SJC-08047

COMMONWEALTH vs. ENEZ KOLENOVIC.

Hampshire. April 7, 2017. - October 18, 2017.

Present: Gants, C.J., Lenk, Gaziano, Budd, & Cypher, JJ.

Homicide. Constitutional Law, Assistance of counsel, Public trial, Confrontation of witnesses. Practice, Criminal, Assistance of counsel, Argument by counsel, Instructions to jury, Admissions and confessions, Argument by prosecutor, Public trial, Confrontation of witnesses, Mistrial, Jury and jurors, Verdict, Capital case. Evidence, Blood alcohol test, Blood sample, Expert opinion, Intoxication. Jury and Jurors. Intoxication. Mental Impairment.

Indictment found and returned in the Superior Court Department on September 24, 1996.

The case was tried before Mary-Lou Rup, J.; a posttrial motion for reduction of the verdict, filed on March 18, 2003, was heard by her; and, following review by this court, 471 Mass. 664 (2015), a motion for reconsideration was heard by her.

Michael R. Schneider for the defendant.
Thomas H. Townsend, Assistant District Attorney, for the Commonwealth.

BUDD, J. The defendant, Enez Kolenovic, was convicted of murder in the first degree on a theory of extreme atrocity or

cruelty in the death of David Walker. On appeal, the defendant argues error in several areas, including error committed by his trial counsel, the trial judge, and the prosecutor, creating a substantial likelihood of a miscarriage of justice. He also asks this court either to remand his case to the Superior Court for renewed consideration of his motion to reduce the verdict, or to grant him relief under G. L. c. 278, § 33E. We affirm the defendant's conviction and the denial of his motion for a reduced verdict, and decline to grant extraordinary relief pursuant to G. L. c. 278, § 33E.

Background. The evidence presented in the defendant's trial and the postconviction evidence introduced in his motion for a new trial hearing is summarized in Commonwealth v. Kolenovic (Kolenovic I), 471 Mass. 664 (2015). We provide a condensed version of events as the jury could have found them, reserving some details for discussion.

1. The homicide. The defendant spent much of the day on September 15, 1996, drinking alcohol. Around 9:30 P.M. he went to a bar, which was connected to a restaurant that his family operated. At the bar, the defendant continued to drink, along with Melissa Radigan and John McCrystal.

Near 11 P.M., the defendant had a dispute with another patron, David Walker, the victim, which culminated in the two going outside, where, chest-to-chest, they "bumped" and yelled

at each other. Police happened upon the scene, and tempers quickly cooled. The defendant and the victim returned to the bar; the defendant bought the victim a drink.

At approximately 1 A.M., the defendant, McCrystal, Radigan, and the victim made their way to McCrystal's vehicle with plans to drive to the defendant's apartment. The defendant asked Radigan to sit with him in the back seat, ensuring that the victim sat in the front passenger seat, with the defendant directly behind the victim.

Minutes later, as the vehicle approached the defendant's apartment, McCrystal, who was driving, noticed the defendant move forward in his seat and put his arm around the victim. The defendant had slit the victim's throat with a knife.[1] McCrystal stopped the vehicle; the defendant got out, pulled the victim from the vehicle onto the ground, and continued to stab him. In total, the victim suffered nine knife wounds, the fatal one extending from the middle of the victim's neck to behind his ear. The lack of defensive wounds on the victim suggests that he did not anticipate the initial and fatal attack in the

[1] John McCrystal saw the white handle of the knife, which reminded him of the type used at the defendant's family restaurant. Earlier in the evening, when the defendant was at the bar, he was observed entering his family's attached restaurant for five minutes. While the prosecution alleged that that is when he got the knife, there was no direct evidence of him doing so presented at trial. The knife was never recovered.

vehicle.

After McCrystal pulled the defendant off the victim, the defendant stated to McCrystal, "You've got to be with me on this." When McCrystal refused, the defendant got in the vehicle and drove away.

After an approximately twenty-minute, high-speed police chase, the defendant was apprehended. At the time of the killing, the defendant's blood alcohol content level was estimated to be between 0.26 and 0.3.

2. The trial. In September, 1996, a grand jury indicted the defendant for the victim's murder. The prosecution pursued a charge of murder in the first degree on the theories of deliberate premeditation and extreme atrocity or cruelty in an eleven-day trial in early 1999. The jury ultimately convicted the defendant of murder in the first degree on the theory of extreme atrocity or cruelty.

3. Procedural history. As his direct appeal to this court was pending, the defendant filed a motion for a new trial and requested a reduction of the verdict pursuant to Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995). We stayed the direct appeal and remanded the motions to the Superior Court. The motion judge, who was the trial judge, denied the rule 25 (b) (2) motion; however, she granted the defendant's motion for a new trial. The Commonwealth appealed, and we reversed the

order for a new trial. See Kolenovic I, 471 Mass. at 665. The defendant then sought a remand to allow the judge to reconsider her denial of the rule 25 (b) (2) motion. A single justice remanded the matter to the trial judge, who denied the motion to reconsider. The defendant's appeal from that denial has been consolidated with his renewed direct appeal.

Discussion. 1. Ineffective assistance of counsel. The defendant contends that his trial counsel rendered ineffective assistance because his closing argument rebutted only the prosecution's theory of deliberate premeditation. This, he argues, left the defendant exposed to the prosecution's other, and ultimately successful, theory: extreme atrocity or cruelty.

In the review of cases involving murder in the first degree,

> "[r]ather than evaluating an ineffective assistance claim under the traditional standard of Commonwealth v. Saferian, 366 Mass. 89, 96 (1974),[2] . . . we apply the standard of G. L. c. 278, § 33E, to determine whether there was a substantial likelihood of a miscarriage of justice. Commonwealth v. Wright, 411 Mass. 678, 681-682 (1992), S.C., 469 Mass. 447 (2014). See Commonwealth v. LaCava, 438 Mass. 708, 712-713 (2003), quoting Commonwealth v. Harbin, 435 Mass. 654, 656 (2002). More particularly, we determine whether there was an error in the course of the trial by defense counsel (or the prosecutor or the judge)

[2] Under Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), the standard for ineffective assistance is whether an attorney's performance fell measurably below that which might be expected from an ordinary fallible lawyer and, if so, whether such ineffectiveness has likely deprived the defendant of an otherwise available substantial defense.

