17-P-895 Appeals Court

COMMONWEALTH vs. CHHOEUT CHIN.

No. 17-P-895.

Suffolk. March 5, 2019. - March 23, 2020.

Present: Hanlon, Agnes, & Sullivan, JJ.

Homicide. Evidence, Identification, Prior misconduct, Authentication, Videotape. Identification. Practice, Criminal, Motion for a required finding, Motion to suppress.

Indictment found and returned in the Superior Court Department on September 18, 2014.

A pretrial motion to suppress evidence was heard by Charles J. Hely, J., and the case was tried before Jeffrey A. Locke, J.

Elizabeth A. Billowitz for the defendant.
Janis DiLoreto Smith, Assistant District Attorney (Edmond J. Zabin, Assistant District Attorney, also present) for the Commonwealth.

HANLON, J. After a jury trial in the Superior Court, the defendant, Chhoeut Chin, was convicted of murder in the second degree. He appeals, arguing that there was insufficient evidence to sustain his conviction, that the identification

procedure was unnecessarily suggestive, that prior bad acts evidence was admitted in error, and that video surveillance footage was admitted in evidence without proper authentication. We affirm.

Background. The jury heard the following evidence. On August 1, 2013, between approximately 7:30 A.M. and 8:30 A.M., a maintenance crew was cleaning the parking area at Shore Plaza, a housing complex located at 400, 500, 600, and 800 Border Street in the East Boston section of Boston. After cleaning up in the parking area of 800 Border Street, Noe Santos, a member of the maintenance crew, went inside to wash the windows at that building. As he was doing that, Santos could see the entire parking lot area under 800 Border Street, and he noticed something lying on the ground next to a dumpster; he had not seen anything when he was there earlier. Santos went out to look and saw that it was a person and, thinking the individual was either drunk or passed out, he went to find his supervisor, Carl Abruzese, the maintenance director at Shore Plaza. The two returned and discovered a woman's body. She was not breathing. Abruzese telephoned 911.

Boston Police Homicide Detective Michael Walsh was among the responding police officers, and he observed that the victim was barefoot and there appeared to be no belongings or identification with the body. Three doctors from the medical

examiner's office also responded, and Walsh watched them conduct a preliminary examination. There was blood coming from the victim's mouth and there were marks on her neck; however, there were no "scrapes or cuts, lacerations, or any type of drag marks."

Walsh and Boston Police Sergeant Detective Joseph Dahlbeck then obtained surveillance video recordings from the Shore Plaza management office. Walsh testified that the camera located at 800 Border Street -- where the victim's body was discovered -- showed a blue car entering the parking area from Border Street around 9 A.M., and leaving at 9:14 A.M., heading toward Route 1A in the direction of Lynn. The blue car had a black hood, a visor over the rear windshield, a tachometer in the front of the dashboard, "star rims," and a gray marking near the rear wheel well.[1]

Dr. Anna McDonald, a forensic pathologist, testified that she conducted an autopsy of the victim on August 2, 2013.[2] Dr.

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[1] Boston Police Detective Vance Mills later prepared a compilation of surveillance video recordings taken from 800 Border Street and from nearby businesses, including George's Collision on Border Street, Angelo's Auto Body, Inc., on Condor Street, and a Mobil gasoline station on the corner of Border Street and Condor Street.

[2] At the time, Dr. McDonald was a fellow at the medical examiner's office. As a fellow, all of her findings "went through" a preceptor who was board certified in forensic pathology and then were reviewed by the chief medical examiner. Additionally, homicide cases "by and large were reviewed at a

McDonald was a forensic pathology fellow employed by the chief medical examiner in Boston. Among other things, she observed petechial hemorrhages in both of the victim's eyes as well as her mouth, "signifying . . . rupturing of those small capillaries [in and around the eyes] due to pressure on the neck." She also observed abrasions on both sides of the victim's neck, "indicating some force being applied to the neck"; there was "hemorrhage into the deep muscles that are on either side of the spine as well that extended the portion of the neck"; and there was a "fracture of the back of the fifth cervical vertebrae . . . kind of down towards the bottom of [her] neck . . . . And . . . there was blood around that as well." Dr. McDonald concluded, "It essentially correlates to a decent amount of pressure that had to be applied to fracture the back of your neck." The toxicology report indicated that the victim also "had some morphine in her blood."[3] From all of her observations, Dr. McDonald concluded, to a reasonable medical certainty, that the cause of death was "compression of the neck, and then the manner of death in this case is homicide."

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conference with the other medical examiners where [they] would talk about interesting cases."

