SJC-09070

COMMONWEALTH vs. DANIEL MASON.

Suffolk. February 14, 2020. - August 25, 2020.

Present: Gants, C.J., Lenk, Budd, & Kafker, JJ.

Homicide. Jury and Jurors. Evidence, Prior misconduct, Firearm, Relevancy and materiality, Opinion. Practice, Criminal, Capital case, Jury and jurors, Voir dire, Challenge to jurors, Argument by prosecutor, Assistance of counsel.

Indictments found and returned in the Superior Court Department on March 29, 2001.

The cases were tried before Christine M. McEvoy, J.

Amy M. Belger for the defendant.
Cailin M. Campbell, Assistant District Attorney, for the Commonwealth.

BUDD, J. A jury convicted the defendant, Daniel Mason, of murder in the first degree on theories of deliberate premeditation, extreme atrocity and cruelty, and felony-murder, as well as armed assault with intent to murder, animal cruelty,

and related offenses[1] in connection with a shooting that killed Michael Lenz, injured Gene Yazgur, and killed Yazgur's dog. The defendant appeals from his convictions, arguing error on the part of trial counsel, the prosecutor, and the judge requiring a new trial.[2] In the alternative, he asks us to exercise our authority under G. L. c. 278, § 33E, to order a new trial. After full consideration of the record, we affirm the defendant's convictions and decline to grant extraordinary relief under G. L. c. 278, § 33E.

Background. We summarize the facts the jury could have found, reserving certain details for discussion.

Shortly before 5:30 A.M. on March 2, 2000, an intruder entered the apartment of Michael Lenz and Gene Yazgur as they slept and opened fire on them. Yazgur awoke to the sound of gunfire as the intruder shot at Lenz first. Yazgur attempted to close his bedroom door, but the shooter partially kicked it in and shot Yazgur through the opening. The shooter alternated between shooting at Lenz and Yazgur, as well as Yazgur's dog, for several minutes, then left the apartment. Lenz, who had

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[1] The defendant was also convicted of home invasion, in violation of G. L. c. 265, § 18C, and two counts of unlawful possession of a firearm, in violation of G. L. c. 269, § 10 (a).

[2] The defendant's motion for new trial was denied after a hearing in 2006. Although the defendant asserts in his appellate briefs that he filed a pro se notice of appeal from the denial of his motion for new trial, the record does not reflect that such an appeal was filed.

been shot in his head, chest, and wrist, died approximately two hours later. Yazgur, who sustained gunshot wounds to his face, back, hand and each thigh, survived after undergoing multiple surgeries and being placed in a medically-induced coma for two and one-half weeks. Yazgur's dog was shot five times and found dead at the scene.

The Commonwealth's case against the defendant was circumstantial. Yazgur observed that the shooter was a short, stocky male, but Yazgur could not see his face. At around the time of the shooting, a witness saw a man approximately five feet, six inches tall dressed in a long, black trench coat and dark hat, carrying a bag and walking on the street near the victims' home. That witness testified that a hat, coat, and two bags seized from the defendant's apartment resembled the clothing worn, and a bag carried by, the man he saw on the day of the shooting.

Less than one hour after the shooting, the defendant was driving away from the Jamaica Plain section of Boston when he hit a car in front of him. The defendant refused to give the other driver his name or driver's license, and attempted to pay for the damage in cash.[3] The passenger in the other vehicle noticed two bags in the defendant's car.

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[3] After ignoring two requests for his driver's license, the defendant handed his vehicle registration to the passenger in

Two days after the shooting, the defendant asked his roommate to say that the defendant had not left their apartment on the night of the shooting. The defendant also asked the roommate to say that he had never seen any guns or explosives in the apartment, even though he previously had seen explosives there.

The murder weapons were never recovered, but the Commonwealth presented evidence that the defendant's uncle owned two handguns matching the bullets and shell casings recovered from the scene and may have stored them in the defendant's apartment. Yazgur testified that the gunshots were "very measured," and not quick. The jury further heard evidence that the defendant was a marksman who had served in the Israeli military.

The day prior to the murder, the defendant had been served with an execution of judgment for a civil damages award of more than $100,000 for assaulting Yazgur with a knife in 1997. The defendant vowed that Yazgur would "never see a penny," and that the defendant would kill Yazgur first.

At trial, the defense focused on the lack of physical evidence tying the defendant to the shooting, challenged the defendant's alleged motive against Yazgur, and suggested that

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the other vehicle; the registration included the defendant's name and address.

there had been insufficient investigation into people who might target Lenz rather than Yazgur.

Discussion. 1. Jury empanelment. The defendant alleges two errors occurred during jury selection with respect to the voir dire of prospective jurors, and a peremptory challenge used by the Commonwealth.

a. Voir dire. The defendant argues that as an observant Jew and a former member of the Israeli Defense Forces (IDF), he was entitled to have each potential juror questioned about his or her opinions on Judaism, the IDF, and the nation of Israel. In support of this contention, the defendant points to news coverage of the Israeli-Palestinian conflict during the fall of 2000 and the winter of 2001 which, he claims, was ubiquitous and polarizing. He also asserts that news coverage of the terrorist attacks on September 11, 2001, which took place three months before his trial, caused Americans to become fearful and mistrusting of the Middle East, including Israel. The defendant additionally raises the specter of racial prejudice due to his Jewish heritage. Although the defendant did not request that the judge make inquiry in these areas, he claims that the judge's failure to do so sua sponte violated his right to a fair trial. He further claims that his counsel's failure to request individual voir dire to root out potential juror bias in these areas was ineffective assistance. There was no error.