'and, if there was, whether that error was likely to have influenced the jury's conclusion.' Wright, supra at 682."

Commonwealth v. Gulla, 476 Mass. 743, 745–746 (2017). We find no error.

Defense counsel portrayed the prosecution's extreme atrocity or cruelty theory as a "fallback" theory and asserted that the prosecution's "true" position was that the defendant was guilty of deliberately premeditated murder. He then set about arguing that the Commonwealth had not proved deliberate premeditation beyond a reasonable doubt.

Counsel's emphasis on premeditation in his closing was a tactical decision. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8 (2003).

Selecting which arguments to address in closing "is a core exercise of defense counsel's discretion." Yarborough, 540 U.S. at 8. "In deciding what to highlight during closing argument, counsel inevitably [has] to make strategic choices with regard to emphasis and importance, all in the context of the time allotted to such argument." Commonwealth v. Dinkins, 440 Mass. 715, 722 (2004). Here, trial counsel chose to apportion his allotted time between refuting the Commonwealth's theory of deliberate premeditation and mounting an intoxication defense.

In reviewing whether an attorney's tactical decision was an error, we consider if that decision, when made, was "manifestly unreasonable." Commonwealth v. Degro, 432 Mass. 319, 332 (2000), quoting Commonwealth v. Martin, 427 Mass. 816, 822 (1998). Counsel's decision to focus on the deliberate premeditation theory in his closing made sense at the time, given that the majority of the evidence introduced at trial was aimed at proving deliberate premeditation.[3] See Yarborough, 540 U.S. at 9 ("Counsel plainly put to the jury the centerpiece of his case . . ."); Degro, supra at 333 (reasonable for closing argument to focus on theory on which "the defendant had tried the case").

Trial counsel also focused, more generally, on an intoxication defense, which, had it been successful, would have removed the case from the realm of murder altogether. Counsel repeatedly argued that the defendant's higher-order thinking was impaired, that the defendant did not have the ability to "think clearly" or "reflect," and that he was incapable of forming the specific intent necessary for malice.[4]

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[3] It is worth noting that counsel was successful insofar as the jury did not convict the defendant on this theory.

[4] The defendant argues that his trial counsel failed to explain how the defendant's intoxication negated malice. This claim is meritless. While counsel did not use the word "malice," he repeatedly asserted that the defendant could not

Further, counsel's use of the intoxication defense did challenge the prosecution's extreme atrocity or cruelty theory, albeit in an indirect fashion, as a defendant's impaired mental capacity is an additional factor that the jury can consider in determining whether the murder was committed with extreme atrocity or cruelty. See Commonwealth v. Cunneen, 389 Mass. 216, 228 (1983), citing Commonwealth v. Gould, 380 Mass. 672 (1980). As discussed infra, the judge so instructed the jury. Contrast Commonwealth v. Street, 388 Mass. 281, 287 (1983) (in conceding that defendant could not be found to lack criminal responsibility, counsel also destroyed defendant's impairment defense). Counsel told the jury that, in order to convict under either theory of murder in the first degree, they had to find that "[the defendant] had the ability to know what [he was] doing; [he] had the ability to think about what [he was] doing is wrong; and then [he] thought about it and [he] carried it through." Counsel concluded, "That's not what happened here." This assertion, coming at the end of a closing argument that largely focused on the defendant's intoxication throughout the entirety of the crime, amounts to a defense against the theory

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form specific intent, which undercuts the viability of first and second prong malice. Although counsel did less to address third prong malice, his focus on how the defendant's intoxication impaired the defendant's state of mind and knowledge certainly drew into doubt whether the defendant met the criteria for third prong malice.

of extreme atrocity or cruelty.[5] See Gould, supra at 686 & n.16 (when defendant is impaired, whether he "appreciate[d] the consequences of his choices" is relevant to extreme atrocity or cruelty).

In addition, although he did not necessarily focus on the extreme atrocity or cruelty theory during his closing, trial counsel undercut that theory during the cross-examination of the medical examiner. He established that some of the knife wounds were superficial, that none of the torso wounds touched a major

[5] The defendant's contention that his counsel inadequately connected the defendant's intoxication to the brutality of the killing is unavailing. Although not as explicit, the thrust of counsel's closing was the same as that in Commonwealth v. Urrea, 443 Mass. 530, 541-542 (2005), in which we found no error. Urrea's counsel stated that the defendant was not aware of the extent of the harm he was inflicting, which is similar to the instant case, where counsel asserted that the defendant did not know what he was doing. Id.

Additionally, the defendant argues that counsel's failure to raise a specific defense -- that the savagery of the attack indicated the defendant's impairment -- was manifestly unreasonable. We disagree. "A claim of ineffective assistance of counsel made on the trial record alone, as here, 'is the weakest form of such a challenge because it is bereft of any explanation by trial counsel for his actions.'" Commonwealth v. Niemic, 472 Mass. 665, 670 n.2 (2015), quoting Commonwealth v. Peloquin, 437 Mass. 204, 210 n.5 (2002). Because the defendant did not raise this issue in his motion for a new trial, we have no explanation from counsel as to why counsel did not argue that the atrocious attack was probative of the defendant's impairment. We can easily imagine reasonable justifications for counsel's choice. Perhaps counsel thought that the brutal, and in some ways skillful, attack undermined his intoxication defense. We do not hold counsel to a standard of performance elevated by the benefit of hindsight. Niemic, supra, quoting Peloquin, supra.

organ or penetrated the chest wall, that the victim would have lost consciousness within "minutes" of the initial neck wound, and that the medical examiner could not be certain of the size of the knife. This evidence challenged the presence of some of the factors that guide the jury in assessing extreme atrocity or cruelty. See Cunneen, 389 Mass. at 227.[6] Counsel's decision to omit points already made on cross-examination from his closing does not amount to ineffective assistance of counsel. See Commonwealth v. Denis, 442 Mass. 617, 628 (2004) ("suggesting ways in which counsel's closing argument might have been stronger does not make out a claim of ineffective assistance").

