SJC-11952

COMMONWEALTH vs. ADAM LEE HALL.

Berkshire. January 10, 2020. - June 26, 2020.

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

Homicide. Kidnapping. Jurisdiction, Of crime. Grand Jury. Evidence, Grand jury proceedings, Photograph, Relevancy and materiality, Inflammatory evidence, Prior misconduct. Practice, Criminal, Capital case, Request for jury instructions, Grand jury proceedings, Trial of indictments together, Severance, Conduct of prosecutor.

Indictments found and returned on October 6, 2011, and August 7, 2012.

A motion to sever the indictments was heard by C. Jeffrey Kinder, J., and the cases were tried before him.

James W. Rosseel for the defendant.
David F. Capeless, Special Assistant District Attorney, for the Commonwealth.

KAFKER, J. In February 2014, the defendant was found guilty by a jury of three counts of murder in the first degree for the brutal killings of David Glasser, Edward Frampton, and

Robert Chadwell.[1] The Commonwealth's theory of the case was that the defendant committed the murders with two coventurers, David Chalue and Caius Veiovis, to prevent Glasser from testifying against the defendant in two pending criminal cases. They also kidnapped Frampton, Glasser's roommate, and Chadwell, who was visiting Glasser and Frampton's apartment at the time. After the three victims were killed, the defendant, Chalue, and Veiovis dismembered the victims' bodies and placed the body parts in plastic bags, which the defendant arranged to be buried. The defendant, Chalue, and Veiovis were tried separately, and all were convicted. We affirmed Veiovis's convictions of murder in the first degree, kidnapping, and witness intimidation. See Commonwealth v. Veiovis, 477 Mass. 472, 490 (2017).[2]

The defendant presents multiple claims on appeal: (1) that there was insufficient evidence that the murders took place in Massachusetts; (2) that the judge erred in denying the defendant's request for a special verdict question regarding territorial jurisdiction; (3) that the indictments against the defendant should have been dismissed due to the prosecutor's

[1] The defendant was also convicted of armed robbery, assault and battery by means of a dangerous weapon, four counts of witness intimidation, four counts of kidnapping, possession of a firearm during the commission of a felony, and conspiracy.

[2] Chalue's appeal has not yet been heard by this court.

failure to present exculpatory evidence to the grand jury, the presentation of allegedly false testimony to the grand jury regarding the accuracy of cell site location information (CSLI), or the presentation of arguably impermissible character evidence; (4) that the defendant's conviction of kidnapping based on a 2010 incident (2010 kidnapping) be vacated because the theory of kidnapping was invalid or at least foreclosed by the ruling of a Superior Court judge (motion judge) on a pretrial motion to dismiss; (5) that photographic evidence of codefendant Veiovis's weapons was erroneously admitted against the defendant; (6) that anatomical drawings of dismembered human bodies found in Veiovis's apartment were erroneously admitted against the defendant; (7) that evidence of assorted uncharged attempts to frame Glasser for various crimes was erroneously admitted; (8) that the joinder of lesser indictments with the murder charges prejudiced the defendant and instead required severance; and (9) that alleged prosecutorial misconduct resulted in a substantial likelihood of a miscarriage of justice requiring a reversal of the defendant's convictions or a new trial. We vacate the defendant's conviction for the 2010 kidnapping, as the kidnapping theory presented at trial had already been dismissed by the motion judge, but affirm all other convictions and conclude that the defendant is not entitled to relief under G. L. c. 278, § 33E.

1. Background. Because the defendant challenges the sufficiency of the evidence at trial with regard to territorial jurisdiction, we recite the facts the jury could have found, viewing the evidence in the light most favorable to the Commonwealth. See Commonwealth v. Combs, 480 Mass. 55, 57 (2018). In July 2009, the defendant beat Glasser with a baseball bat in Peru, Massachusetts, because he believed Glasser had stolen and sold motor vehicle parts that belonged to the defendant. The defendant then forced Glasser to sign over the title to his pickup truck, and the defendant subsequently sold the truck. The police later recovered it, and the defendant was criminally charged for beating Glasser and taking the truck. The trial was scheduled for September 2010.

Glasser was expected to testify against the defendant as a witness at the September 2010 trial. In August 2010, the defendant sought to discredit Glasser as a witness by framing him for a false kidnapping charge. The defendant schemed to frame Glasser for the kidnapping and armed robbery of Nicole Brooks, the defendant's girlfriend. The defendant arranged for Brooks to falsely accuse Glasser of kidnapping her and shooting at her. To provide support for this story, the defendant drove with Brooks to a location in rural upstate New York and shot a gun two or three times into a tree to fabricate proof of the framed attack. The gun the defendant used to shoot the tree was

supposed to be planted in Glasser's vehicle by Scott Langdon, another acquaintance of the defendant, so the police could later trace the bullet holes in the tree to the planted gun. The defendant asked Langdon to offer one hundred dollars to Glasser in exchange for a ride to New York, which Langdon did. During that drive, Langdon planted the gun -- as well as Brooks's wallet -- in Glasser's truck. When the defendant had planned this scheme, he told Brooks that, if the plan did not work, he would have to make Glasser disappear.

Brooks gave a statement to New York police, claiming Glasser had robbed her and shot at her. She provided a description of Glasser and the license plate number of his truck. She later identified Glasser in a photographic array. Glasser was never arrested by New York authorities, but was instead arrested by police in Pittsfield. Glasser was in custody for about one week.

The accomplices to the scheme to frame Glasser eventually confessed to the police that they had been a part of the setup, and those confessions were corroborated by other evidence. Specifically, surveillance footage from a grocery store and a gasoline station raised suspicions about the truth of the accomplices' original reports to police and the legitimacy of Glasser's arrest. The defendant was charged with kidnapping under two theories: (1) under a theory of inveiglement when the

defendant framed Glasser for a crime that led to his arrest and detention, and (2) under a theory that defendant enticed Glasser to drive to New York under false pretenses. The first theory of inveiglement was dismissed by the motion judge on August 3, 2011, who reasoned that "[n]o case law suggests that an arrest by police officers, acting in good faith but upon false information, can constitute kidnapping by inveiglement by the person who furnished the false information. Otherwise, by extension, any case of detention based on a false police report could also constitute kidnapping." The false pretenses theory, however, was determined to be valid, and for that reason the kidnapping charge was not dismissed in its entirety.