A criminal defendant is entitled to juror voir dire to identify fair and unbiased jurors as a part of the right to an impartial jury. Commonwealth v. Dabney, 478 Mass. 839, 848, cert. denied, 139 S. Ct. 127 (2018). See G. L. c. 234A, § 67A. Where it appears that a substantial risk exists that an extraneous issue might affect the outcome of the case, a defendant is entitled to individual voir dire of prospective jurors to determine their impartiality. See G. L. c. 234A, § 67A.[4] See also Commonwealth v. Lopes, 440 Mass. 731, 736-737 (2004). However, it is the defendant's burden to "show that

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[4] At the time of the defendant's trial, juror voir dire was governed by the predecessor to G. L. c. 234A, § 67A. General Laws c. 234, § 28, as amended by St. 1985, c. 463, provided in part:

> "For the purpose of determining whether a juror stands indifferent in the case, if it appears that, as a result of the impact of considerations which may cause a decision or decisions in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possibly preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court shall, or the parties or their attorneys may, with the permission and under the direction of the court, examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may . . . cause a decision or decisions to be made in whole or in part upon issues extraneous to the case."

Although G. L. c. 234, § 28, was repealed and replaced in 2016 with G. L. c. 234A, § 67A, see St. 2016, c. 36, § 4, the pertinent language in both statutes is "virtually identical." Commonwealth v. Colon, 482 Mass. 162, 180 n.15 (2019).

there is some basis for finding that a substantial risk of extraneous influences on the jury exists, . . . and that there is a substantial risk that jurors would be influenced by such considerations" (citations omitted). Commonwealth v. Ashman, 430 Mass. 736, 739 (2000).

Here, the defendant has failed to meet his burden to show that there was a substantial risk that jurors would be influenced by his being a former member of the IDF, or being an observant Jew, necessitating individual voir dire to assess juror impartiality. In fact, he failed to raise the issue at all during jury selection.[5]

The defendant's claim that there was an additional substantial risk of racial bias against Jews also fails. We have required judges to conduct an individual voir dire on the issue of potential bias, if requested to do so, in trials for murder, rape, and sex offenses against children where the defendant and victim are of different races. See Commonwealth v. Colon, 482 Mass. 162, 175-176 (2019) (collecting cases).

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[5] As the defendant failed to raise this issue at trial, we review the claim on appeal for a substantial risk of a miscarriage of justice. We discern no such risk. None of the articles or public opinion polls cited by the defendant addresses American mistrust of Israel or the Israeli Defense Forces (IDF) at the time of the trial. Instead, they refer to an increased support of Israel by American Jews following the September 11, 2001, terrorist attacks, Americans' perception of Israeli-United States politics, and Israeli mistrust of the IDF.

More recently we expanded the rule prospectively to include potential prejudice where the defendant and victim are of different ethnic backgrounds. Id. at 182. Although we have yet to address whether Jewish people are members of a race, ethnicity, religion, or combination thereof, here the defendant has not asserted that he and either of the victims were of different races or ethnicities. At any rate, even where it is established that a defendant and a victim of a qualifying crime are of different races, "the requirement for individual voir dire arises upon the defendant's request for such inquiry; it is not automatic." See Commonwealth v. Martinez, 476 Mass. 186, 195 (2017), quoting Commonwealth v. DiRusso, 60 Mass. App. Ct. 235, 237 (2003).

Thus, the judge did not err or abuse her discretion in failing to include questions on Judaism, Israel, or the IDF during juror voir dire. See Commonwealth v. Morales, 440 Mass. 536, 549 (2003) ("Unless the defendant shows that there is a substantial risk that the jury would be influenced by extraneous issues, . . . the judge need not ask questions aimed at discovering the existence of those factors" [quotations and citations omitted]).

The defendant's claim of ineffective assistance of counsel for failure to request individual voir dire similarly lacks merit. In determining whether defense counsel was ineffective

in defending a charge of murder in the first degree, we ask whether there was an error and, if so, whether the error was likely to have influenced the jury's conclusion. Commonwealth v. Kolenovic, 478 Mass. 189, 192-193 (2017).

Where a defendant bases a claim of ineffective of counsel on a nonstrategic failure to raise a certain issue, we consider whether the issue had any evidentiary support and, if so, whether its omission had any effect on the outcome of the case. See, e.g., Commonwealth v. Stevens, 379 Mass. 772, 774 (1980) ("Counsel had no obligation, indeed no right, to present a defense of lack of criminal responsibility which could not be supported by evidence"). See also Commonwealth v. Satterfield, 373 Mass. 109, 114-115 (1977) (trial counsel's failure to raise certain issues had no effect on outcome of case and therefore was not ineffective assistance).