[3] The victim also had bruising to the back of her head on the right side, signifying "some sort of blunt injury to that area." There was no other evidence of "stab wounds, gunshot wounds, anything like that," or of "significant blunt trauma."

Fingerprints were taken during the autopsy, and the victim was identified as Sherry Bradley.

After learning of the victim's murder, Christopher Schmitt, the victim's friend and an intermittent roommate, contacted Michael Bradley, the victim's father. Schmitt showed Bradley several text messages that the defendant had sent to Schmitt's cell phone -- most of them were directed at least indirectly at the victim. For example, the messages included the following: "SHE WILL GET OD N DIE TONIGHT"; "She a fucking low life prostitute she don't deserve nothing at all"; "She gonna n will die slow with OD TONIGHT!!!!!"; and "So y you fucking bitch don't answer when I called u?" Other text messages showed the defendant was desperate for drugs, and some expressed an apology for his behavior. The last text on July 27, 2013, requested that the victim meet the defendant at the Lynn Common.

On August 4, 2013, Schmitt met with Walsh and Boston Police Detective Vance Mills. Mills testified that Schmitt described people whom the victim had been seeing. In particular, he spoke about a man, whom he knew as "Ricky" or "T." Schmitt described Ricky as an Asian, possibly Cambodian, man, about five feet, six inches or five feet, seven inches tall, who drove a "souped up" blue Honda, and lived at 11 Williams Avenue in Lynn. Schmitt also provided two possible license plate numbers for the Honda. Mills testified that, on August 4, 2013, after Schmitt told the

police about the victim's relationship with Ricky, Mills showed him a photograph of a man; Schmitt identified the man in the photograph as Ricky or T. However, the detectives subsequently ruled out the man in the photograph as a suspect, as they could not connect him to any vehicle.

Walsh and Mills then went to 11 Williams Avenue in Lynn, and spoke with the first-floor tenant, Roberto Rivera. At trial, Rivera identified the defendant as the man who had lived on the third floor of the building and who had driven a blue Honda Civic "kind of customized, like very sporty . . . [with a] black hood." He also identified the victim from a photograph as a woman whom he had seen with the defendant, "[p]robably about three times."

On August 5, 2013, after a conversation with a member of the Lynn Police Department, Walsh and Mills went to 82 West Neptune Road in Lynn.[4] When they arrived, they observed a blue Honda Civic parked in the driveway; the vehicle was registered to the defendant at 11 Williams Avenue and matched the car in the surveillance video recordings from 800 Border Street. The detectives spoke with the defendant and, after they introduced themselves, they showed him a photograph of the victim; the defendant denied knowing her or anyone by the victim's name.

[4] Walsh and Mills testified that 82 West Neptune Road in Lynn was the home of the defendant's family.

The defendant claimed that "the only white girl he knew was . . . up here for a couple of weeks named Melissa, and she went back to Orlando." He also informed the detectives that he lived at 11 Williams Avenue and gave the officers a cell phone number. The detectives then arranged to have the defendant's car towed to Boston Police headquarters.

On August 6, 2013, given this information, Mills showed Schmitt a photograph of the defendant, and Schmitt stated "emphatically" that the photograph showed the person he knew as Ricky "one hundred percent." Mills explained at the hearing on the motion to suppress that Schmitt was only shown one photograph at that time, as opposed to an array, because Schmitt was not a percipient witness to the crime but, rather, had preexisting knowledge of the man he knew as Ricky.

The jury heard other testimony connecting the victim and the defendant and connecting the defendant to the blue Honda. Bradley, the victim's father, testified that he and his wife had taken custody of the victim's children after she began using pain medication for a back injury. On one occasion in the spring of 2013, the victim came to his house to pick up some clothes, and she arrived in a car driven by the defendant, who remained outside. Bradley described the car as a "little low blue car with a black hood and spoiler thing, fins on the back." In June, the victim again arrived at Bradley's house with the

defendant in "a blue Honda with the black hood and the spoiler on the back." She also brought the defendant to a Fourth of July party at Bradley's house; at the time, she introduced the defendant to her father as T. The last time that Bradley saw the victim, approximately a week before she died on August 1, 2013, he gave her money for food.

Johnnie Phillips had been acquainted with the victim for roughly one and one-half years; she stayed intermittently in his apartment and used his cell phone. Phillips testified that, in early July of 2013, he saw a man whom he knew as Ricky arguing with the victim.[5] Phillips described the man as Cambodian or Vietnamese and testified that "in that argument [the man] kicked her. He kicked her in the stomach. . . . He wanted her to come out. He wanted her to come back outside. . . . [H]e kicked her pretty hard, and then he bolted, because I started to come after him . . . ."

