rival gang members. Coupled with the affiant's experience that SnapChat videos could be created with a cellphone like the one seized, the SnapChat video established a direct nexus between the cellphone found on Evelyn and the crime alleged. Further, a witness saw four men leaving the area of the crime, which suggested the cellphone may have also been used to coordinate the shooting with other members of Evelyn's gang. Under these facts, the Commonwealth has shown probable cause to search the cellphone. See Commonwealth v. Holley, 478 Mass. 508, 527 (2017) ("the warrant affidavit was not based merely on [the co-defendant's] association with [the defendant]. Instead, it showed both that Pritchett was directly implicated in the crime and that his contemporaneous cellular communications, including text messages, were inferably related to the criminal activity under investigation").

The delay in seeking the warrant, some eight weeks, does not invalidate the warrant. Delay in searching a cellphone may become unreasonable under the Fourth Amendment; "the reasonableness of the delay is determined by 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," including whether police acted diligently in obtaining a warrant. White, 475 Mass. at 593-94. The cellphone was lawfully seized incident to Evelyn's arrest and was properly held as evidence; in addition to what may have been contained in the cellphone, the fact that Evelyn had a cellphone and the victim was assailed by multiple persons made the presence of the cellphone potentially relevant to proving the crime. See Commonwealth v. Arthur, No. 17-P-1244, 2018 WL 4689190, at *3 (Mass. App. Ct. Oct. 1, 2018) (cell phones properly maintained in police custody as evidence of the crime independent

of their content "to provide detail as to how the crime was planned and coordinated. Put another way, in proving the joint venture, and the involvement of all three alleged perpetrators, the Commonwealth might well decide to introduce the cell phones, where they were located, and how they were found after the arrests. This evidentiary value existed regardless of whether, on further investigation, the cell phones might contain additional relevant evidence in their digital data"). Because the cellphone was properly seized and held as evidence, there was no concern that the judiciary needed to make a prompt determination as to whether the government's continued possession of the device was proper. See White, 475 Mass. at 595. The delay in searching the cellphone was thus not unreasonable under these facts. See, e.g., Arthur, No. 17-P-1244, 2018 WL 4689190, at *3 (footnotes omitted) (delay in seeking search warrant for cellphone not unreasonable where the police were already lawfully in possession of the cell phones and would be through trial, and "[t]here was thus no substantial interest under the Fourth Amendment ...requiring that the search of the contents of the cell phones occur expeditiously. Under the balancing test described in White, here the government had a substantial interest in maintaining the cell phones as evidence until trial; and, on the other hand, the defendant's possessory interest in the cell phones during the delay carried no significant weight, as the defendant showed no basis to expect that the cell phones would have been returned to him during those eighty-five days or, indeed, at any time before trial").

ORDER

For the foregoing reasons, the Court rules as follows:

(1) Evelyn's motion to suppress all evidence obtained pursuant to a stop and arrest that occurred on January 9, 2016 is **DENIED**;

(2) Evelyn's related request to permit expert testimony pursuant to Commonwealth v. Lanigan, 419 Mass. 15 (1994) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) is **ALLOWED** for purposes of the suppression hearing. The Court declines to determine whether that testimony is admissible at trial;

(3) The Commonwealth's motion to strike the testimony of Evelyn's expert is **DENIED**;

(4) Evelyn's motion to exclude any testimony from Boston police officers "which purports to provide an opinion concerning the significance of observations made of the defendant, which allegedly provided support for their decision to stop, seize and arrest him" is **ALLOWED IN PART**, as the Court did not permit the officers to testify to true opinion testimony, but **DENIED** to the extent the motion sought to exclude the police officers from testifying about conclusions they reached based on objective facts, their training and experience, or from providing any related lay opinion; and

(5) Evelyn's motion to suppress evidence from and regarding Evelyn's cellular telephone is **DENIED.**

MICHAEL D. RICCIUTI
Justice of the Superior Court

Date: October 22, 2018

CERTIFICATE OF SERVICE

I, Kathryn Hayne Barnwell, certify that on June 29, 2019, I served by e-mail, one copy of the foregoing Brief, to:

ADA John Zanini
Suffolk District Attorney's Office
One Bulfinch Place
Boston, MA 02114

/s/ Kathryn Hayne Barnwell
Kathryn Hayne Barnwell

CERTIFICATE OF COMPLIANCE

I hereby certify that the brief and appendix in this matter comply with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs and word limitations in briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices and other papers). The Brief was produced, using Microsoft Word for Mac Version 16.16.8, in proportional font and the non-excluded sections consist of 10,943 words (or less than the maximum of 11,000 words).

/s/ Kathryn Hayne Barnwell
Kathryn Hayne Barnwell