After his plan to frame Glasser failed, the defendant tried to bribe Glasser not to testify against him for the pending charges for beating Glasser with the baseball bat and the kidnapping. On August 26, 2011, Glasser expressed to a friend that he was worried about testifying in an upcoming trial, and stated that he was going to "hide out for a couple days" and "stay in the house." Glasser and his roommate, Frampton, lived in a first-floor apartment in Pittsfield and were both clients of mental health and social services agencies. Both received Federal disability assistance.

On Friday, August 26, 2011, the defendant picked up a friend, Katelyn Carmin, in a tan Buick.[3] With the defendant in the car at the time were Chalue and Veiovis. While driving, the defendant spoke about Glasser, saying "I ought to kill that motherfucker for ruining my life." Chalue and Veiovis responded to the defendant, saying: "Don't worry about it. We will get him." The defendant ultimately drove Carmin, Chalue, and Veiovis to the Hells Angels clubhouse in Lee that evening.[4] At the clubhouse, Carmin drove an all-terrain vehicle around the property with Chalue and Veiovis. The defendant told Carmin to be careful, because he needed Chalue and Veiovis to do a job for him and did not want them to get hurt.

The next day, Saturday, August 27, the defendant, Chalue, and Veiovis went to a Hells Angels party in Springfield. That evening, the three men went to the clubhouse, where they met up with two women, Allyson Scace and Kayla Sewell, and then proceeded to Veiovis's apartment in Pittsfield. The defendant drove separately to the apartment in his Buick. Before he went to Veiovis's apartment, he went to Steven Hinman's home in Lenox. At Hinman's home, the defendant showed Hinman several firearms he had, including a .45 caliber semiautomatic pistol in

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[3] At other times during the trial, the same Buick was described as gold or brown.

[4] The defendant was a sergeant at arms in a local chapter of the Hells Angels motorcycle club.

his vest and a "dog food bag" with a .44 caliber magnum revolver and a sawed-off M-16-type weapon. When he arrived at Veiovis's apartment, the defendant pulled the firearms out of the dog food bag and asked Veiovis where he kept his cleaner and gloves. Veiovis directed the defendant to a cabinet, and then the defendant and Chalue proceeded to disassemble and clean out the firearms.

That same night, on Saturday, August 27, Chadwell -- Glasser's neighbor from down the street -- visited Glasser and Frampton and stayed into the evening. The upstairs neighbor asked Glasser to move his truck sometime after 10 P.M., which is when the victims were last seen. The three men were last heard from around 11:20 P.M. that night. Shortly after midnight, the upstairs neighbor heard banging downstairs on Glasser's front door. The defendant later told a friend, Karen Sutton, that one of the victims was fixing a computer and another was playing a video game when the defendant arrived at Glasser's apartment with Chalue and Veiovis. He said the man fixing the computer "picked a bad night to work on the computer," and was "collateral damage."

Early Sunday morning at 1:30 A.M., the defendant was driven to the Sutton family residence in Pittsfield, where he met with Dawson. The defendant asked to use Dawson's cell phone, and then left with it. He later returned the cell phone to Dawson,

and instructed her to delete the calls placed on it and not to tell anyone that he had ever taken it.

During Saturday night and into Sunday morning, Tropical Storm Irene had reached western Massachusetts and brought heavy rain. At 5:30 A.M. Sunday morning, the defendant bought three candy bars, Black and Mild cigars, and Marlboro cigarettes with wet cash at a convenience store in Pittsfield. The store clerk noticed that the defendant's boots and jeans were wet, and that he had mud on his shirt. The defendant departed from the store in his Buick. The defendant did not smoke, but Veiovis smoked Black and Mild cigars, and Chalue smoked Marlboro cigarettes.

Shortly after, the defendant returned to the Sutton residence, where he parked his Buick. Veiovis followed behind him in a Jeep. The defendant got into the Jeep, and left in that vehicle with Veiovis.

At approximately 9:30 A.M., the defendant returned to the Sutton residence in Veiovis's Jeep with Veiovis and Chalue. The defendant asked Dawson and her friend, Alexandra Ely, who was staying there and also dating the defendant, to go buy breakfast food and bleach, and gave them wet cash to do so. Dawson described the cash as "wet" and "nasty" when the defendant handed it to her. The defendant instructed the women not to touch a bag in the Buick, and to wash their hands after handling the money he gave them. The women drove off in the Buick to get

the food, and subsequently they met the defendant, Chalue, and Veiovis at the defendant's house in Peru to eat breakfast.[5] Later, the women returned in the Buick to the Sutton residence. The defendant, Chalue, and Veiovis followed behind them, came to the Sutton residence in Veiovis's Jeep, and then took the Buick with them.

At approximately 2 P.M. that day, the defendant went to the home of David Casey in Canaan, New York. The defendant asked Casey if he knew of a place where he could park a car he was having trouble with near Becket. Casey made a call and found a place for the defendant to park the car. The defendant then told Casey that he had killed Glasser and two others. The defendant described the other two men as a "fat guy" and a black man. The defendant told Casey that, when he went to kill Glasser, his gun misfired, and he had to rechamber another round of ammunition. While he was doing so, Glasser took off running into the woods; someone else ran after Glasser, shot him, but did not kill him, and returned him to the defendant. The defendant told Casey that Glasser begged not to be killed, saying he would not testify against the defendant. The defendant told Glasser he had warned Glasser about what would happen if Glasser testified against him. The defendant told

[5] The women did not purchase the bleach, as the defendant later changed his mind.

Casey that, after he shot Glasser, he stabbed the black man, and that, after all three men were dead, they "chopped them all up, cut their heads off, arms off, legs off, gutted them."[6] The defendant told Casey that it was raining at the time, and he enjoyed working in the rain.

The defendant asked Casey if he could use Casey's excavator to dig a hole and bury the victims. The defendant told Casey that, if Casey helped him, no harm would come to Casey, his girlfriend, his sister, or Langdon.[7]

That evening, the defendant brought his Buick -- containing the dismembered remains of the victims -- to Casey's acquaintance's property in Becket. The defendant told the property owner he was having mechanical problems and would remove the car by the next day. The defendant then returned to the Hells Angels clubhouse in Lee, where he spent the evening with Chalue and Veiovis.

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[6] Based on Casey's testimony, the defendant mentioned neither Chalue nor Veiovis by name, but did state that one of the men he was with enjoyed torturing and cutting up the victims.