We cannot fault trial counsel for failing to identify, or to give credence to, an entirely speculative connection between the September 2001 attacks and Israel and to further associate that connection, or Middle East politics, with the defendant. Even if trial counsel had raised the issue, we are not convinced that he would have been able to demonstrate a substantial risk that the jury would be influenced by such extraneous issues, and denial of the request would have been well within the judge's discretion. See Commonwealth v. Gonzalez, 443 Mass. 799, 811

(2005) (where it was "entirely speculative" whether expert could have given exonerating testimony, not ineffective for counsel to fail to call expert); Commonwealth v. Carroll, 439 Mass. 547, 557 (2003) (failure to pursue futile tactic is not ineffective assistance of counsel).

Finally, the defendant has failed to allege any actual prejudice. As discussed in further detail infra, during jury selection, the judge asked whether any prospective jurors had any bias or prejudice toward either the defendant or the prosecution, and excused any jurors who had heard about and formed opinions about the case.[6] At the conclusion of jury selection, the judge made a finding that the jury were impartial without objection from either party. And just before jury deliberation, the judge gave instructions on determining the facts of the case without the influence of prejudice or bias. Cf. Commonwealth v. Jackson, 384 Mass. 572, 579 (1981) ("We presume, as we must, that a jury understands and follows limiting instructions, . . . and their use usually renders any error in the introduction of prejudicial evidence harmless" [citations omitted]). On appeal, the defendant does not argue that the jury was biased or unfair. This claim therefore fails.

[6] The defendant identifies articles published prior to trial which referred to him as a "former Israeli commando" who was "haunted by his experiences as a sniper in the Israeli military."

b. Peremptory challenge. The defendant also argues that the prosecutor improperly used a peremptory challenge to strike juror no. 3-14 because she was Jewish.[7] He argues that the trial judge's approval of the Commonwealth's peremptory challenge of juror no. 3-14 violated both his State and Federal constitutional rights, especially given the role that his background as an observant Jew and former member of the Israeli special forces played in the Commonwealth's case against him at trial.[8]

To assess this claim of error, we examine in some detail how jury empanelment unfolded. The judge began by directing a series of questions to the entire venire designed to flag issues

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[7] Although the defendant "presume[s]," based on the juror's first and last name, that she was both Israeli and Jewish, there is no evidence of the juror's religious affiliation or national origin.

[8] The defendant's roommate and a coworker testified that the defendant observed the Jewish Sabbath, which required him not to work, including by driving, between sunset on Friday and sunset on Saturday each week. However, the defendant's roommate further testified that the defendant was not home after sunset on the night after the shooting -- a Friday -- and returned some time before he woke up on Saturday morning. The Commonwealth also presented evidence that the defendant took a flight from Boston to Baltimore Washington International Airport on Saturday afternoon, one day after the shooting, where he met with his uncle for one hour before flying back to Boston. The jury also heard testimony and saw the defendant's resume indicating that he had extensive training and experience as an expert sniper with the Israeli naval special forces; in his closing argument, the prosecutor repeatedly argued that this training enabled the defendant to carry out the nighttime shooting.

that potentially could affect the impartiality of the prospective jurors.[9] The judge also asked whether any prospective juror had any other reason, including health issues, language difficulties, or scheduling conflicts caused by jury service that would create an "extreme" hardship.

Prospective jurors from the venire were then called in order to fill the jury box. When those who had responded in the affirmative to one or more of the judge's questions were called, they were asked to come to sidebar for an individual voir dire, and would either be excused or seated after being questioned by the judge. Once the jury box was filled with sixteen jurors, both sides were invited to exercise peremptory challenges beginning with the Commonwealth. As the parties exercised their peremptory challenges, the vacant seats were filled from the venire. After trial counsel exercised his peremptory challenges, the prosecutor then had an additional opportunity to use any remaining challenges on newly seated jurors.

Juror no. 3-14, who had not responded affirmatively to any of the questions asked of the venire as a group, was seated during the first round of empanelment. During the first round

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[9] The questions included whether anyone in the venire knew any of the parties, attorneys, or witnesses; had heard anything about the case; had any opinion or bias with respect to the case; or had any other reason that would prevent them from being fair and impartial.

of peremptory challenges, the prosecutor struck two jurors: one who had indicated that he had a scheduling issue during his individual voir dire but was not excused on that basis, and another who had expressed an anxious reluctance about serving. After those jurors were replaced, the prosecutor indicated that he was content with the jury.[10]

Trial counsel, in turn, exercised five peremptory challenges. As the vacant seats were being filled, the judge excused juror no. 4-13, who indicated that she would have trouble reaching her family in Plymouth by sundown to celebrate Hanukkah during the trial. After the juror was excused, trial counsel stated, "I would put on the record that this case will be steeped in Jewish traditions and relations. I don't think excusing a person of Jewish religious beliefs just based on the holidays is appropriate in this case. Otherwise we are going to sit all non-Jewish people." The judge responded by explaining that she excused the juror not because she was Jewish, but instead because she would be unable to perform jury service for religious reasons. Trial counsel's objection was noted.

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[10] The prosecutor did not strike juror no. 1-10, who indicated that she had to take care of her mother but was not excused on that basis, nor did he strike juror no. 2-10, who indicated that he was a small business owner and that serving would work a hardship on his business.

After the vacant seats were filled, juror no. 3-14, who had not yet been challenged by either side, approached the sidebar to express concern about her work commitments as a medical resident. The judge assured her that her employer was obligated to make an accommodation for jury service, and the juror returned to the jury box.[11]

Once trial counsel exercised four additional peremptory challenges, and thereafter indicated that he was content, the Commonwealth had an opportunity to use its remaining peremptory challenges.