"[T]he guaranty of the right to counsel is not an assurance to defendants of brilliant representation or one free of mistakes." Commonwealth v. LeBlanc, 364 Mass. 1, 13-14 (1973). Although trial counsel's closing did not ultimately succeed, it was not manifestly unreasonable and was not ineffective

[6] "We have delineated a number of factors which a jury can consider in deciding whether a murder was committed with extreme atrocity or cruelty. These include indifference to or taking pleasure in the victim's suffering, consciousness and degree of suffering of the victim, extent of physical injuries, number of blows, manner and force with which delivered, instrument employed, and disproportion between the means needed to cause death and those employed." Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983). See Model Jury Instructions on Homicide 46-49 (2013).

assistance.[7]

2. Jury instructions. a. Instructions on extreme atrocity or cruelty. Despite acknowledging that the judge's instructions on extreme atrocity or cruelty reflect current case law, the defendant nevertheless asserts that they violated his right to due process. We disagree.

The defendant asserts that the judge failed to provide sufficient guidance to the jury in assessing extreme atrocity or cruelty given evidence of the defendant's intoxication. The judge repeatedly instructed that the jury should consider intoxication when making this determination.[8] This instruction

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[7] The sufficiency of counsel's performance becomes apparent when the challenged closing is compared to others that we have held constituted ineffective assistance of counsel. For example, in Commonwealth v. Westmoreland, 388 Mass. 269, 272, 274 (1983), despite evidence at trial that would have supported insanity or mental impairment, counsel conceded in his closing the former and did not assert the latter. Instead, counsel merely stated that the defendant was "out of control" and made an ill-defined case for manslaughter. Id. at 274. In contrast, here, counsel's intoxication defense forcefully contested the most serious charge of murder in the first degree. Counsel was more direct in his attack of deliberate premeditation, but his assertions with regard to the defendant's mental state questioned whether the defendant could have committed the killing with extreme atrocity or cruelty.

[8] In giving the jury a framework for thinking about intoxication prior to instructing on the elements of murder, the judge stated: "[I]ntoxication from alcohol is not, standing by itself, an excuse or justification for the commission of a crime. . . . The issue of the effect of [the defendant's] consumption of alcohol on the day in question is relevant on certain of the elements of murder, and you may and should

gave the defendant an advantage: we have held only that a jury may, not must, take a defendant's intoxication into account when evaluating extreme atrocity or cruelty. See Commonwealth v. Szlachta, 463 Mass. 37, 49 (2012) ("judge properly instructed the jury that they could consider evidence of mental impairment in determining whether the defendant acted with extreme atrocity or cruelty in causing the victim's death"); Commonwealth v. Oliveira, 445 Mass. 837, 845-846, 848-849 (2006); Gould, 380 Mass. at 685-686. Contrast Commonwealth v. Howard, 469 Mass. 721, 750 (2014) (extreme atrocity or cruelty instructions that

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consider any credible evidence of [the defendant's] consumption of alcohol when you determine whether the prosecution has proved those elements beyond a reasonable doubt." She went on to describe intoxication as relevant to "whether [the defendant] acted in an extremely atrocious or cruel manner causing the death of [the victim]."

Further, when the judge listed the Cunneen factors, she specifically instructed the jury: "When you consider those seven factors, you should also consider any evidence of the effect on [the defendant] of his consumption of alcohol at the time in question in order to determine whether he committed the killing with extreme atrocity or cruelty."

Last, during their deliberations, the jury inquired, "Is the Defendant's intent or his purpose/objective a consideration we should use to evaluate each of the seven factors of extreme atrocity?" The judge responded in part that "certain of the factors do . . . take into account [the defendant's] . . . state of mind. . . . But . . . others . . . do not . . . ." This response may have done little to clarify the jury's confusion, but the judge added to her explanation all that was required of her by stating, "in considering those seven factors you may and should consider the effect on [the defendant] of his consumption of alcohol at the time in question."

only relate impairment to defendant's intent or knowledge but not to whether killing occurred with extreme atrocity or cruelty constitute error); Commonwealth v. Gonzalez, 469 Mass. 410, 421-422 (2014) (same). Certainly, the judge's instructions made clear that intoxication was an appropriate consideration in determining whether the defendant committed the killing with extreme atrocity or cruelty, in accordance with our prior case law.

The defendant notes that members of this court have raised questions in the past as to whether a jury should be able to find that a defendant, whether impaired or not, committed a murder with extreme atrocity or cruelty without a finding that the defendant "appreciate[d] the consequences of his choices." Gould, 380 Mass. at 686 n.16. See, e.g., Commonwealth v. Riley, 467 Mass. 799, 828-829 (2014) (Duffly, J., concurring); Commonwealth v. Berry, 466 Mass. 763, 777-778 (2014) (Gants, J., concurring). However, the court has not reformulated our homicide jurisprudence in this area. See, e.g., Commonwealth v. Boucher, 474 Mass. 1, 2-3 (2016); Szlachta, 463 Mass. at 48-49; Oliveira, 445 Mass. at 848-849; Cunneen, 389 Mass. at 227; Commonwealth v. Gilbert, 165 Mass. 45, 58-59 (1895).