[7] Langdon was Casey's sister's live-in boyfriend and also a participant in the scheme to frame Glasser for armed robbery in 2010. At the time of the killings, Langdon was cooperating with the police regarding the pending charges against the defendant. It is unclear from the record if the defendant was aware of Langdon's cooperation with police.

On Monday morning, the defendant and Chalue returned to Becket to retrieve the Buick. Casey met them there. The defendant introduced Chalue to Casey, saying Chalue was "a member of the Aryan Brotherhood and in order to get in you have to murder someone." The defendant opened the trunk of the Buick and commented that "they're starting to smell." The defendant later drove the Buick to the property where Casey kept the excavator, while Chalue stayed at Casey's acquaintance's property. Casey used the excavator to dig a large hole, and the defendant opened the trunk and dropped a number of plastic garbage bags -- containing the remains of the victims -- into the hole.

On Monday afternoon, the defendant and Chalue brought the Buick to a salvage yard in Massachusetts and sold it for scrap. The interior carpets were wet, the back seat was mostly missing, the carpet had been removed from the trunk, and much of the car was stripped down to bare metal. That same afternoon, the defendant told two friends that Glasser and two of his friends were missing and "probably dead."

On Monday evening, the defendant and Chalue were at the Hells Angels clubhouse. Both were drinking and joking. At one point, the defendant pretended to run away from Chalue, yelling "Help me, help me!," while Chalue pretended to point a gun at the defendant. The defendant laughed and said: "You should

have seen the look on his face," and "you should have seen him run and try to get away." The defendant and Chalue also talked about "butch" or "butcher" when they were joking. The defendant referred to Veiovis as "butch," and said he was "crazy," "a sadistic psycho," and "sick."

On Sunday and Monday, there was no response to Glasser's door or telephone, but Glasser's truck remained in the driveway. On Monday, Glasser did not appear to bring a friend to work as planned, and Frampton missed a doctor's appointment. A missing person's report was filed on Glasser, Frampton, and Chadwell on Wednesday, August 31. The police entered the apartment that day and found all three victims' cell phones and Frampton's wallet. The television was on, and a calendar was marked off daily through Saturday, August 27.

On Sunday, September 4, 2011, the defendant, Chalue, and Veiovis went back to the salvage yard where they left the Buick, arguably to see whether the Buick had been crushed. On Friday, September 9, and Saturday, September 10, 2011, the police dug up the plastic bags containing the victims' body parts after speaking with Casey and learning of their burial . The victims had been shot and stabbed, and their neck, arms, and legs had been dismembered. Two of the bodies had been cut through the torso. Most of the dismemberment took place with chopping or hacking with a sharp instrument, such as a butcher knife.

Later, the police searched Veiovis's apartment and found a machete, a cleaver, hatchets, and knives -- all weapons similar to those used to dismember the victims or to inflict the victims' wounds. They also found two spiked baseball bats and a collage of anatomical illustrations that depicted dismemberment similar to that inflicted on the victims.

Three sets of indictments were returned by three different sittings of a Berkshire County grand jury on August 21, 2009, November 19, 2010, and October 6, 2011.[8] The defendant moved to dismiss the indictments, arguing that the prosecution impaired the integrity of the grand jury proceedings. The motion was denied. On November 18, 2013, the defendant filed a motion to sever the indictments, which also was denied. The defendant was tried from January 6 through February 7, 2014. After he was convicted, the defendant commenced this appeal.

2. Discussion. a. Sufficiency of evidence of territorial jurisdiction. "It is elementary that it must be shown that jurisdiction lodged in the courts of Massachusetts before the defendant can be found guilty of the offence charged." Combs, 480 Mass. at 60, quoting Commonwealth v. Fleming, 360 Mass. 404, 406 (1971). It is our practice in Massachusetts that, when there is a genuine factual dispute about whether a crime was

[8] New indictments were returned for the same crimes when the grand jury reconvened in 2012.

committed in Massachusetts, "that issue is to be submitted to the jury in the form of an instruction." Combs, supra at 61. "Where territorial jurisdiction is a triable issue, the Commonwealth's burden of proof is the same as it is for the substantive elements of the crime(s) charged, that being proof beyond a reasonable doubt." Id. However, no jurisdictional instruction is required where the evidence makes it neither reasonable nor possible to assume that the victim was not killed or injured in Massachusetts. See id., citing Commonwealth v. Jaynes, 55 Mass. App. Ct. 301, 308-310 (2002).

General Laws c. 277, § 62, establishes the jurisdiction of the Commonwealth to try a defendant for murder:

> "If a mortal wound is given, or if other violence or injury is inflicted, or if poison is administered, in any county of the commonwealth, by means whereof death ensues without the commonwealth, the homicide may be prosecuted and punished in the county where the act was committed."

We have interpreted the words "by means whereof death ensues" not to simply mean "follows" in a chronological sense. Commonwealth v. Lent, 420 Mass. 764, 768 (1995). Instead, it requires "a connection between the Massachusetts violence or injury and a victim's out-of-State death," such that the death "would not have occurred but for the violence or injury that was inflicted in Massachusetts." Id.

We held in Commonwealth v. Travis, 408 Mass. 1, 7-9 (1990), that the evidence presented to the jury of a kidnapping that

took place in Massachusetts was enough to allow the jury to reasonably conclude that the defendant inflicted "violence or injury" on the victim in the Commonwealth, even though her body was found in Rhode Island. In that case, there was no evidence of an injury inflicted in Massachusetts that was a mortal wound or that was the proximate cause of the victim's death. Id. The only eyewitness of the kidnapping in Massachusetts testified that the defendant walked the victim to his car, and put his hand on her back. Id. at 4. The victim jumped back before entering the vehicle. Id. Despite the lack of any violent injury inflicted in Massachusetts, jurisdiction was satisfied. See id. at 8-9. See also Jaynes, 55 Mass. App. Ct. at 308-310 (no jurisdictional instruction required where victim was kidnapped in Massachusetts and his body was disposed of in Maine, as kidnapping "include[s] the requisite violence to the victim to confer jurisdiction on the Commonwealth under G. L. c. 277, § 62").

Similarly, we held in Lent, 420 Mass. at 769-770, that, pursuant to G. L. c. 277, § 62, there was jurisdiction over the defendant, who kidnapped the victim in Massachusetts, tried to rape him in Massachusetts, and then ultimately drove him to New York, where the defendant strangled him to death. We held that this level of violence was sufficient to provide jurisdiction. Lent, supra at 769. "A jury could find beyond a reasonable

doubt on the evidence that, if [the defendant] had not committed the violence and had not inflicted injuries in Massachusetts, the death would not have occurred." Id. at 770.