The prosecutor sought to strike a juror who had indicated that jury service would create a work-related hardship but had not been excused on that basis, and requested to strike juror

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[11] The judge and the prospective juror had the following exchange at sidebar:

> The juror: "I'm sorry. Actually I should have said something earlier. I actually want to serve and I'm a medical resident and on Monday I start my shift, my night rotation so I don't know -- I mean, I could -- for two weeks, it would be hard to find coverage to replace me."
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> The judge: "They'd have to. Beth Israel, they have to."
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> The juror: "By law they have to but I think they would give me a hard time."
>
> The judge: "Have them call the clerk and we'll talk to them for you. Okay?"
>
> The juror: "Okay."

no. 3-14. The following exchange took place between the prosecutor and the judge:

> The prosecutor: "I would like to challenge the juror in seat one, 4-14. There's a juror that I was initially content with that raised a question and came up that I would now like to challenge with the [c]ourt's permission. That would be in seat number thirteen, juror 3-14."
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> The judge: "And why would you want to challenge her at this point?"
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> The prosecutor: "Because of her statement that she has difficulty with work, she may be working overnight. She stated that she would be working nights and that she was concerned about that."
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> The judge: "That isn't what I understood. She said it would be difficult to get coverage, not that she would be working."
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> The prosecutor: "My concern, Judge, is that she expressed a problem with being here and that's why, the reason for her request. I'm reluctant to have somebody sit who has expressed that type of problem."
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> The judge: "Alright. You may challenge her then. Do you have any others?"
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> The prosecutor: "That's it."
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> The judge: "Okay."
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> The prosecutor: "Thank you, Your Honor."

Trial counsel did not object to the prosecutor's peremptory challenge of juror no. 3-14.

Thereafter, the prosecution exercised two additional peremptory challenges, bringing his total to six; four of those challenged had raised concerns regarding work commitments. Both

parties then indicated that they were content with the jury composition.

The Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights prohibits a party from exercising peremptory challenges on the basis of a juror's membership in certain discrete groups. See Batson v. Kentucky, 476 U.S. 79, 84-88 (1986); Commonwealth v. Soares, 377 Mass. 461, 486-488, cert. denied, 444 U.S. 881 (1979). Under the Massachusetts Declaration of Rights, peremptory challenges cannot be used on prospective jurors based on their gender, race, color, creed, or national origin or ethnicity. See Soares, supra at 488-489.

There is a three-step procedure used to determine whether a peremptory challenge properly has been made. See Batson, 476 U.S. at 94-95; Soares, 377 Mass. at 489-491. We generally presume that peremptory challenges are made and used properly during jury selection. See Commonwealth v. Lopes, 478 Mass. 593, 598 (2018). However, a defendant may rebut that presumption by demonstrating that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." Commonwealth v. Sanchez, 485 Mass. , (2020), citing Johnson v. California, 545 U.S. 162, 168 (2005). If the judge finds that the presumption has been rebutted, the burden shifts to the prosecutor to articulate a nondiscriminatory or "group-

neutral" reason for the challenge (citation omitted). Commonwealth v. Oberle, 476 Mass. 539, 545 (2017). The reason must be both adequate and genuine. Id. It is for the judge to determine whether the Commonwealth has carried its burden. Id. We review a judge's decision as to whether to allow a peremptory challenge for an abuse of discretion. Commonwealth v. Jones, 477 Mass. 307, 319-320 (2017).

As mentioned, there is no evidence on the record of the religious affiliation or national origin of juror no. 3-14. Assuming without deciding that the juror was Jewish, and that the defendant could have challenged the prosecutor's peremptory challenge on Batson-Soares grounds during jury selection, we note that he failed to do so. However, because the judge asked for a reason for the Commonwealth's peremptory challenge, the first phase of the analysis, i.e., rebutting the presumption that the peremptory challenge was proper, implicitly was satisfied. See Commonwealth v. Curtiss, 424 Mass. 78, 81-82 (1997) ("By requiring . . . counsel to explain his reasons, and by consciously providing the record with an explanation for his actions, the judge implicitly recognized that a prima facie showing of impropriety existed").

The burden then shifted to the prosecutor to provide a group-neutral reason for the strike, which he did: the prosecutor pointed to the juror's concern about her work as a

medical resident. The question before us is whether the judge abused her discretion in accepting the prosecutor's reason as adequate and genuine. See Commonwealth v. Maldonado, 439 Mass. 460, 464-465 (2003). We conclude that she did not.