The defendant's arguments that the instructions provided to the jury failed to narrow the class of homicides committed with extreme atrocity or cruelty, and that the instruction did not

allow the jury to weigh mitigating factors against aggravating factors,[9] are interrelated and misapprehend the nature of the Cunneen factors. Rather than being sentence enhancers, the Cunneen factors are "evidentiary considerations" that guide the jury's determination as to whether the Commonwealth has proved beyond a reasonable doubt the element of a killing with extreme atrocity or cruelty. Commonwealth v. Noeun Sok, 439 Mass. 428, 438 (2003), quoting Commonwealth v. Moses, 436 Mass. 598, 606 (2002). The Cunneen factors are not, as the defendant characterizes them, aggravating factors to be weighed against mitigating factors. See Noeun Sok, supra.

Thus, there was no error in the judge's instructions on extreme atrocity or cruelty.

b. Humane practice instruction. The defendant contends that he was entitled to a humane practice instruction. At trial, witnesses testified that the defendant made incriminating statements after pulling the victim from the vehicle onto the driveway of his apartment complex. The first statement was a response to McCrystal's exhortation, "Billy, get off of him,

[9] Analogizing to death penalty cases, the defendant contends that the Cunneen factors are aggravating factors that increase the punishment for a defendant, and therefore should serve to narrow the class of offenders eligible for a life without parole sentence so as to avoid an "arbitrary and capricious" application of that penalty. See Gregg v. Georgia, 428 U.S. 153, 188 (1976). As discussed infra, this analogy is inapt.

you're going to kill him." The defendant replied, "I think it's too late for that." The second and third statements, made soon thereafter, were the defendant's entreaties to McCrystal: "You've got to be with me on this," and, "Come on, we're family." The defendant alleges his trial counsel erred in failing to request a humane practice instruction with respect to those statements, and that the trial judge similarly erred by failing to provide, sua sponte, such instruction. We disagree.

Only voluntary confessions or admissions are admissible regardless of whether they are made to police or civilians. See Commonwealth v. Brown, 449 Mass. 747, 765 (2007), citing Commonwealth v. Sheriff, 425 Mass. 186, 192 (1997). If the voluntariness of a confession or admission is a live issue at trial, our "humane practice" rule requires, even absent a request from defense counsel, that the judge instruct the jury on the issue.[10] See Brown, supra at 765; Commonwealth v. Benoit, 410 Mass. 506, 512 (1991); Commonwealth v. Parham, 390 Mass. 833, 841 (1984). However, we have never applied the humane practice rule to statements made during the "criminal episode." See Commonwealth v. Boateng, 438 Mass. 498, 501, 504 & n.3 (2003) (statements made by defendant after attacking victim but

[10] The humane practice instruction conveys to the jury that the prosecution must prove the voluntariness of the statements beyond a reasonable doubt. See Commonwealth v. Sheriff, 425 Mass. 186, 193 (1997).

before he prevented witness from seeking help not covered by humane practice rule).

Here, the defendant's first statement was made while he was still on top of the victim. The second and third statements came once the defendant had been pulled away from the victim. All of the statements were made after the victim suffered the fatal knife wound, but before the defendant led the police on a high-speed chase. Because the defendant's statements occurred during the criminal episode, he was not entitled to a humane practice instruction. There was no error on the part of either defense counsel or the trial judge.

3. Prosecutor's closing argument. The defendant challenges three statements in the prosecutor's closing argument as improper. "In determining whether an argument was improper we examine the remarks 'in the context of the entire argument, and in light of the judge's instructions to the jury and the evidence at trial.'" Commonwealth v. Gaynor, 443 Mass. 245, 273 (2005), quoting Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 231 (1992). We take each challenged statement in turn.

a. The defendant contends the prosecutor improperly focused on the gruesome nature of the killing by addressing the severity of the throat wound, recounting how the defendant repeatedly stabbed the victim after pulling him out of the vehicle, and by noting that the victim was conscious for three

to five minutes following the initial and ultimately fatal throat wound. The prosecutor's description of the gruesome nature of the killing was not improper.

The Commonwealth charged the defendant with murder in the first degree on the theories of extreme atrocity or cruelty as well as deliberate premeditation. The way the victim died is relevant to whether the killing was committed with extreme atrocity or cruelty. See Cunneen, 389 Mass. at 227 (listing factors jury may consider in determining extreme atrocity or cruelty). See also Commonwealth v. Mejia, 463 Mass. 243, 254 (2012) ("because the violent nature of the murder was relevant to whether it was committed with extreme atrocity or cruelty, the remarks were not improper").

b. The defendant also argues that the prosecutor improperly stated in his closing argument that the defendant showed "indifference or even pleasure . . . in the way he executed [the victim], cutting his throat, dragging him out and repeatedly stabbing him and saying simply to the pleas of 'stop' from the other witnesses, 'It's too late for that.'" We disagree.

In closing argument, a prosecutor may suggest that the jury draw reasonable inferences from the evidence. Commonwealth v. Grimshaw, 412 Mass. 505, 509 (1992). The victim's nine knife wounds, several of which the medical examiner testified were

suffered after the fatal wound, were sufficient to justify the inference that the defendant was indifferent to the victim's suffering. Commonwealth v. Coleman, 389 Mass. 667, 674 (1983) ("[t]he defendant's persistence in seeking to inflict additional wounds demonstrated an indifference to the victim's suffering").

Although there was less evidence that the defendant took pleasure in the victim's suffering, the evidence presented was nevertheless sufficient to support that inference. The defendant's statement, "I think it's too late for that," in response to pleas for the defendant to stop, appears to be a declaration of fact rather than one of "pleasure." However, McCrystal also testified that it was difficult to pull the defendant off of the victim. This evidence could support an inference that the defendant wanted to remain atop the victim because he took pleasure in "pounding" away at the victim. Distinguishing proper inferences from improper speculation can be difficult. Commonwealth v. Bois, 476 Mass. 15, 33 (2016). However, "we must and do recognize that closing argument is identified as argument," and that the jury understand the instructions from the judge that the closing argument is not evidence. Commonwealth v. Kozec, 399 Mass. 514, 517 (1987). Although close, the challenged statement "did not cross the line between fair and improper argument." Commonwealth v. Sanna, 424 Mass. 92, 107 (1997).

c. Finally, at the beginning of his closing argument, the prosecutor held up the victim's photograph and asked, "What did he do that night to deserve to be sliced and stabbed to death?" The defendant contends that this rhetorical question improperly appealed to the jurors' sympathy. We agree.