We reached a different conclusion in Combs, 480 Mass. at 65-66. In that case, the victim drove with the defendant's coventurer[9] from Hartford, Connecticut, to the defendant's apartment in Springfield. Id. at 57. When the vehicle arrived at the apartment, a neighbor only saw the coventurer in it; the neighbor did not see the victim. Id. at 58. After spending approximately thirty minutes in the Springfield apartment, the coventurer and the defendant began driving back toward Hartford. Id. It was not clear from the evidence whether the victim was alive at this time. Id. There was no evidence presented in the case to establish Massachusetts as the location of the killing: there was no forensic evidence obtained from the Springfield apartment, and no other witness besides the neighbor testified as to what happened at the Springfield apartment. Id. at 66. Because the jury were "left to guess whether the victim was killed in Springfield, as opposed to in Connecticut," there was not sufficient evidence to support jurisdiction under G. L. c. 277, § 62. Id.

[9] The coventurer's case was tried separately, and no territorial jurisdiction argument was made in that case. See Commonwealth v. Combs, 480 Mass. 55, 66 n.21 (2018); Commonwealth v. Williams, 475 Mass. 705 (2016).

We conclude that any rational trier of fact could have found beyond a reasonable doubt that the defendant at least inflicted violence or injury on the victims in Massachusetts, "by means whereof [their] death[s] ensue[d]." G. L. c. 277, § 62. See Combs, 480 Mass. at 62-63. Evidence presented shows that the three victims were at Glasser's apartment in Pittsfield when the defendant, Chalue, and Veiovis kidnapped them. But for the kidnappings of the three men at the Pittsfield apartment, their deaths would not have occurred. See Lent, 420 Mass. at 770; Travis, 408 Mass. at 8-9. Further, the bodies were found in Massachusetts, and the Buick was brought to a salvage yard in Massachusetts. Almost all of the relevant events before 1:30 A.M. and after 5:30 A.M. took place in Massachusetts. In fact, the record before us only places the defendant in New York on Sunday at 2 P.M., hours after the kidnappings and murders took place. Even while the defendant was in New York, the Buick with the dismembered bodies was located in or near Becket. Jurisdiction under G. L. c. 277, § 62, is satisfied.

b. Defendant's request for a special verdict question. At trial, over defense counsel's objection, the judge did not pose a special jury question as to whether there was territorial jurisdiction over the defendant's charged crimes. "Submission of special questions . . . . is rarely resorted to in criminal trials, and in any case is discretionary with the judge"

(citation omitted). Commonwealth v. Dane Entertainment Servs., Inc. (No. 1), 389 Mass. 902, 916 (1983). "'Special questions' involve a general verdict from the jury coupled with an answer or answers to written interrogatories on one or more issues of fact, the decision of which is essential to the verdict." Commonwealth v. Licciardi, 387 Mass. 670, 675 (1982).

The considerations underlying the need for the submission of a special question are not relevant here. "[N]one of the relevant facts as developed during the trial [gives] rise to a 'reasonable and possible' inference [that the relevant conduct took place] outside the confines of Massachusetts." Jaynes, 55 Mass. App. Ct. at 309. No special question was required.

Further, the judge properly instructed the jury on the issue of jurisdiction when, upon the defendant's request, he said that the Commonwealth must prove beyond a reasonable doubt that all of the charged offenses occurred in Berkshire County. The defendant is "not entitled to any particular instruction as long as the charge, as a whole, was adequate" (citation omitted). Dane Entertainment Servs., Inc., 389 Mass. at 916. Such was the case here. We discern no error.

c. Alleged defects in grand jury proceedings. "[G]enerally a court will not inquire into the competency or sufficiency of the evidence before the grand jury" (quotation and citation omitted). Commonwealth v. McCarthy, 385 Mass. 160,

161-162 (1982). Extraordinary circumstances may warrant a judicial inquiry into grand jury proceedings either "when it is unclear that sufficient evidence was presented to the grand jury to support a finding of probable cause to believe that the defendant committed the offense charged in the indictment" or "when the defendant contends that the integrity of the grand jury proceedings somehow has been impaired." Commonwealth v. Freeman, 407 Mass. 279, 282 (1990). The defendant argues that the integrity of the grand jury proceedings were impaired and the indictments against him should be dismissed because the prosecutor (1) failed to present exculpatory evidence to the grand jury; (2) presented allegedly false testimony to the grand jury regarding the accuracy of CSLI; and (3) presented arguably impermissible character evidence. We address each argument in turn.

i. Exculpatory evidence. The defendant argues that statements by Casey's sister, Teresa Casey-Cunagin, were not presented to the grand jury, and that such testimony would have been exculpatory evidence that calls into question the integrity of the grand jury proceedings. The defendant states Casey-Cunagin told police that three drug dealers were staying in an apartment across the street from Glasser's apartment, and that one of those drug dealers, "Joey," also referred to as "Whitey," had an altercation with Frampton. The defendant claims that

Casey-Cunagin told police she lent Whitey her car on August 27, 2011, and he returned it on August 30, 2011, with blood in it.

The defendant also claims that the prosecution failed to tell the grand jury that Casey gave conflicting statements to the police on September 9, 10, 16, and 18, 2011.[10] More specifically, the defendant claims that the prosecutor failed to present to the jury that Casey, a major witness in the grand jury proceedings, was implicated in the charged crime to a greater degree than he initially admitted to the police.

"A prosecutor is not required to present all possibly exculpatory evidence to a grand jury. But a prosecutor cannot be permitted to subvert the integrity of grand jury proceedings by 'selling' the grand jury 'shoddy merchandise' without appropriate disclaimers." Commonwealth v. Connor, 392 Mass. 838, 854 (1984). Where the prosecutor knows of evidence that "would greatly undermine the credibility of an important witness, the prosecutor must at least alert the grand jury to the existence of that evidence." Id.

Here, the integrity of the indictments was not impaired. First, the Commonwealth elicited testimony about the theory that

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[10] Casey at first only said he allowed the defendant to park his car near the excavator, and then subsequently noticed the excavator had been moved; he later told police he dug the hole, but did no more than that; then, he told police he assisted in placing the victims' remains in the hole that he dug, in addition to filling in the hole with rocks.