Phillips also testified that, "when [the victim] came over, [Ricky] kept on calling on my number, trying to get in contact with [the victim]." During July 2013, Ricky also called and texted Phillips repeatedly looking for the victim -- "hundreds of times," according to Phillips. After the victim would leave

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[5] Phillips did not identify the defendant as Ricky at trial. However, the prosecutor argued that, from all of the other evidence, the jury reasonably could find that Ricky was the defendant.

Phillips's apartment, Ricky would come by repeatedly to ask when she would be back and where she was. On or about July 21, 2013, Ricky told Phillips that he was mad at the victim because she "had ripped off him and his cousin." Phillips testified that Ricky told him that the cousin was from East Boston and Phillips understood that Ricky was referring to either drugs or money.

The last time Phillips saw the victim alive, she was with Schmitt. She gave Phillips some heroin, and he gave clothes she had left with him to Schmitt. Shortly afterwards, Ricky called Phillips's cell phone to say that he had seen the three walking back towards Phillips's apartment and described what he had seen at Phillips's window. According to Phillips, "he mentioned everything, he described every place we went, everything."

Schmitt testified that he met the victim in January 2013 at Phillips's house, and the victim and Schmitt began to use heroin together. Schmitt, who spent a good deal of time with the victim in July of 2013, also would let her use his cell phone frequently. He testified that the defendant would often "pop up" out of "nowhere" and ask the victim to go somewhere with him. Schmitt said the defendant "just want[ed] to know where she was and he always wanted her to be with him . . . . [He] asked where she was going, needed to know all the time. And, yeah, wouldn't let her leave sometimes." The defendant also called Schmitt's cell phone in attempt to reach the victim on

multiple occasions. Between July 30 and July 31, 2013, the defendant sent forty-nine text messages and made thirty-eight calls to Schmitt's cell phone looking for the victim. Schmitt identified the defendant in court as the man he knew as Ricky.

Corey Enquist testified that he had introduced himself to the victim a few months before she died. At the time, he was engaged in selling crack cocaine, and he sold drugs to the victim on more than one occasion.[6] During several of the drug exchanges between Enquist and the victim, the victim would arrive with a short Asian man who was driving a "blue-ish Civic Acura type" car. On one occasion, the victim got into Enquist's truck and, when they drove off, the blue car followed them. On another occasion, Enquist received a text message asking to meet in East Lynn for a drug sale -- he assumed the message was from the victim, as it was from the cell phone number that he associated with her. However, when Enquist arrived to complete the transaction, the victim was not present; rather, it was the Asian male who had accompanied the victim earlier.

On July 31, 2013, the day before the victim's body was discovered, the victim and Schmitt encountered the defendant while they were walking together to meet Enquist. The victim told the defendant to leave, but according to Schmitt the

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[6] Enquist testified with a promise by the Commonwealth not to prosecute him.

defendant "just kept arguing with her, saying he wanted to go with her . . . . And she just kept yelling at him, getting angry, telling him to leave, to get out of here." Shortly afterwards, Enquist arrived in a black truck. The victim got into the truck and drove away, and Schmitt returned to his apartment.

Enquist testified that when he saw the victim on July 31 she was "dope sick" and asked him for heroin. Enquist did not have access to heroin, but he did sell her crack cocaine. After leaving Enquist, the victim returned to Schmitt's apartment and they used drugs together. The victim and Schmitt planned to watch movies later, but the victim wanted to go to the store to get some food first. She left the house, telling Schmitt she would be right back, but she never returned.

In an attempt to locate the victim when she did not return, Schmitt contacted the defendant. The defendant told Schmitt that the victim had left, that she was going to Foxborough, and that he had not seen her. Prior to July 31, the defendant had texted Schmitt's cell phone "multiple times a day" looking for the victim; however, after August 1, the text messages "dropped off immediately." A few days later, the defendant told Schmitt that his cell phone was going to be shut off and not to call him.

Daniel Sloan, the defendant's employer, also testified. In the summer of 2013, the defendant worked at Altec Plastics, Inc., doing shop work and delivering parts. Sloan testified that he communicated with the defendant via text message or cell phone call when he needed the defendant at work. Sloan had two cell phone numbers that he used to reach the defendant; one of the numbers ended with 6978. On July 21, 2013, between 1:35 A.M. and 7:45 A.M., four outgoing messages were sent from the 6978 number to Phillips's cell phone. Phillips had the same 6978 number listed in his cell phone's contacts under the victim's name.[7] Additional phone records showed that thirty-eight calls and forty-nine text messages were made from the 6978 number to Schmitt's cell phone between July 30 and July 31, 2013. On July 31 the defendant contacted Sloan from that same cell phone number. The defendant next communicated with Sloan on August 8, 2013, from a cell phone number ending with 4561, the same number the defendant gave to the detectives.