A prosecutor may "humanize the proceedings" but may not do so in a way that plays on the jury's sympathy and emotions. Mejia, 463 Mass. at 253, quoting Commonwealth v. Santiago, 425 Mass. 491, 495 (1997), S.C., 427 Mass. 298 and 428 Mass. 39, cert. denied, 525 U.S. 1003 (1998). See Kozec, 399 Mass. at 516-517. The prosecutor's rhetorical question did not pertain to whether the defendant was guilty but instead sought to persuade the jury to convict on the basis of the brutal nature of the killing. See Commonwealth v. Gentile, 437 Mass. 569, 580 (2002) (prosecutor's statement that victim "didn't deserve to die this way" was improper).

The rhetorical question was improper, yet the defendant did not object to this portion, or indeed any part, of the closing at trial. Thus, we consider, "in the context of the arguments and the case as a whole," whether the improper statement created a substantial likelihood of a miscarriage of justice. Commonwealth v. Maynard, 436 Mass. 558, 570 (2002). See Gaynor, 443 Mass. at 273, citing Commonwealth v. Allison, 434 Mass. 670, 686 (2001). We conclude that it did not.

First, although it inappropriately appealed to jurors' sympathies, the improper statement did not go to the heart of the defense strategy -- that the defendant was too intoxicated to form the necessary intent for murder in the first degree under either a theory of deliberate premeditation or extreme atrocity or cruelty. Contrast Commonwealth v. Clary, 388 Mass. 583, 591, 594 (1983) (improper statements of prosecutor "struck at the heart of [the] defense," contributing to reversible error).

Further, the judge instructed that closing arguments are not evidence and that the jury should not be swayed "by prejudice or by sympathy." We presume that the jury follow the judge's instructions and have held that even such general instructions can diminish prejudice suffered by the defendant. See Bois, 476 Mass. at 35-36, citing Commonwealth v. Camacho, 472 Mass. 587, 609 (2015); Gentile, 437 Mass. at 580.

Finally, given the abundance of evidence introduced on the brutal nature of the killing, it is "unlikely that the prosecutor's argument had an inflammatory effect on the jury beyond that which naturally would result from the evidence presented." Bois, 476 Mass. at 35, citing Commonwealth v. Kater, 432 Mass. 404, 423 (2000). The improper statement was isolated, and "it was not a principal focus of what otherwise

was a proper closing argument."[11] Gaynor, 443 Mass. at 274. See Commonwealth v. Ortiz, 435 Mass. 569, 579 (2002).

There was no reversible error in the prosecutor's closing argument.

4. Court room closure. The defendant claims that the trial judge erred by improperly closing the court room during jury selection. The right to a public trial is guaranteed by the Sixth Amendment to the United States Constitution and extends to jury empanelment. See Presley v. Georgia, 558 U.S. 209, 213-215 (2010) (per curiam); Commonwealth v. Dyer, 460 Mass. 728, 735 (2011), cert. denied, 566 U.S. 1026 (2012). Although under certain circumstances a trial judge may determine that it is necessary to close the court room to the public, he or she must make findings on the record to justify the closure. See Waller v. Georgia, 467 U.S. 39, 45, 48 (1984), citing Press-

[11] The defendant also asserts that the fact that the prosecutor put the improper rhetorical question to the jury at the beginning of the closing argument, coupled with the fact that he simultaneously held the victim's photograph in his hand in a "dramatic" way, was particularly prejudicial. The defendant does not cite any decision that suggests the positioning of an improper statement at the outset of a closing argument is sufficient to produce a substantial likelihood of a miscarriage of justice. Further, we cannot imagine that the prosecutor's actions were any more dramatic than kicking a trash can or making stabbing motions with a ruler during closing argument, neither of which was found to be prejudicial enough to warrant a new trial. See Commonwealth v. Johnson, 425 Mass. 609, 611-612 (1997); Commonwealth v. Barros, 425 Mass. 572, 581 (1997).

Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 511-512 (1984). See also Commonwealth v. Weaver, 474 Mass. 787, 814 (2016), aff'd, 137 S. Ct. 1899, 1909-1910, 1912 (2017). "[I]t is a well-settled principle that a properly preserved violation of that right is structural error requiring reversal." Commonwealth v. Vargas, 475 Mass. 338, 357 (2016).

The defendant asserts that his family was excluded from the court room for a portion of jury empanelment due to space constraints, and that the trial judge made insufficient findings to warrant the closure. He argues that this court room closure requires a new trial. The parties disagree about when, the extent to which, and the circumstances under which the court room was closed. Because we conclude that the defendant has not made a sufficient showing to warrant a new trial, we assume without deciding that there was an improper closure during a portion of the empanelment process.[12]

In Weaver, 137 S. Ct. at 1912, the United States Supreme

[12] The defendant has moved to expand the record and remand the issue to the Superior Court. Indeed, claims of ineffective assistance of counsel are best raised in motions for a new trial, so that an adequate factual record for appellate review can be developed. See Commonwealth v. Zinser, 446 Mass. 807, 808-809 & n.2 (2006) ("The occasions when a court can resolve an ineffective assistance claim on direct appeal are exceptional, and our case law strongly disfavors raising ineffective assistance claims on direct appeal"). Because we conclude that the defendant did not suffer prejudice warranting a new trial even if he were to prove the facts he alleges, there is no need for a remand to determine those facts.