First, the prosecutor's group-neutral explanation for seeking to strike juror no. 3-14 was adequate, as it was "clear and reasonably specific, personal to the juror and not based on the juror's group affiliation" (citation omitted). Id. at 464. As for whether the explanation was genuine, "an explanation is genuine if it is in fact the reason for the exercise of the challenge." Id. at 465. In reviewing the circumstances surrounding the peremptory challenge, we note that the prosecutor declined to use peremptory challenges on three other similarly situated jurors who sought to be excused due to scheduling issues. However, we also note that the prosecutor did not challenge juror no. 3-14 during the first round of peremptory challenges, and in fact announced that he was content with the jury composition that included her. It was only after the juror raised a work-related hardship, after being seated, that he used a peremptory challenge against her. Further, at that same time he struck juror no. 4-14, who similarly voiced a work-related concern. Given this timing, we cannot conclude that the judge abused her discretion in apparently finding that the neutral reason provided by the prosecutor was genuine as

well as adequate.[12] See Commonwealth v. Rodriguez, 431 Mass. 804, 811 (2000) ("We grant deference to a judge's ruling on whether a permissible ground for the peremptory challenge has been shown and will not disturb it so long as it is supported by the record"). See also L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) (abuse of discretion is "a clear error of judgment in weighing the factors relevant to the decision, . . . such that the decision falls outside the range of reasonable alternatives" [quotations and citation omitted]).

2. Evidentiary issues. a. Prior bad act evidence. The defendant and Yazgur were not strangers to one another at the time of the shooting. They met approximately three and one-half years earlier, in September 1997, when the defendant attacked Yazgur with a knife for blocking a street with a moving van. The assault resulted in injuries to Yazgur's face and right ear. The defendant subsequently was convicted of assault and battery, and received an eighteen-month suspended sentence. Yazgur also sued the defendant and was awarded more than $100,000 in

[12] In support of his argument that the strike of juror no. 3-14 was not related to her work hardship, the defendant cites the fact that juror no. 3-14 was struck after trial counsel noted that the case would be "steeped in Jewish tradition and relations." However, it is also true that the prosecutor challenged juror no. 3-14 at his first opportunity after she raised her potential work hardship.

damages. As mentioned, the day prior to the shooting, the defendant had been served with an execution on the judgment.

It is well settled that although not admissible to show bad character or propensity, evidence of a defendant's prior bad acts is admissible for other purposes, including to demonstrate motive, as long as its probative value is not outweighed by its prejudicial effect. See Commonwealth v. Crayton, 470 Mass. 228, 249 n.27 (2014). See also Mass. G. Evid. § 404(b)(2) (2020).

The Commonwealth presented evidence of the defendant's prior assault on Yazgur, as well as details of the criminal and civil proceedings that followed. The defendant does not deny that his assault on Yazgur was evidence probative of motive. However, he contends that the testimony from the prosecutor who handled the defendant's criminal prosecution and the attorney who represented Yazgur in the civil suit, each of which was offered over the defendant's objection, was excessive and unduly prejudicial. We disagree.

The contested testimony provided context for the defendant's hostility toward Yazgur. The prosecutor in that criminal case described the criminal proceedings, including the fact that Yazgur testified against the defendant during trial, which was probative of the origin for the defendant's anger toward Yazgur. Yazgur's civil attorney provided details of the damages hearing that occurred almost two years later. The

attorney recounted that at the conclusion of the hearing, the defendant "snarled" at Yazgur, "You'll never see a penny," demonstrating the defendant's escalating hostility toward Yazgur. It also demonstrated a pattern of the defendant expressing this sentiment. The defendant's then-roommate testified that, during the early morning hours of the day of the shooting, the defendant referenced the execution on the judgment he had received the day before, grabbed his crotch, and said, "Here's their $118,000, they'll never see a penny, I'll kill them first."[13]

Finally, we note that the judge instructed the jury that the testimony of these witnesses was not admissible to show that the defendant had bad character or a propensity to commit bad acts. See Commonwealth v. Helfant, 398 Mass. 214, 228-229 (1986) (limiting instructions sufficiently diminished prejudicial effect of evidence). See also Commonwealth v. Bryant, 482 Mass. 731, 737 (2019) (jury presumed to follow limiting instructions on prior bad act evidence).

We conclude that the prejudicial effect of the evidence of the prior assault and its aftermath, including the testimony from the attorneys involved in the prior assault on Yazgur, was

[13] The roommate testified that the defendant had made a similar comment in the past, before the defendant began living with the roommate.

outweighed by its probative value; thus, the judge did not abuse her discretion in admitting it. See Commonwealth v. Fordham, 417 Mass. 10, 22 (1994).

b. Firearm testimony. The Commonwealth called the defendant's uncle, Carl Dworman, as a witness to demonstrate that the defendant had access to firearms. The defendant argues that the testimony was improper because it "insinuated by negative inference" that the defendant used firearms owned by Dworman in the shooting. This argument fails.

"Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action." Mass. G. Evid. § 401 (2020). See Commonwealth v. Scesny, 472 Mass. 185, 199 (2015), quoting Commonwealth v. Bresilla, 470 Mass. 422, 436 (2015). To be relevant, evidence need only "provide a link in the chain of proof" (citation omitted). Scesny, supra. A trial judge has "substantial discretion to decide whether evidence is relevant" (citation omitted). Id.

The weapons used in the shooting were never recovered. However, based on an examination of bullets and cartridges recovered from the scene, a detective testified that the shooter used two different types of firearms: a nine millimeter pistol manufactured by Glock, and a revolver that fired either .38 or .357 caliber ammunition. Dworman testified that he possessed

both a nine millimeter Glock, originally purchased by the defendant, and a .38 caliber revolver. According to Dworman, several months before the shooting, he stored the firearms in cardboard boxes at an airplane hangar managed by a friend. Dworman further testified that two months after the shooting, he discovered that these boxes were missing. He did not report the guns as stolen to police until one month later, immediately after he spoke with a detective about the shooting.[14] Although Dworman confirmed that he stored multiple boxes of his possessions at the defendant's apartment at the time of the shooting, he did not testify that he ever stored his firearms there.