Discussion. 1. Sufficiency of the evidence. The defendant first argues that the judge erred in denying his motion for a required finding of not guilty. He contends that the combination of circumstantial evidence and evidence of consciousness of guilt was insufficient to allow the jury to

[7] Phillips had two other cell phone numbers saved for the victim in his phone in addition to the 6978 number.

find beyond a reasonable doubt that he was guilty of murder in the second degree. We disagree.

When reviewing the denial of a motion for a required finding of not guilty, "we consider the evidence introduced at trial in the light most favorable to the Commonwealth, and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Oberle, 476 Mass. 539, 547 (2017), citing Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). "The inferences that support a conviction 'need only be reasonable and possible; [they] need not be necessary or inescapable.'" Commonwealth v. Waller, 90 Mass. App. Ct. 295, 303 (2016), quoting Commonwealth v. Woods, 466 Mass. 707, 713, (2014). "That the case against [the defendant] was 'circumstantial' in some sense of that dubious term does not suggest that the proof was insufficient." Commonwealth v. Best, 381 Mass. 472, 483 (1980).

"The elements of murder in the second degree are (1) an unlawful killing and (2) malice. See Model Jury Instructions on Homicide 20 (1999). Malice can be established by proving any of three facts, or 'prongs': (1) the defendant intended to cause the victim's death; (2) the defendant intended to cause grievous bodily harm to the victim; or (3) the defendant committed an intentional act which, in the circumstances known to the

defendant, a reasonable person would have understood created a plain and strong likelihood of death." (Footnote omitted.) Commonwealth v. Earle, 458 Mass. 341, 346 (2010).

The principal question here is whether the evidence was sufficient to prove that it was the defendant who killed the victim. The Commonwealth's case relied on circumstantial evidence that the defendant possessed the motive to kill the victim and the means and opportunity to do so, in addition to the fact that that his car was observed where the victim's body was dumped, and he subsequently demonstrated consciousness of guilt.

First, there was evidence that the victim's cause of death was asphyxiation by strangulation. The defendant contends that medical evidence that the victim was murdered was "sparse," and that the facts permitted an inference that the victim died of an overdose. However, the weight of the evidence was for the jury to determine.

Second, the defendant argues in particular that there was insufficient evidence to go to the jury "on the question whether it was the defendant who committed the assault that led to the death of the victim." Commonwealth v. Montecalvo, 367 Mass. 46, 53 (1975). Specifically, he contends there was insufficient evidence to identify him as Ricky. However, Schmitt identified the defendant in court and, at the defendant's request, the

judge gave the jury a limiting instruction regarding the reliability of Schmitt's identification. There was no objection. In addition, there was considerable other evidence that the defendant was Ricky, a man involved in the victim's life in the months before she died, one who had used drugs with her and also stalked her, and frequently abused her both physically and verbally. He sent hundreds of threatening and abusive text messages from a cell phone, and the defendant's employer used that same cell phone number to contact the defendant.

Third, the defendant had the opportunity to murder the victim. Schmitt testified that the defendant would follow the victim and seemed to just "pop up," or "come out of nowhere," wherever the victim was. Phillips corroborated this, testifying that the defendant told him that he had followed Phillips, the victim, and Schmitt around and was able to recount their every move. Schmitt further testified that, on the day of the victim's murder, the defendant unexpectedly approached the victim wanting "to get his drugs" and that the victim told him to leave. The defendant and the victim then continued arguing until the victim's drug dealer arrived. The defendant was saying "he wanted to go with her and . . . be with her. And she just kept yelling at him, getting angry, telling him to leave, to get out of here."

Fourth, a very distinctive blue Honda Civic with a black hood, a tachometer near the dashboard, and a spoiler, one that matched the description of the defendant's car, was observed at the location where the victim's body was discovered in the window of time between 8:30 A.M., when Santos estimated that he stopped cleaning the parking lot and the time, shortly afterwards, when he saw the body. The jury heard testimony from Schmitt, Bradley, Enquist, and Rivera, all connecting Ricky or the defendant to that vehicle. On August 5, 2013, Detectives Walsh and Mills located a Blue Honda Civic registered to the defendant, matching the description given by the four witnesses, and parked at 82 West Neptune Road in Lynn, where the defendant's family lived. The jury also heard considerable evidence, including the defendant's own admission to the detectives, connecting the defendant to 11 Williams Avenue in Lynn -- an address also associated with the Honda Civic. Schmitt testified that he made four or five trips with the victim to the defendant's apartment at 11 Williams Avenue.