Court distinguished sharply between preserved and unpreserved errors on appeal.[13] Where, as here, the defendant did not object to the closure at trial,[14] and raises the issue on appeal as an

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[13] Throughout its opinion in Weaver, the United States Supreme Court emphasized "the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance-of-counsel claim." Weaver v. Massachusetts, 137 S. Ct. 1899, 1912 (2007). In making this distinction, the Supreme Court explained that direct review of preserved error means that the trial judge had an opportunity to correct the error and make findings on the record, whereas an ineffective assistance claim raised in postconviction proceedings raises the costs and uncertainties of a new trial. Id. Based on the Supreme Court's reasoning, we infer that the important distinction is not whether the claim was made in the direct appeal or in the motion for new trial, but rather whether the court room closure issue was preserved at trial.

[14] At one point during empanelment, trial counsel had a brief exchange with the judge, about the family entering the court room, and acquiesced when the judge responded that there was not enough room for the entire family at that time:

Defense counsel: "Judge, before those jurors come out, is the Court going to call each -- the number of people in each panel from Friday and go through it in that fashion? The reason I'm asking --"

The judge: "We're going to keep them out of the courtroom until -- they are just going to be brought in the courtroom individually."

Defense counsel: "My client's family had wanted to come in and sit down."

The judge: "They can certainly do that during jury [e]mpanelment, the individual jury [e]mpanelment. Not right now, we don't have room in the courtroom."

Defense counsel: "That's what I wanted to know."

ineffective assistance of counsel claim,[15] he bears "the burden . . . to show either a reasonable probability of a different outcome in his or her case or . . . to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." Id. at 1911. See Weaver, 474 Mass. at 814, 815, citing Commonwealth v. LaChance, 469 Mass. 854, 856 (2014), cert. denied, 136 S. Ct. 317 (2015) (defendant must "demonstrate[] . . . facts that would support a finding

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The clerk: "We are bringing them in all together right now?"

The judge: "Right. [Defense counsel], if your client's parents want to come into the courtroom during this portion, they are welcome. I know there are a large number of people."

Defense counsel: "There are. I think they would all prefer to come in together. It will probably make it easier."

The judge: "That's up to you. Okay."

This exchange did not rise to the level of an objection. See Commonwealth v. Torres, 420 Mass. 479, 482-484 (1995), quoting Commonwealth v. Keevan, 400 Mass. 557, 564 (1987) ("It is a fundamental rule of practice that where a party alleges error . . . he must bring the alleged error to the attention of the judge in specific terms in order to give the judge an opportunity to rectify the error, if any" [emphasis added]).

[15] As "the statutory standard of [G. L. c. 278, § 33E,] is more favorable to a defendant than is the constitutional standard for determining the ineffectiveness of counsel," a defendant convicted of murder in the first degree must show for either a direct or a collateral attack on an unpreserved issue that any error caused a substantial likelihood of a miscarriage of justice. Commonwealth v. Wright, 411 Mass. 678, 681-682 (1992), S.C., 469 Mass. 447 (2014).

that the closure subjected him to a substantial likelihood of a miscarriage of justice"). In Weaver, 137 S. Ct. at 1913, the Supreme Court determined that the defendant had not made such a showing where

> "petitioner's trial was not conducted in secret or in a remote place. . . . The closure was limited to the jury voir dire; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers rather than the judge; there were many members of the venire who did not become jurors but who did observe the proceedings; and there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself.
>
> "There has been no showing, furthermore, that the potential harms flowing from a courtroom closure came to pass in this case. For example, there is no suggestion that any juror lied during voir dire; no suggestion of misbehavior by the prosecutor, judge, or any other party; and no suggestion that any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands." (Citation omitted.)

Similarly, here, the defendant has made no showing of prejudice. He has not argued that the closure had any effect on the proceedings, nor has he pointed to any misbehavior by any prospective juror, the judge, or the parties. Thus, there was no reversible error.

5. Evidentiary rulings. The defendant claims that the trial judge also erred with regard to two evidentiary rulings.

a. Serologist's testimony.[16] At trial, a State police crime laboratory supervisor testified without objection regarding the testing and comparison of a sample of the victim's blood to eleven bloodstains from the vehicle where the victim was killed. The defendant claims that the witness was not the serologist who performed the relevant tests, and that, therefore, the admission of her testimony violated his rights to confrontation and due process. There was no error.

The right of a defendant to confront witnesses who testify against him or her is protected by the Sixth Amendment and art. 12 of the Massachusetts Declaration of Rights. Contrary to the defendant's assertions, the testifying serologist was involved in the majority of the blood testing to which she testified, as either the main tester, double reader, or supervisor.[17] Facts within an expert's personal knowledge include tests that the expert either performed or supervised. See Commonwealth v. Nardi, 452 Mass. 379, 390 (2008), citing Commonwealth v. Hill, 54 Mass. App. Ct. 690, 697 (2002). Contrast Commonwealth v.

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[16] We now allow the Commonwealth's motion to expand the record to include serology paperwork regarding the testing of eleven bloodstains from the vehicle in which the victim was killed.

[17] A series of tests for six particular characteristics were performed on several blood samples taken from the motor vehicle. The serologist who testified to the cumulative serology chart at trial was consistently involved in tests for four of the six blood characteristics for the samples.

Tassone, 468 Mass. 391, 402 (2014) (confrontation clause violation where deoxyribonucleic acid [DNA] results offered in evidence without testimony of any analyst from laboratory that tested crime scene DNA sample). Consequently, there was no confrontation clause violation.