Whitey murdered the victims during the grand jury proceedings. Second, the Commonwealth learned early on that the story about Whitey was a red herring concocted by the defendant: the defendant told Dawson to tell police that Whitey was the last person seen with Glasser. Testimony regarding Whitey was therefore not exculpatory, and the prosecution's failure to further develop it did not amount to an impairment of the proceedings, particularly because there was more than enough evidence to indict the defendant, i.e., that the defendant schemed to discredit Glasser as a witness in the pending case against the defendant, and that the defendant said he would have to have Glasser "disappear" if those plans did not work. The grand jury also heard testimony that the defendant told Casey he killed three victims, and that Casey helped the defendant dig a hole to dump the bodies where the dismembered bodies of the three victims were ultimately found by the police. There was also evidence that the defendant, Chalue, and Veiovis were driving the defendant's Buick on the night of the murders, and that the Buick was used to transport the victims' remains. Dawson testified at the grand jury that, after the murders, the defendant was drinking and joking at the Hells Angels clubhouse with Chalue, seemingly imitating one or more of his victims when he yelled, "Help me, help me!" There was also testimony by Dawson before the grand jury that the defendant knew the three

victims were missing before the police were even seen investigating at Glasser's house. In light of this evidence, there was no impairment of the integrity of the grand jury proceedings.

Further, the prosecutor was forthcoming about Casey's incomplete statements to police. During the prosecutor's questioning, Casey agreed that he at first only told the police that the excavator had been moved and that the defendant had come to him about parking the car overnight. Casey also admitted to speaking to the police multiple times, and about coming forward with more of the story as time went on. The defendant's argument that the prosecutor withheld exculpatory evidence and tarnished the integrity of the grand jury proceedings is therefore without merit.

ii. Testimony on accuracy of CSLI data. The defendant contends the Commonwealth knowingly introduced false CSLI evidence to the grand jury. The defendant argues that Officer John T. Briggs of the Lee police department testified that CSLI evidence pinpointed the defendant's location during the late morning and into the early afternoon of August 29, 2011, at the top of the driveway of the property where the victims' remains were buried. In his grand jury testimony, Briggs reasoned that the defendant's cell phone was transmitting signals with two sectors of a certain cell tower; that his location would have to

have been where those two sectors met; and that the location of the top of the driveway was in the center of those two sectors. During the subsequent trial, testimony by Federal Bureau of Investigation (FBI) Special Agent Eric Perry clarified that, when engaging in call detail analysis, officers "cannot point the location of the phone." However, Perry testified CSLI does allow officers to narrow a particular geographic area when a cell phone is utilizing an overlapping sector.

The defendant claims that Briggs's grand jury testimony was inconsistent with Perry's trial testimony because, according to the defendant, Briggs testified to the defendant's precise location when he said the location was "right at the top of the driveway." The defendant claims that, given the contradiction in testimony, the prosecution knowingly presented false evidence to the grand jury about CSLI, as it knew, based on Perry's testimony, that CSLI could not give the exact location of the cell phone.

The defendant's argument is overstated. Although Briggs's grand jury testimony suggested that the CSLI was more precise than it actually was, it correctly placed the defendant in the vicinity of where the bodies were buried, as did Perry at trial. Even if Briggs had specifically clarified what could be learned of the defendant's location based on the CSLI, there is no likelihood that the grand jury would not have indicted the

defendant given the evidence against him supporting the indictments, as discussed supra. See Commonwealth v. Mayfield, 398 Mass. 615, 620 (1986). See also Commonwealth v. Collado, 426 Mass. 675, 680 (1998) ("In a claim that false testimony was presented to a grand jury, the defendant bears the heavy burden of proving that (1) the evidence was given to the grand jury knowingly or with reckless disregard for the truth and for the purpose of obtaining an indictment, and (2) that the evidence probably influenced the grand jury's determination to indict the defendant" [quotation and citation omitted]). This argument is therefore without merit.

iii. Character evidence. The defendant contends that, during the grand jury proceedings, the prosecution presented propensity evidence that improperly influenced the grand jury's decision to indict. We agree that some of the prior bad act testimony was erroneously admitted, but conclude that this evidence would not have influenced the grand jury's decision to indict, given the ample other evidence supporting the indictments, and thus the admission of the testimony did not invalidate the indictments returned against the defendant. See Freeman, 407 Mass. at 283.

The prosecution introduced a 2007 indictment for when the defendant beat a victim with an axe handle, as well as an uncharged allegation that the defendant had requested that a

woman falsely accuse the victim of rape in order to discredit him. Although prior bad acts, their interrelationship closely resembled the defendant's scheme to frame Glasser, and as a result were relevant to show the modus operandi of the defendant to beat someone and then later frame him for a crime in order to discredit his testimony. Because this evidence was relevant for purposes other than propensity, it was not error that it came before the grand jury.

The prosecutor also presented a letter from the defendant that said: "The weekend all this happened, me, [Chalue,] and [Veiovis] were supposed to do a crime in Springfield. . . . [W]e put it off because of the storm. We stayed at [Veiovis's] place and got wasted instead." The defendant objects to this evidence, as the reference to the three men's plans to commit a crime in Springfield was evidence of a prior bad act. However, we conclude that the evidence also put the defendant in the company of both Chalue and Veiovis at the time the murders took place, and was therefore relevant for purposes other than propensity evidence.

Similarly, contrary to the defendant's arguments, the prior bad act testimony about the defendant's arrest for beating Glasser or his attempts to frame Glasser for other crimes was not just propensity evidence, as it was relevant to the

defendant's intent and motive to commit the charged crimes of witness intimidation, kidnapping, and murder.

The prosecutor did, however, present propensity evidence when he read a police statement to the grand jury averring that, when the defendant was seventeen, "he and his brother Richie held a guy for a couple days, and they tortured him before letting him go. [The defendant] spent a few years in jail for the incident." The prosecutor also read another police statement to the grand jury stating that the defendant ran a prostitution ring, paid prostitutes in drugs, and sold cocaine. The two statements read by the prosecutor had no relevance aside from the purpose of establishing that the defendant had a propensity for violence and criminal activity.