Fifth, the defendant's many, many text messages to the victim and to her friends in the days leading up to the murder stopped abruptly immediately after the murder. Thereafter, the defendant began using a different cell phone number. He told one of the victim's friends that she had gone to Foxborough; to the police, he denied knowing her at all.

On this record, we are satisfied that the Commonwealth presented sufficient evidence, albeit circumstantial, for the jury to conclude beyond a reasonable doubt that the defendant and Ricky were the same person, that the victim's cause of death was asphyxiation by strangulation, a homicide, and that the defendant was guilty of murder in the second degree. See Commonwealth v. Lao, 443 Mass. 770, 780 (2005) ("Any weaknesses in . . . identification [evidence] were for the jury to weigh, and did not constitute grounds for a required finding of not guilty"). Compare Commonwealth v. Robertson, 408 Mass. 747, 756 (1990). See also Lao, supra at 779 ("evidence of a defendant's guilt may be . . . entirely circumstantial"); Robertson, supra (sufficient circumstantial evidence that defendant "had reason to kill the victims, had the means and opportunity to do so, and demonstrated a consciousness of guilt").

2. Motion to suppress. The defendant next argues that the trial judge erred in denying his motion to suppress Schmitt's out-of-court identification of the defendant as Ricky, and in permitting Schmitt to make an in-court identification. He contends that the use of a single-photograph identification procedure on August 4, 2013, and then again on August 6, 2013, "amounted to a willful 'stacking of the deck' against [the defendant] and was so unnecessarily suggestive and conducive to

mistaken identification as to deny [the defendant] due process of law." We are not persuaded.

In reviewing a motion to suppress an out-of-court identification "we review a judge's findings of fact to determine whether they are clearly erroneous but review without deference the judge's application of the law to the facts as found." Commonwealth v. Johnson, 473 Mass. 594, 602 (2016). For constitutional purposes, an out-of-court single-photograph identification is the equivalent of a "show-up identification," a procedure that is generally disfavored because it is inherently suggestive. See Commonwealth v. Dew, 478 Mass. 304, 306 (2017); Commonwealth v. Carlson, 92 Mass. App. Ct. 710, 712 (2018).

"It is the defendant's burden to prove by a preponderance of the evidence that the showup was 'so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny [him] due process of law.'" Commonwealth v. Phillips, 452 Mass. 617, 628 (2008), quoting Commonwealth v. Martin, 447 Mass. 274, 279-280 (2006). Whether an identification procedure employed in cases involving a "showup" is "unnecessarily or impermissibly suggestive turns, in large measure, on whether the police had good reason for using a one-on-one identification procedure." Commonwealth v. Wen Chao Ye, 52 Mass. App. Ct. 850, 855 (2001). See Commonwealth v. Austin, 421 Mass. 357, 361-362, (1995).

"Factors relevant to this inquiry include 'the nature of the crime involved and corresponding concerns for public safety; the need for efficient police investigation in the immediate aftermath of a crime; and the usefulness of prompt confirmation of the accuracy of investigatory information, which if in error, will release the police quickly to follow another track.'" Dew, 478 Mass. at 307, quoting Austin, supra at 362. "'Good reason' exists where some combination of the factors collected in Austin is present." Carlson, 92 Mass. App Ct. at 713. See Commonwealth v. Odware, 429 Mass. 231, 235 (1999) (judge must examine "totality of the circumstances" to determine whether identification procedure was unnecessarily suggestive [citation omitted]).

We need not and do not decide whether the police had good reason for showing only a single photograph to Schmitt on August 4 and again on August 6. Even assuming that the police should not have conducted what amounted to an unnecessarily suggestive pretrial showup identification procedure with Schmitt, and, as a result, that Schmitt did not make a nonsuggestive and unequivocal out-of-court identification of the defendant, there was no error in permitting Schmitt to identify the defendant in court. The Supreme Judicial Court has stated that a witness who was neither a percipient witness to the crime nor present at the scene of the crime is not subject to the newly-announced rule

that requires an unequivocal out-of-court identification before a witness may make an in-court identification. See Commonwealth v. Collins, 470 Mass. 255, 265 (2014) ("as in [Commonwealth v.] Crayton, [470 Mass. 228 (2014)], this new rule shall apply prospectively to trials that commence after issuance of this opinion, and the rule shall apply only to in-court identifications of the defendant by eyewitnesses who were present during the commission of the crime"). See also Crayton, supra at 243 ("where the witness is not identifying the defendant based solely on his or her memory of witnessing the defendant at the time of the crime, there is little risk of misidentification arising from the in-court showup despite its suggestiveness").[8]