As to the specific tests with which the defendant suggests the serologist was not involved, their role in her testimony was either cumulative or irrelevant. One of the tests related to characteristics that were indistinguishable between the defendant and the victim.[18] The other test did show a distinction between the defendant and victim, but was only one of three tests that showed such a distinction.[19] Thus, even if

[18] The serologists additionally tested the blood of McCrystal and Radigan. McCrystal did not match any of the samples taken from the motor vehicle, and Radigan was excluded as a source from all of the samples from the vehicle except for the sample from the right front fender. The laboratory supervisor testified that the sample from the right front fender had only been tested for three of the six blood characteristics, which she said was why the sample could not be distinguished between Radigan and the victim.

[19] The defendant and the victim shared three of six blood characteristics. The serologist did not participate in the testing for all six characteristics for each of the eleven samples. The record indicates that she participated in some but not all of the testing for two of the characteristics; only one of these would allow for distinction between the defendant's and the victim's blood. However, for each of the bloodstain samples, the serologist participated in all of the testing for two of the three differentiating characteristics. Thus, there were two other values used to distinguish whether the blood was consistent with the victim's or the defendant's profile. As a

testimony regarding results of this blood test was hearsay, it did not cause a substantial likelihood of a miscarriage of justice. See Commonwealth v. DePina, 476 Mass. 614, 623-624 (2017), citing Commonwealth v. Spray, 467 Mass. 456, 471 (2014), and Commonwealth v. Britt, 465 Mass. 87, 92 (2013).

b. Evidence regarding defendant's blood alcohol content. The defendant argues that the judge improperly prevented him from presenting a frame of reference regarding the defendant's level of intoxication, i.e., that his blood alcohol content (BAC) was three times the legal limit established by G. L. c. 90, § 24 (operation of motor vehicle while under influence [OUI] statute), thereby violating his right to present a defense and to due process of law. We disagree.

Prior to trial, the prosecution brought a motion in limine to exclude any reference to the BAC level for OUI. The defendant's counsel opposed this motion, and the trial judge deferred ruling on the matter. At trial, defense counsel never sought to offer in evidence the BAC, or the fact that the defendant's BAC was three times the legal limit under § 24. Instead, defense counsel invited the defense expert to explain the effects of intoxication by reference to alcohol's impact on driving. After the prosecutor's objection to this question was

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result, the tests in which the serologist did not participate were cumulative of the other results.

sustained, defense counsel then invited the defense expert to explain the effects of intoxication by reference to alcohol's impact on the use of a dangerous piece of equipment, such as a chain saw, for which there was no objection. There was no error.

6. Motion for mistrial. During cross-examination of the defendant's substance abuse expert, the prosecutor asked a question that implied that the defendant had concealed a knife in his jacket before getting in the vehicle with the victim, thereby suggesting premeditation, even though no such evidence had been introduced.[20] After the judge sustained the defendant's objection, the prosecutor asked a hypothetical question once again related to using the jacket to conceal the knife. The judge sustained the defendant's objection a second time, but denied the defendant's subsequent motion for a mistrial. Instead, the judge instructed jurors not to consider the

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[20] The prosecutor's two questions were the following:

> "And you became aware, didn't you, that the allegation is he had a knife in the pocket of that jacket, you became aware of that, didn't you?"
>
> "Would it be relevant to you, in forming your opinion about someone's state of mind if you were to learn that within an hour of the incident, that person put on a jacket and concealed a knife?"

Defense counsel's objections were sustained because no evidence had been introduced that suggested the defendant had a knife in the pocket of his jacket.

questions.

Assuming that the prosecutor's questions were improper, "[i]t is well within the trial judge's discretion to deny a mistrial . . . and to rely on appropriate curative instructions." Commonwealth v. Woods, 414 Mass. 343, 357, cert. denied, 510 U.S. 815 (1993), citing Commonwealth v. Charles, 397 Mass. 1, 12 (1986). Here, the prosecutor's questions about concealing a knife with the jacket went to the question of premeditation. As the jury did not convict on this basis, we conclude that the improper questions were appropriately handled by the trial judge. There was no abuse of discretion.

7. Failure to dismiss juror. The defendant contends that the judge erred in failing to dismiss a juror exposed to extrinsic and inaccurate evidence. Over the weekend, just after the trial had begun, a juror's former husband told the juror that he had heard that the defendant stabbed the victim over 200 times. The juror told the former husband not to say any more about the case and notified a court officer about the exchange when she returned to court on Monday. During the resulting voir dire hearing, the juror stated that she did not believe the extraneous information and would consider only the evidence introduced at trial. After inquiring of the juror further to the satisfaction of both counsel, the judge found that the juror remained indifferent, objective, and impartial. Counsel did not

object. On appeal, the defendant argues that the judge's failure to dismiss the juror caused a substantial likelihood of a miscarriage of justice. We disagree.

"The trial judge has 'discretion in addressing issues of extraneous influence on jurors discovered during trial.'" Commonwealth v. Maldonado, 429 Mass. 502, 506 (1999), quoting Commonwealth v. Trapp, 423 Mass. 356, 362, cert. denied, 519 U.S. 1045 (1996). Here the judge's careful examination of the juror, including asking further questions to satisfy both parties, shows there was no abuse of discretion. See Trapp, supra at 362-363. The juror's answers indicated that she remained impartial. Further, she indicated that she would follow the judge's admonitions to consider only the evidence introduced at trial and not share the information with any other jurors. See id. See also Commonwealth v. Roberts, 433 Mass. 45, 53 (2000) ("jury are presumed to follow the instructions of the judge"). We also note that the juror did not take part in the deliberations because she was selected as an alternate. As a result, it is hard to imagine how allowing the juror to remain could have caused a substantial likelihood of a miscarriage of justice. See Gonzalez, 469 Mass. at 417 (no substantial likelihood of miscarriage of justice where court was "substantially confident that . . . the jury verdict would have been the same").

"In coming forward the juror did exactly what [s]he was supposed to do," Trapp, 423 Mass. at 362, so the judge could evaluate the situation. There was no error.