Dworman's testimony permitted the reasonable inference that the defendant had access to, and used, Dworman's guns to commit the shooting, thereby providing a link in the Commonwealth's chain of proof. See Scesny, 472 Mass. at 199. See also Commonwealth v. Buttimer, 482 Mass. 754, 761 (2019) ("[i]nferences drawn from circumstantial evidence need only be reasonable and possible; [they] need not be necessary or inescapable" [quotations, citation and alterations omitted]). Because the weapons used in the shooting were never recovered, and no physical or eyewitness evidence directly identified the

[14] Carl Dworman had not recovered his firearms by the time of trial.

defendant as the shooter, Dworman's testimony was particularly probative. See Martinez, 476 Mass. at 192. The judge did not err in admitting this testimony.[15]

Over the defendant's objection, in response to questioning, Dworman confirmed that he had refused to speak to investigators about the shooting until he first consulted a lawyer. He explained that he wanted a lawyer to be present because of the seriousness of the accusations against his nephew and because he did not want anything he said to be misinterpreted or misconstrued. As this testimony was irrelevant, the prosecutor should not have been permitted to elicit it.

We have held that a defendant's decision to consult an attorney before arrest "is not probative in the least of guilt or innocence, and a prosecutor may not 'imply that only guilty people contact their attorneys.'" Commonwealth v. Nolin, 448

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[15] The defendant contends on appeal that he was prejudiced by Dworman's testimony because the prosecutor "portrayed Dworman as a suspicious, unsavory character," in part by "emphasiz[ing] Dworman's gun ownership." Indeed, in his closing argument, the prosecutor described Dworman as "not believable" and "not forthright," urging the jury to conclude that Dworman had lied about not storing his firearms at the defendant's apartment. However, the prosecutor was entitled to impeach Dworman, and did so by reference to contradictory testimony by the manager of the airplane hangar, who testified that Dworman never stored cardboard boxes at the hangar and that nothing had gone missing from the hangar. See G. L. c. 233, § 23. Dworman's testimony about firearms was not unfairly prejudicial, nor did the risk of such prejudice outweigh its probative value. See Commonwealth v. Scesny, 472 Mass. 185, 199 (2015). See also Mass. G. Evid. § 403 (2020).

Mass. 207, 222 (2007), quoting Commonwealth v. Person, 400 Mass. 136, 141 (1987). See Sulie v. Duckworth, 689 F.2d 128, 131 (7th Cir. 1982), cert. denied, 460 U.S. 1043 (1983) ("Where evidence that the defendant asked for a lawyer is used to prove . . . guilt, its probative value is slight . . ."); Martin v. State, 364 Md. 692, 707 (2001) ("we find [the defendant's] consultation with an attorney equivocal at best and unable to support any logical inference of guilt"). This prohibition is derived from the recognition that such arguments violate a defendant's right to due process, because "[t]he right to the advice of counsel would be of little value if the price for its exercise is the risk of an inference of guilt." Nolin, supra at 222, quoting Person, supra. Because a fact witness rather than a defendant was asked at trial about his decision to consult counsel,[16] due process protections are not implicated.[17]

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[16] Dworman did not invoke his privilege against self-incrimination at trial. See Pixley v. Commonwealth, 453 Mass. 827, 832 (2009).

[17] Although our cases are clear that a prosecutor may not comment on a defendant's pretrial request to consult counsel, it appears that we have not held that the United States Constitution or the Massachusetts Constitution proscribes comments on a nonparty witness's request for counsel. See Commonwealth v. Nolin, 448 Mass. 207, 222 (2007). Our conclusion, infra, that the judge should not have admitted questions and testimony about Dworman's decision to consult counsel before speaking with police is based on the evidentiary issue of their relevance. We do not here extend the "due process protection embodied in the prohibition against arguing

However, as a matter of evidentiary relevance, just as a defendant's decision to consult an attorney is not probative of the defendant's guilt, a witness's decision to do so is not probative of what that witness may or may not have done. Thus, here, Dworman's request to consult a lawyer before speaking to police was not probative of whether he provided the defendant with access to guns (inadvertently or otherwise). Cf. United States v. Zaccaria, 240 F.3d 75, 78, 80 (1st Cir. 2001), discussing United States v. Hale, 422 U.S. 171 (1975) (as "evidentiary, not constitutional" matter, defendant not allowed to impeach witness with evidence that witness refused to speak to investigators, because fact of witness's silence "not significantly probative" of witness's innocence). See Hale, supra at 176-177 (1975) ("In most circumstances silence is so ambiguous that it is of little probative force. . . . [I]nnocent and guilty alike -- perhaps particularly the innocent -- may find [interrogation] so intimidating that they may choose to stand mute"). As the fact that Dworman expressed the desire to consult a lawyer prior to speaking with investigators was not probative of any material issue in this case, we conclude that questions eliciting the testimony on that topic should not have been asked.

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guilt from a defendant's decision to consult a lawyer," id., to a nonparty witness's request for counsel.