Nevertheless, we cannot conclude that reading the police statements to the grand jury impaired the indictment process. "[H]ad there been less evidence incriminating [the defendant]," the presentation of this evidence "could have led the grand jury to indict [the defendant] improperly on the basis of his propensity to commit crime, rather than on the crime charged." Commonwealth v. Vinnie, 428 Mass. 161, 175, cert. denied, 525 U.S. 1007 (1998). However, testimony that is improper must, when "viewed in the context of all the evidence presented to the grand jury," make a difference in the jury's decision to indict the defendant in order to be considered an impairment of the

integrity of the grand jury proceedings. Id. at 174-175. In this case, as discussed supra, the cumulative evidence presented against the defendant during the grand jury proceedings was powerful. See id. at 175. In light of this evidence, there was no impairment of the integrity of the grand jury proceedings.

d. Dismissal of conviction for the 2010 kidnapping. The defendant next contends that his kidnapping conviction based on conduct in 2010 must be reversed, as the theory on which the prosecution proceeded at trial had previously been dismissed by the court. We agree and dismiss the conviction for the 2010 kidnapping.

The conduct providing the basis of the relevant kidnapping charge took place in 2010 when the defendant tried to frame Glasser for the kidnapping and armed robbery of Brooks. As described supra, the defendant was charged with kidnapping under two theories: (1) under a theory of inveiglement when the defendant framed Glasser for a crime that led to his arrest and detention, and (2) under a theory that the defendant enticed Glasser to drive to New York under false pretenses. The motion judge dismissed the first theory on August 3, 2011. The only theory remaining was the false pretenses theory.

However, the prosecution did not proceed on the false pretenses theory, but instead proceeded on the dismissed inveiglement theory. The trial judge stated while instructing

the jury that "[t]he defendant is charged with kidnapping David Glasser by causing him to be arrested and confined in Massachusetts on or about August 14, 2010." This statement, however, only reflects the inveiglement theory of kidnapping that had been dismissed by the motion judge, and made no reference to the false pretenses theory, which was not pursued at trial. Therefore, we conclude that the defendant's 2010 kidnapping conviction must be reversed.

e. Evidentiary issues. i. Photographs of weapons. The defendant argues that photographs found in Veiovis's apartment of a machete, cleaver, hatchets, knives, and two spiked baseball bats were inadmissible against him as they were more prejudicial than probative, and were only relevant as evidence of his bad character or propensity to commit the crimes charged. However, evidence of weapons that "could have been used in the course of a crime [are] admissible, in the judge's discretion, even without direct proof that the particular weapon[s] [were] in fact used in the commission of the crime." Veiovis, 477 Mass. at 485, quoting Commonwealth v. Barbosa, 463 Mass. 116, 122 (2012). That is because "[s]uch evidence is relevant for demonstrating that the defendant had the means of committing the crime" (quotation omitted). Veiovis, supra, quoting Barbosa, supra. The determination whether the risk of prejudice outweighs the probative value of the evidence is therefore a

decision at the discretion of the trial judge, and we reverse only if the trial judge made "a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted), L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014), and if that error resulted in a substantial likelihood of a miscarriage of justice, Veiovis, supra at 486.

In Veiovis, 477 Mass. at 485-486, we held that photographs of the machete, cleaver, hatchets, and knives found in Veiovis's apartment were admissible to show that Veiovis had the means to dismember the victims' bodies. The same is true here: there was evidence presented at trial that the injuries inflicted on the victims were consistent with those caused by the weapons introduced in evidence. Because the defendant successfully enlisted Veiovis to assist him in the venture and Veiovis possessed tools consistent with the dismemberment and injuries inflicted, evidence of the weapons found in Veiovis's apartment was properly admitted to show that the defendant similarly had the means of dismembering the victims' bodies. That the tools were found in Veiovis's possession does not change the admissibility analysis. In short, the trial judge could reasonably have found that the photographs were admissible inasmuch as they were offered to show the defendant's means to

commit the charged crimes, and their admission is not so clearly prejudicial as to warrant reversal. See L.L., 470 Mass. at 185 n.27.

However, as we similarly held in Veiovis, supra, the photographs of the spiked baseball bats were inadmissible, as there was no evidence that they could have been used in the commission of the crimes. Thus, the photographs "had no probative value and posed a needless risk of unfair prejudice." Id. at 486. The Commonwealth concedes this error. However, given the other admissible evidence, particularly the testimony regarding the injuries inflicted, the weapons consistent with those injuries, and the weapons that were ultimately found at Veiovis's apartment, we conclude that this error was not prejudicial. See id. See also Commonwealth v. Graham, 431 Mass. 282, 288, cert. denied, 531 U.S. 1020 (2000) ("An error is nonprejudicial only if we are sure that the error did not influence the jury, or had but very slight effect" [quotation and citation omitted]).

ii. Anatomical drawings. The defendant argues that anatomical drawings found in Veiovis's home were inadmissible against the defendant, and that admitting such drawings in evidence created a substantial likelihood of a miscarriage of justice. The drawings depicted images of human dissections and amputation of body parts. As we explained in Veiovis:

> "A critical piece of evidence in this case was the statement made by Hall in furtherance of the joint venture that 'one of the guys really enjoyed torturing and cutting [the victims] up.' Evidence that the defendant chose to put on his wall anatomical drawings showing the dissection of the human body and chose to possess drawings depicting the amputations of arms and legs tends to identify [Veiovis] as the person who likely fit Hall's description of the third accomplice as someone who enjoyed 'cutting [the victims] up.'"

Veiovis, 477 Mass. at 482. This connects both Veiovis and the defendant to the joint venture. It also provides confirmation of Hall's statement in this regard, further incriminating him. Finally, it provides an additional explanation why the victims were dismembered in this joint venture. As we stated in Veiovis, "[Veiovis's] apparent fascination with amputation and human dismemberment offers an explanation for what would otherwise be inexplicable." Id. at 485. Thus, for many of the same reasons as we found in Veiovis, we discern no abuse of discretion by the trial judge in admitting this evidence.

iii. Prior bad acts. The defendant also contests the admissibility of testimony regarding six uncharged schemes he orchestrated -- after the attempted framing of Glasser for kidnapping and armed robbery in 2010 -- to either discredit Glasser's testimony or influence it. One of these schemes involved an effort to offer Glasser $3,000 to remain silent. The others involved soliciting individuals to make false criminal allegations against Glasser, including rape, theft, and

kidnapping. The defendant argues that this testimony constituted impermissible bad character or propensity evidence the prejudicial effect of which outweighed its probative value. We disagree.

To avoid the risk of unfair prejudice to the defendant, evidence of prior bad acts is inadmissible when offered solely to show the defendant's propensity to commit the charged crime. Mass. G. Evid. § 404(b) (2020). However, such evidence is admissible when offered for another purpose, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or pattern of operation, so long as its probative value for that purpose is not outweighed by its prejudicial effect. Commonwealth v. Crayton, 470 Mass. 228, 249 (2014).