The motion judge credited Schmitt's testimony that he had known the defendant since the winter of 2013, and that, in the summer of 2013, he saw the defendant on a daily basis. The judge found "by clear and convincing evidence that Mr. Schmitt

[8] In Collins, 470 Mass. at 265 n.15, the court stated that "[a]s in . . . Crayton, . . . we do not address whether this new rule should apply to in-court identifications of the defendant by eyewitnesses who were not present during the commission of the crime but who may have observed the defendant before or after the commission of the crime, such as where an eyewitness identifies the defendant as the person he or she saw inside a store near the crime scene a short time before or after the commission of the crime." As we have noted above, Schmitt did not observe the crime and was not present at the scene of the crime.

had a lengthy and frequent independent basis for the identification." The judge also credited Mills's testimony that he used a single-photo procedure, as opposed to an array, because Schmitt was not a percipient witness to the crime and had preexisting knowledge of Ricky. The defendant points to no authority for his argument that the same procedural safeguards afforded to eyewitnesses to a crime necessarily are required for a nonpercipient witness who was not even present at the crime scene. Accordingly, "the absence of the recommended procedures goes only to the weight of the identifications, not admissibility." Commonwealth v. Carter, 475 Mass. 512, 518 (2016).

Furthermore, there is no merit to the defendant's argument that the detectives' failure to provide instructions prior to showing Schmitt either photograph influenced Schmitt's ability to identify the defendant. The defendant's argument implies that the police had a suspect in mind at the time of the showing and that their actions during the identification procedure influenced Schmitt to identify that suspect. The evidence does not support that conclusion. See Commonwealth v. Andrews, 427 Mass. 434, 439 (1998) (motion to suppress subsequent out-of-court identification denied because there was "nothing in the record to indicate that the police had already identified the defendant [or anyone else] as a suspect at the time of the

detective's interview with [the witness] or that the police had any other motive to coach him"). Compare Commonwealth v. Watson, 455 Mass. 246, 253 (2009) ("the absence of a double-blind procedure goes to the weight of the identification evidence, not its admissibility"). In the present case, the detectives had no suspects towards whom to coach Schmitt; instead, Schmitt had provided the detectives information about an individual who had frequent interactions with the victim, and the detectives were attempting to confirm that individual's identity. See Andrews, supra; Commonwealth v. Martinez, 67 Mass. App. Ct. 788, 794 (2006).

Our conclusion makes it unnecessary for us to consider whether the Commonwealth sustained its burden of showing that Schmitt's subsequent identifications, including an in-court identification, had an independent source. Having considered all of the circumstances of the identification procedure, we conclude that the procedure here did not create a substantial risk of a mistaken identification. No question is before us as to the admissibility of evidence of the pretrial identification, as the defendant introduced that evidence.

3. Prior bad acts. The defendant next argues that the trial judge erred in allowing testimony regarding Ricky's prior

bad acts.[9] "[T]he prosecution may not introduce evidence that a defendant previously has misbehaved, indictably or not, for the purposes of showing his bad character or propensity to commit the crime charged, but such evidence may be admissible if relevant for some other purpose." Commonwealth v. Woollam, 478 Mass. 493, 500 (2017), cert. denied, 138 S. Ct. 1579 (2018), quoting Commonwealth v. Helfant, 398 Mass. 214, 224 (1986). Even if the evidence is relevant for another purpose, it "will not be admitted if its probative value is outweighed by the risk of unfair prejudice to the defendant." Crayton, 470 Mass. at 249. See Mass. G. Evid. § 404(b)(2) (2019). We review for abuse of discretion. Commonwealth v. McCowen, 458 Mass. 461, 478 (2010).

In this case, the testimony regarding the defendant's prior bad acts[10] had significant probative value with regard to two central issues in the case: (1) the hostile relationship

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[9] The defendant also argues here that the Commonwealth presented insufficient evidence to connect the defendant and Ricky; that issue is discussed supra in a separate context. Here, the defendant focuses on the content of testimony, but our review of the admission is the same -- was there sufficient evidence for the jury to conclude that the defendant and Ricky were the same person. As we explained, we are satisfied that a sufficient evidentiary link existed so that a reasonable jury could conclude the defendant and Ricky were the same person.