However, there was no prejudice, "because there is no doubt that it 'did not influence the jury, or had but very slight effect.'" Commonwealth v. Hobbs, 482 Mass. 538, 557 (2019), quoting Commonwealth v. Cruz, 445 Mass. 589, 591 (2005). At most, as pointed out by defense counsel at trial, the testimony risked improperly suggesting to the jury that Dworman wanted to speak to a lawyer because he "had something to hide." However, the defendant effectively mitigated this risk on cross-examination by asking Dworman to explain why he sought legal advice, i.e., he felt intimidated, and he did not want anything he said to be misinterpreted.

Further, although the prosecutor impeached Dworman's credibility by reference to contradictory testimony of other witnesses, he did not mention Dworman's request for counsel in his closing argument. Finally, there was abundant other evidence that the defendant had access to firearms with which to commit the crime, including testimony by the defendant's roommate that the defendant told him that he kept a nine millimeter pistol in the apartment, showed him a container of explosives taken from Dworman's possessions stored at the apartment, and asked the roommate to falsely deny that there were firearms or explosives in the apartment the day after the shooting. We are therefore confident that this testimony had, at most, a very slight effect on the jury. See Hobbs, supra.

c. Charred paper fragments. At trial, the Commonwealth sought to introduce charred paper fragments found in the basement of the three-family dwelling where the defendant lived, and testimony relating to their discovery, as evidence of consciousness of guilt. The judge admitted the evidence over the defendant's objection. The defendant contends that the evidence was admitted erroneously because it was irrelevant, and that it led to unfair speculation regarding his guilt. Although we agree with the defendant that the evidence was not relevant, we conclude that the error was not prejudicial.

One day after the shooting, the owner of the building responded to a report of smoke coming from the basement. On the floor and on top of the furnace he found charred fragments of paper that appeared to contain typescript. A tenant living in one of the two other units of the building testified that he had not been in the basement prior to smelling the smoke that day. The tenant in the other unit testified that, as she attempted to locate the source of the smoke, she knocked on the door to the defendant's apartment for several minutes and received no response. Soon thereafter, however, the defendant went down to the basement to ask the building's owner to move a vehicle that was blocking the driveway. He denied knowing anything about the smoke.

The Commonwealth argues that the jury reasonably could have inferred that the defendant burned the papers to destroy evidence linking him to the shooting. However, the connection between the paper fragments found in the basement and the defendant was at best tenuous. It is true that burned papers also were found in the ashtray of the defendant's car, including one that appeared to be a map printed from a mapping website (discussed infra); however, investigators were unable to determine anything about the origin of the charred paper fragments in the basement. Further, the Commonwealth provided no evidence that the defendant had been in the basement prior to the appearance of the smoke. Although a tenant from one of the other units testified that he did not burn anything in the furnace, the owner testified that the door to the building was sometimes unlocked, and he could not remember if the door had been locked that day. Contrast Commonwealth v. Jackson, 417 Mass. 830, 833 & n.5 (1994) (transmission fluid found in defendant's car matched fluid found on sole remnant of victim's shirt).

Without a basis for the jury reasonably to infer that the defendant burned the papers found in the basement, this evidence was irrelevant to consciousness of guilt. See Commonwealth v. Williams, 456 Mass. 857, 869 (2010) (as jury had no basis to conclude that defendant, rather than someone with access to

defendant's social media account, sent Internet messages discouraging witness from testifying, messages were not relevant to consciousness of guilt).

This error was not prejudicial, however, given the overwhelming evidence of the defendant's culpability, including other properly admitted evidence of the defendant's consciousness of guilt. For example, the jury heard testimony that, approximately one hour after the shooting, while traveling on the Riverway from Jamaica Plain toward downtown Boston, the defendant hit the rear of the car in front of him at a traffic light. The defendant refused to provide his name or his driver's license to the other driver, and offered to pay for the damage in cash. In addition, one day after the shooting, the defendant asked his roommate to lie, saying it was "the most important favor he would ever need to ask" -- that is, to confirm that the defendant had not left their apartment on the night of the shooting, and that he had never seen any guns or explosives in the apartment.

Thus, the effect of the erroneously admitted paper fragments from the basement had only a slight effect, if any, on the jury in light of all the properly admitted evidence, including the powerful other evidence of consciousness of guilt. See Commonwealth v. Sullivan, 478 Mass. 369, 377 (2017).

d. Opinion testimony. At trial, the Commonwealth presented the expert testimony of a criminalist concerning the presence and likely causes of blood patterns in the victims' home. The expert also described charred papers recovered from the ashtray of the defendant's car that she identified as a portion of a map originating from a mapping website. She testified that the fragments contained the town names of Needham and Wellesley, the words "Mapquest.com", and portions of the website's disclaimer. Over the defendant's objection, the witness further testified that when she searched on the mapping website for driving directions between the defendant's home in Malden and the victim's home in Jamaica Plain, the result was a map of the Boston metropolitan area including the names Needham and Wellesley in the same relation to each other on that map as they appeared on the charred map fragment. The witness also recognized certain words from the website's disclaimer on one of the burned fragments. The judge admitted photographs of the map fragments and the fragments themselves, but did not admit the criminalist's Internet search result.