8. Reduction of the verdict. The trial judge declined to reconsider the denial of the defendant's rule 25 (b) (2) motion to reduce the defendant's degree of guilt. The defendant asks this court to remand his case to the Superior Court for review, with instructions to the judge that she consider evidence that was not introduced at trial. In the alternative, he asks us to grant him a new trial or reduce the degree of guilt pursuant to our powers under G. L. c. 278, § 33E. We discern no reason to pursue either course.

a. Rule 25 (b) (2). After the jury returned the guilty verdict, the defendant renewed his rule 25 (b) (2) motion, requesting that the judge reduce the degree of guilt to manslaughter or murder in the second degree due to the defendant's extreme intoxication. The judge denied this motion. Nearly eleven and one-half years later,[21] the defendant, by

[21] The defendant's motion for a new trial pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), was filed at the same time as his motion for a reduced verdict pursuant to Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995). While the judge denied the latter motion relatively quickly, the motion for a new trial took years to resolve. The judge eventually allowed the motion for a new trial, but this court reversed that decision in Commonwealth v. Kolenovic, 471 Mass. 664 (2015), and denied the defendant's

motion, requested that the judge reconsider her ruling, but this time he relied primarily on a diagnosis of posttraumatic stress disorder (PTSD) -- a diagnosis of which trial counsel was aware, but chose not to pursue for strategic reasons. See generally Kolenovic I, 471 Mass. at 669-671. The judge once again denied the motion, noting that "evidence outside the trial record has no bearing on whether the verdict should be reduced." The judge was correct.

"[A] judge is not to second guess the determination of the jury, nor to reduce a verdict, based on extraneous factors, where such a verdict would be inconsistent with the weight of the evidence." Commonwealth v. Reavis, 465 Mass. 875, 893 (2013). The defendant's reliance on Commonwealth v. Pagan, 471 Mass. 537, cert. denied, 136 S. Ct. 548 (2015), to argue that Reavis should not apply to his situation, is misplaced. In Pagan, supra at 541, 543, although the judge took into account evidence not presented at trial in deciding the rule 25 (b) (2) motion, the new evidence related to the evidence presented at trial and the defense's theory of the case. Here, however, the defendant sought to have the judge consider evidence and a defense that were not introduced at all. Thus, the judge

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petition for rehearing. A single justice of this court allowed the defendant's motion to remand the case to the Superior Court for reconsideration of his motion to reduce the verdict.

correctly declined to consider evidence that was not introduced at trial and did not abuse her discretion in determining that the weight of the evidence at trial supported a conviction of murder in the first degree that was consonant with justice.

b. G. L. c. 278, § 33E. The defendant also seeks a new trial or a reduction in the degree of guilt pursuant to our power under G. L. c. 278, § 33E. In his view, the killing was driven by severe intoxication compounded by PTSD and other psychiatric disorders.[22] The scope of our review under § 33E review is greater than that of a trial judge considering a motion for a new trial, because, unlike the trial judge, we may consider the entirety of the appellate record, which might include evidence that was not introduced at trial. See Commonwealth v. Coyne, 420 Mass. 33, 35 (1995), citing Commonwealth v. Jefferson, 416 Mass. 258, 267 (1993). Having considered the entirety of that record, we conclude that the defendant has failed to show that his conviction was not consonant with justice.

While a defendant may, in some circumstances, demonstrate that mental impairment, whether caused by a diagnosable disorder

[22] The defendant also asks us to exercise our powers under G. L. c. 278, § 33E, in light of what he considers to be ineffective assistance of counsel. For the reasons explained in part 1 of the discussion, supra, there was no error by counsel. Thus, the performance of the defendant's trial counsel has little bearing on our § 33E analysis.

or by severe intoxication, may justify a reduction of the verdict, "the fact of a mental illness by itself does not generally warrant reduction of a conviction of murder in the first degree." Berry, 466 Mass. at 771-772 (noting extraordinary effect of tumor on cerebellum combined with bipolar or schizoaffective disorder, and that defendant's aggression and impulsive conduct improved substantially once tumor was removed). We note that the degree of intoxication was heavily litigated at trial, such that the jury had the opportunity to consider whether the defendant could form the requisite intent. See Reavis, 465 Mass. at 893-894 (court did not exercise § 33E power where jury had opportunity to consider not only evidence of quantity of alcohol consumed but also testimony from witnesses regarding defendant's conduct and perceived level of intoxication). See also Coleman, 389 Mass. at 674 ("[I]ntoxication is only a single factor. In the present case, it simply did not detract from the vicious manner in which the crime was carried out").

In addition, while the defendant argues that extraneous evidence regarding his mental disorders shows that he was unable to understand what was happening, his actions on the night of the killing demonstrate otherwise. There was a significant amount of time between the defendant and the victim's dispute around 11 P.M. and the killing in the vehicle, which happened

shortly after 1 A.M. Contrast Commonwealth v. King, 374 Mass. 501, 506-507 (1978). Further, there was evidence from which the jury could have found that the defendant carefully arranged the position of the passengers so that the victim was sitting in front of him. Finally, the violence against the victim did not cease when McCrystal stopped driving; instead, the defendant pulled the victim out of the vehicle and continued to stab him. Once McCrystal got the defendant off the victim, the defendant asked for McCrystal's loyalty. When McCrystal refused, the defendant drove off, leaving the victim to die and beginning a high-speed chase with the police. The weight of this evidence would tend to show that, contrary to what the defendant asserts is shown by the posttrial evidence, the defendant knew what was happening around him and what he was doing that night. As a result, the defendant has failed to show that the weight of the evidence was against a finding of extreme atrocity or cruelty such that a lesser degree of guilt or a new trial would be more consonant with justice.

Thus, after a thorough review of the entire record, we decline to set aside or reduce the defendant's conviction. See Boucher, 474 Mass. at 9.

Conclusion. The order denying the defendant's motion for a reduced verdict, on reconsideration, is affirmed. The defendant's conviction is affirmed.

So ordered.