Here, the evidence of the six uncharged schemes was relevant to show the defendant's motive to silence Glasser as a prospective witness in the defendant's upcoming trial, and the great lengths to which he would go to attempt to secure such silence. The defendant's schemes were clearly "sufficiently related in time to be logically probative." See Commonwealth v. Gollman, 436 Mass. 111, 115 (2002). The defendant himself explicitly drew the connections when he explained that Glasser would have to disappear if the defendant's scheme to frame Glasser for kidnapping and armed robbery in 2010 did not work,

and when he said, "I ought to kill that motherfucker [Glasser] for ruining my life."

We do not consider the prejudicial effect of this evidence to outweigh its great probative value. Whatever prejudicial effect this evidence had, it was mitigated by the judge's limiting instructions when evidence of these schemes was introduced. There was no error here.[11]

f. Joinder. The defendant argues that the trial judge improperly denied his motion to sever the indictments, as he was prejudiced by the joinder of the charges of murder in the first degree with the lesser offenses, and that this resulted in a substantial likelihood of a miscarriage of justice. We disagree.

Pursuant to Mass. R. Crim. P. 9 (a) (1), 378 Mass. 859 (1979), two or more offenses are related and appropriate for joinder "if they are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan." A defendant may move to sever if joinder of the offenses is not in the best interests of justice, but the burden is on the defendant to show that he or she is

[11] We also reject the defendant's argument that the cumulative impact of this evidence resulted in a prejudicial effect that outweighed the evidence's probative value.

prejudiced by the joinder. See Commonwealth v. Zemtsov, 443 Mass. 36, 45 (2004); Mass. R. Crim. P. 9 (d), 378 Mass. 859 (1979). We have emphasized that "[s]eparate trials are not required merely because offenses occurred on different dates or involved different victims" (citation omitted). Zemtsov, supra at 44. "Prejudice requiring severance does not arise from the mere fact that the defendant's chances for acquittal of [one of the charges] might have been better had the offenses been tried separately" (quotation and citation omitted). Commonwealth v. Spray, 467 Mass. 456, 469 (2014). Instead, "[t]he question whether failure to sever offenses joined for trial resulted in undue prejudice to a defendant turns largely on whether evidence of the other offenses would have been admissible at a separate trial on each indictment." Zemtsov, supra at 45. A showing that "joinder tended to show [a defendant's] bad character or propensity to commit a crime" does not necessarily suffice to create unfair prejudice. Spray, supra. Instead, the defendant's burden is to show that "the prejudice resulting from a joint trial is so compelling that it prevent[ed] [him] from obtaining a fair trial" (citation omitted). Commonwealth v. Delaney, 425 Mass. 587, 595 (1997), cert. denied, 522 U.S. 1058 (1998). Whether severance of indictments is proper "is a matter within the sound discretion of the judge [and his or her]

decision will be reversed only if there has been a clear abuse of discretion." Zemtsov, supra at 43.

We discern no error here. The series of increasingly violent crimes committed against Glasser constitute a pattern that "escalated to a final attack" on Glasser and the other two victims in this case. See Commonwealth v. White, 60 Mass. App. Ct. 193, 195-197 (2003) (joinder of stalking charge with charge of armed assault with intent to murder was proper where defendant engaged in pattern of threats and acts of violence against victim over course of four years and violence escalated to final attack). The three distinct episodes of (1) beating Glasser with a baseball bat; (2) conspiring with others to falsely accuse Glasser of kidnapping and assaulting Brooks to discredit Glasser's testimony; and (3) murdering Glasser and his two friends to silence him constitute a "series of criminal episodes connected together," and were thus properly joined. See Mass. R. Crim. P. (9) (a) (1). As the motion judge found, "the alleged 2009 beating of Glasser by Hall, the alleged 2010 scheme to frame him for armed robbery and . . . Hall's alleged murder of Glasser, Frampton and Chadwell, constitute part of [a] single scheme or plan to harm, discredit and eliminate Glasser as a potential witness against Hall." Moreover, Hall's beating of Glasser to prevent him from testifying and the act of conspiring to discredit Glasser's testimony are probative of the

defendant's motive and intent on the murder charges, and evidence of those offenses therefore would have been admissible at a separate trial of the murders. See Zemtsov, 443 Mass. at 45.

In a similar vein, we reject the defendant's argument that it was improper for the prosecutor to say in his closing argument "what ultimately ends up happening in the third case proves the first two" -- i.e., that the murder in the first degree of Glasser supported the charges against the defendant for beating Glasser with a baseball bat and framing him for the armed robbery and kidnapping of Brooks. This did not, as the defendant contends, contradict the court's instruction that the jury must come to an independent conclusion regarding each charge. The evidence of the different crimes was interrelated, and could properly be so considered. When the evidence, argument, and instructions are considered as a whole, we discern no error. Commonwealth v. Lopes, 478 Mass. 593, 607 (2018).

g. Alleged prosecutorial misconduct. The defendant contends that he did not receive a fair trial due to repeated acts of misconduct by the prosecution that rose to the level of a constitutional violation and that could not be remedied with cautionary instructions. We address each perceived error in turn.

i. Misuse of the grand jury. The defendant claims that, by admitting prior indictments as exhibits in the grand jury proceedings, the Commonwealth impermissibly "inject[ed]" a prior finding of probable cause into the deliberations, thus compromising the integrity of the proceedings. Further, by reconvening the jury when the defendant filed for dismissal, the defendant argues, the prosecution used the grand jury as an attempted "end run" around the defendant's motion to dismiss.

The defendant's argument has no merit. To support his claim, he cites to Commonwealth v. Cote, 407 Mass. 827 (1990). However, we see no parallel between Cote and the present case. In Cote, the district attorney obtained business telephone message records by use of a grand jury subpoena; those records were not presented to the grand jury, but they were presented at trial. Id. at 830. Although the court held that this was an abuse of the grand jury subpoena power by the district attorney, it also held that there was no prejudice to the defendant and no serious impairment of the grand jury process. Id. at 831-833.