[10] The defendant's prior bad acts included his verbally and physically abusive arguments with the victim, his multiple threatening and abusive text messages, his use of drugs with the victim, and his stalking of the victim when she was with others.

between the defendant and victim, see Commonwealth v. Miller, 475 Mass. 212, 229-230 (2016); and (2) the defendant's motive and intent to murder the victim, which were central issues in the case. See Woollam, 478 Mass. at 500, quoting Helfant, 398 Mass. at 224 (prior bad act evidence may be admissible to show "common scheme, pattern of operation, absence of accident or mistake, identity, intent, or motive"); Commonwealth v. St. Germain, 381 Mass. 256, 271 (1980), quoting Commonwealth v. Borodine, 371 Mass. 1, 8, cert. denied, 429 U.S. 1049 (1976) ("[I]f there is evidence of motive, that evidence is admissible"). When prior bad act evidence that occurred close in time to the date of the offense bears directly on the central issues in a case, the value of admitting it is not outweighed by the danger of unfair prejudice. See Commonwealth v. Caine, 366 Mass. 366, 371 (1974). Accordingly, we see no abuse of discretion in allowing the jury to hear the testimony.[11]

4. Compilation video. The defendant argues that the judge erred in admitting the compilation of surveillance video recordings taken from 800 Border Street and various nearby

[11] Furthermore, no substantial risk of a miscarriage of justice was created when the judge's detailed instruction on the limited use that the jury could make of the prior bad act evidence was not given until the final instructions. The defendant did not request a contemporaneous instruction, and one is not mandatory. We presume that juries follow the judge's instructions. See Commonwealth v. Degro, 432 Mass. 319, 328 (2000); Commonwealth v. Chubbuck, 384 Mass. 746, 753 (1981).

businesses at or near the time that the victim's body was deposited. Specifically, the compilation video contained footage from 800 Border Street; from an auto body shop on Border Street; from a second auto body shop on Condor Street; and from a gasoline station on the corner of Border Street and Condor Street. See note 1, supra. The defendant contends that the footage on the compilation video was not properly authenticated and, also, that the judge abused his discretion in allowing Mills and Walsh to testify regarding their own observations of what they saw in the compilation video.

"The requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Commonwealth v. Purdy, 459 Mass. 442, 447 (2011), quoting Mass. G. Evid. § 901(a) (2011). "The role of the trial judge in jury cases is to determine whether there is evidence sufficient, if believed, to convince the jury by a preponderance of the evidence that the item in question is what the proponent claims it to be. If so, the evidence should be admitted, if it is otherwise admissible" (citation omitted). Purdy, supra at 447. See Commonwealth v. Connolly, 91 Mass. App. Ct. 580, 586 (2017) ("Authenticity can be established through testimony of a witness either [1] that the thing is what its proponent represents it to be, or [2] that circumstances

exist which imply that the thing is what its proponent represents it to be" [quotations and citations omitted]).

The most significant video at issue in this case is that taken from the garage at 800 Border Street in Shore Plaza. That footage was admitted separately, without objection, as the defendant concedes, although he now describes the authentication as "imperfect." In fact, Abruzese testified regarding the Shore Plaza video recording; it showed, among other things, portions of the underside of 800 Border Street.[12] The jury also heard testimony from Dahlbeck, who said that he personally copied the relevant Shore Plaza footage; Dahlbeck confirmed that the time and date stamps on the footage were accurate by comparing them with his department-issued cell phone ("I determined that it was actually up to the minute").

Detective Mills also collected video footage from nearby businesses, including Angelo's Auto Body, Inc., George's Collison, and a Mobil gasoline station. He testified that the footage he compiled from those businesses fairly and accurately represented what could have been seen from the various cameras

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[12] Abruzese was not, as the defendant points out, the person responsible for maintaining the video recording system at Shore Plaza. Nonetheless, he identified the video exhibit in the court room and testified that it "accurately depict[ed] the areas as [he] knew them to be, or that [he was] familiar with underneath 800 Border Street including the parking area." The video was then admitted without objection.

located in the area of Shore Plaza.[13] Specifically, Mills testified that at 8:59:47 A.M. the video showed the distinctive blue Honda Civic traveling on Border Street heading towards Shore Plaza. Mill's testimony directly corresponded with Abruzese's testimony that at 8:59:53 A.M. the Shore Plaza video showed the same vehicle coming from Border Street heading towards Shore Plaza.[14] Next, Mills testified that at 9:14:17 A.M. the video recorded from the Mobil gasoline station depicted the vehicle exiting Shore Plaza and turning left onto Border Street heading towards Condor Street. Similarly, Abruzese testified that at 9:14:16 A.M., the video depicted the vehicle exiting Shore Plaza and taking a left onto Border Street. Finally, Mills testified that at 9:32:01 A.M. the video taken from Angelo's Auto Body, Inc., depicted the vehicle traveling on Condor Street in the direction away from Shore Plaza.