The defendant argues that it was error to admit the testimony regarding the results of the witness's Internet search. He further contends that the judge erred in permitting the witness to provide both expert and lay opinion testimony

without an instruction as to how to evaluate the two types of testimony. There was no error.

As the testimony regarding the charred fragments was based on the witness's personal observations and her Internet search did not require any specialized knowledge, it was lay opinion rather than an expert opinion. Commonwealth v. Canty, 466 Mass. 535, 541 (2013). Because it was helpful for the jury to determine whether the defendant had burned incriminating driving directions, it was admissible. See Mass. G. Evid. § 701 (2020) (lay opinion admissible where it is "[a] rationally based on the witness's perception; [b] helpful to a clear understanding of the witness's testimony or in determining a fact in issue; and [c] not based on scientific, technical, or other specialized knowledge").

As for an instruction explaining the difference between expert and lay opinion testimony, such an instruction likely would have helped the jury differentiate between the two types of testimony provided by the same witness. See Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 579 (1998) (when percipient witness also gives expert testimony, "[i]t is easy for the line between specific observations and expert generalizations to become blurred in these situations"). See also United States v. York, 572 F.3d 415, 425 (7th Cir. 2009) ("the jury might be smitten by an expert's aura of special reliability and therefore

give his factual testimony undue weight" [quotations and citation omitted]). However, defense counsel did not request such an instruction, and the failure to provide one did not result in a substantial likelihood of a miscarriage of justice. See Commonwealth v. Veiovis, 477 Mass. 472, 486-487 (2017). The questioning regarding the mapping website comparison was not extensive; the map produced by the criminalist's search was not admitted in evidence; and the prosecutor did not refer to the criminalist's comparison in closing. Further, defense counsel effectively cross-examined the criminalist on this point, highlighting that the witness did not compare the map fragments to any other driving directions. In light of the prosecutor's minimal use of the challenged testimony and defense counsel's thorough cross-examination of the witness, the lack of a limiting instruction did not create a substantial likelihood of a miscarriage of justice. See id.

3. Closing argument. During the defendant's closing argument, trial counsel posited that the shooter may have been targeting Lenz rather than Yazgur, and argued there was "no evidence the police ever investigated Mr. Lenz to see what he was involved in." In response, the prosecutor reminded the jury

of the evidence that had been presented about Lenz, and refuted the idea that he had given anyone a motive to kill him.[18]

The defendant now contends that the portion of the prosecutor's closing rebutting defense counsel's criticism of deficiencies in the Commonwealth's evidence constituted an improper appeal to the jurors' sympathy causing undue prejudice. The defendant did not object to the prosecutor's statements regarding the decedent at trial. There was no error.

A prosecutor is entitled to respond to an argument made by the defense at closing. Commonwealth v. Smith, 404 Mass. 1, 7 (1989). Here the prosecutor accurately pointed out that the defendant's theory, i.e., that the decedent was "involved in" something that created a motive to kill him, was not supported by the evidence. See Commonwealth v. Silva, 471 Mass. 610, 622-623 (2015). The prosecutor also fairly rebutted the defense's claim that there was a dearth of information about the decedent by reminding them of the evidence presented of the decedent's attributes. See Commonwealth v. Santiago, 425 Mass. 491, 495 (1997), S.C., 427 Mass. 298 (1998) and 428 Mass. 39, cert. denied, 525 U.S. 1003 (1998) (prosecutor "entitled to tell the

[18] The prosecutor said, "You heard about that man. He is a poet. He is a teacher. He is a student. He is a son. He was a boyfriend. He was liked by people that you heard testify here. That is outrageous to suggest, based on no evidence, that Michael Lenz was responsible for someone coming in there and killing him in his sleep."

jury something of the person whose life had been lost in order to humanize the proceedings"). Further, it was not improper for the prosecutor to comment unfavorably on the theory of the defense. See, e.g., Commonwealth v. Felder, 455 Mass. 359, 369 (2009); Commonwealth v. Roberts, 433 Mass. 45, 55–56 (2000); Commonwealth v. Cohen, 412 Mass. 375, 384-385 (1992).

Finally, the judge instructed the jury that closing arguments were not evidence, that the jury were required to decide the case on the evidence, and that they were not to be "influenced by any sympathy or bias or emotional reaction to the evidence nor to the openings or closings."[19] Commonwealth v. Richenburg, 401 Mass. 663, 675 (1988) (overreaching comments during prosecutor's closing statements did not require reversal in light of judge's charge to jury that attorneys' closing arguments were merely theories, not evidence).

4. Review pursuant to G. L. c. 278, § 33E. The defendant contends that, even if no error requires reversal of his convictions, a combination of the aforementioned issues and the

[19] The defendant also takes issue with the fact that the prosecutor alleged that defense counsel "tried to scare" the jury. The reference was in connection with the defense's theory that an unidentified fingerprint found in Yazgur's room belonged to the real killer. The defendant made a timely objection to the comment, but the judge declined to give a curative instruction, commenting that trial counsel did in fact suggest that the killer had not been found. There was no error with respect to that ruling. See Commonwealth v. Charles, 397 Mass. 1, 12-13 (1986).

prejudice that resulted warrants a new trial under G. L. c. 278, § 33E. Pursuant to our duty under that statute, we carefully have reviewed the entire record, and we discern no reason to grant a new trial or reduce the degree of guilt.

Judgments affirmed.