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[13] Each recording was made on August 1, 2013, and Mills collected the videos on August 22, 2013. For each video, Mills compared the time stamp for the video that was running at the time with the time on his cell phone. Mills testified that the video from George's Collision contained a time stamp that was off by twelve hours and twenty minutes; the time stamp from the Mobil gasoline station was fair and accurate; and the video from Angelo's Auto Body, Inc., contained a time stamp that was ten minutes fast.

[14] Mills testified that he viewed the Shore Plaza video and identified the defendant's vehicle prior to investigating establishments on Condor Street and Border Street for additional video recordings.

At trial, the defendant objected to the admission of the "Border and Condor compilation video." The judge overruled the objection, saying to the prosecutor, "[I]f you're representing and the evidence will show that a very distinctive vehicle is depicted on these films on roadways that the vehicle under the Border Street building would have to have traveled, either arriving or leaving during the morning hours of August 1, [2013,] and this jury would be able to conclude that it is the same vehicle, then it seems to me that may be the necessary authentication to fulfil the foundation, and the rest then goes to weight."

Defense counsel objected, saying that he didn't challenge the "distinctiveness of the features of [the] Honda" but that that he didn't think "the time and dates have been established." The judge responded, "We do know with some certainty, it appears, the date and time on the Border Street films, on the Shore Plaza films is accurate. So if the car is arriving from Border Street, or leaving by way of Condor Street, or whatever it may be, and appears similar, and the date and time just happen to coincide, then the rest goes to weight."

The defendant argues that the teaching of Connolly, 91 Mass. App. Ct. at 586-587, compels a different conclusion here. The issue in Connolly was "whether authentication is required when the thing to be authenticated, a video recording, is not

available but testimony about its content is offered." Id. at 586. We concluded that the fact that the video recording in that case was unavailable did not "relieve[] the Commonwealth of any obligation to establish, as a condition of admissibility, that what [the police officer] watched was a fair and accurate depiction of the events in question." Id. For that reason, for the testimony to be admissible, "the Commonwealth first had to lay sufficient foundational facts to demonstrate, by a preponderance of the evidence, that the video was a genuine representation of the events that occurred on the night [in question]. The Commonwealth came far short of meeting that burden, and [did] not argue otherwise in its brief. . . . The officer was not an eyewitness to the incident and had no personal knowledge about the surveillance procedures in the building or how the video was stored." Id. at 587-588.

The evidence here, which included the compilation video itself, is very different from the officer's testimony in Connolly. The 800 Border Street footage was properly admitted without objection, and the defendant does not seriously argue otherwise. We also are satisfied that the other portions of the compilation video were properly admitted for the reasons well explained by the trial judge. We see no error or abuse of the trial judge's discretion in admission of the compilation video.

The defendant further contends that, in admitting Walsh's and Mills's testimony identifying the car in the video as the defendant's car, the judge committed prejudicial error. We disagree. The detectives merely recounted their personal observations, what they saw in the video, and compared those observations to their personal observations of the defendant's car. See Commonwealth v. Cintron, 435 Mass. 509, 521 (2001) ("The only foundation required for the testimony of lay witnesses is the ability to perceive, recall, and recount information within the witness's personal knowledge"). See also Connolly, 91 Mass. App. Ct. at 591 (proper for officer to testify about observations of defendant's gait on video). Commonwealth v. Suarez, 95 Mass. App. Ct. 562, 569-570 (2019), does not compel a different result. In that case, the jury were able to view both an individual shown on a video recording and the defendant in the court room and draw their own conclusion whether the person shown on the video was the defendant. In the present case, the car shown on the video recordings was not physically available for the jury to consider. Accordingly, there was no error. In addition, immediately afterwards, the judge properly instructed the jury that the officers' observations should not override the jurors' own observations if they were at odds. See Commonwealth v. Gomes, 443 Mass. 502, 508 (2005) (jury are presumed to follow judge's instructions).

For the foregoing reasons, the judgment of conviction is affirmed.

So ordered.