The defendant does not illustrate how this case is similar to Cote, or otherwise cite to case law supporting his argument. By introducing the indictments at the grand jury proceedings, and by reconvening the grand jury after the motion to dismiss was filed, the prosecution did not act improperly, and did not engage in any "end run" around the defendant's motion to

dismiss. Nor did the prosecution use the grand jury to prepare an already pending indictment for trial, as no evidence obtained during the reconvened grand jury was introduced at trial. This argument lacks merit.

ii. The defendant's postindictment interviews with police. The defendant contends that the prosecution improperly "glean[ed]" information from the defendant during interviews with the defendant where the defendant's counsel was not present. The defendant does not seek to suppress these statements,[12] but argues instead that these interviews constituted prosecutorial misconduct that resulted in an unfair trial, thus warranting reversal. We reject this argument, in particular because it is a mischaracterization of the interviews that took place. Further, we cannot conclude that these interviews resulted in an unfair trial when "nothing in the Sixth Amendment [to the United States Constitution] prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney." Commonwealth v. Anderson, 448 Mass. 548, 554, 557 (2007), quoting Michigan v. Harvey, 494 U.S. 344, 352 (1990). Although art. 12 of the Massachusetts Declaration of Rights requires police officers to inform a suspect of his or

[12] The defendant moved to suppress these statements before trial, but that motion properly was denied.

her attorney's request that the suspect not be interviewed, that requirement was met in this case. Anderson, supra at 556.

Here, the defendant developed a conflict with his former counsel, Attorney William Rota, over an interest in cooperating with law enforcement to resolve one of his underlying cases. In September 2010, when the defendant was being held on kidnapping charges, the defendant indicated he wanted to speak with the FBI, and made a request to do the same to an officer at the Hampden County house of correction. A State police detective discussed the defendant's request with the district attorney, and then notified Rota. The defendant expressed continuing interest in an interview with the FBI, and told Rota that he did not want to share with Rota what he wanted to say to the FBI. Rota relayed this to the detective, who made arrangements for the defendant to meet with the FBI. The defendant read and signed a Sixth Amendment waiver before the interview began. At that first meeting, and at a second, short follow-up meeting, the investigators did not discuss the charges pending against the defendant, but informed the defendant that he would not be used as an informant. Rota did not have knowledge that the meetings took place.

In 2012, after the murder indictments were returned and once the defense strategy was developed, the defendant wanted to present information related to his defense strategy to the

Commonwealth, believing that -- by providing the Commonwealth with his theory of the murders, i.e., that they were committed by Casey and Whitey -- he would be exonerated. Rota told the defendant that their theory should not be presented until trial, as the Commonwealth would then have time to neutralize the defendant's strategy. However, the defendant went against his attorney's advice and disclosed this information to the State police in an interview that occurred on August 9, 2012. Before the interview, the defendant was advised of his Miranda rights and was reminded that he had an attorney who could be present, but did not execute a written waiver. The defendant indicated he did not wish to have an attorney present, and told the police that he did not trust his attorney, saying he would likely tell Rota to "step down" so he could get a new lawyer.

After Rota was informed of the interview, he advised his client not to have any further discussions with the police -- but to no avail. The defendant met with State police again on August 13, 2012. During that interview, the defendant told the investigators that his "lawyer is not happy that I talked with you." Rota subsequently moved to withdraw from the case given the conflict, and a Superior Court judge granted the motion.

In light of these facts, it was the defendant who initiated the interviews with law enforcement, even after Rota's repeated advice not to do so. The defendant was advised of his rights

and reminded that he had an attorney. During the interviews, the defendant did most of the talking, with questions by investigators only seeking to clarify the information given. The defendant even acknowledged that the investigators were there at his request. Disregarding his counsel's advice, as was his right, the defendant made a determined choice to engage with law enforcement. There was no prosecutorial misconduct here.[13]

iii. Search of the defendant's jail cell. In a motion to dismiss the charges against him, the defendant argued that his right to counsel was violated by investigators who conducted a search of his jail cell pursuant to a valid warrant on November 19, 2012, despite the defendant's request to have counsel present. The defendant contends that privileged attorney-client communications were seized from his jail cell, which the officer in charge of the search disputed. The trial judge denied the motion, finding that the officer "set aside and did not seize any writings that he verified were either to or from [the defendant's] attorney." The defendant raises the same issue again on appeal. "Where there has been conflicting testimony as

[13] Even if we were to find an ethical violation, and we do not do so here, the meeting with the defendant in these circumstances would not be grounds for reversal. Cf. Commonwealth v. Vao Sok, 435 Mass. 743, 754 (2002) (no prejudice resulting from alleged violation of rule of professional conduct by prosecutor where police officer informed defendant his attorneys did not want polygraph to continue, yet defendant nevertheless agreed to polygraph).

to a particular event or series of events, a judge's resolution of such conflicting testimony invariably will be accepted," and we will not disturb the ruling absent a finding of clear error. Commonwealth v. Carr, 458 Mass. 295, 298-299 (2010).

The defendant has presented no case law supporting his proposition that the target of a search warrant has a right to have counsel present during the execution of a warrant. The officers executed a warrant to search the defendant's cell for writings that would show evidence of the murders and witness intimidation. Further, the officer in charge of the search did not, as the judge found, seize any writings that he verified were either to or from the defendant's attorney. Such action does not amount to prosecutorial misconduct, particularly when the defendant has not identified any of the materials seized as subject to the attorney-client privilege.

iv. Improper burden shifting. The defendant claims the prosecutor impermissibly shifted the burden of proof to the defendant when, during his direct examination of a State police trooper, he implied the defendant had an obligation to inspect evidence by asking whether evidence collected by police was "made available for viewing and examination by anyone connected with this case." Likewise, the defendant claims the prosecution shifted the burden to the defendant when the prosecutor stated during closing argument that, if the defendant "complains about

what wasn't tested based upon the evidence you hear, he's not just complaining about the . . . Commonwealth, he's complaining about himself." We disagree in both instances.

First, the prosecutor stated in his closing argument that "the Commonwealth is not arguing that the defendant has any obligation to do anything in this case." More importantly, the judge also emphasized that "[t]he defendant did not have to explain anything. The burden of proof rests entirely on the Commonwealth . . . ." The defendant also takes the prosecutor's closing argument out of context when he argues that the words "he's complaining about himself" were supposed to refer to the defendant's obligation to inspect the evidence. Instead, the prosecution was referencing the general inability of the prosecution and others to engage in the usual forensic methods to gather evidence due to the efforts of the defendant, Veiovis, and Chalue "to hide the scene and the weapons and thus, whether specifically by their intentions or not, deter the usual forensic methods to gather evidence." We conclude that there was no error on the part of the prosecutor here.[14]

[14] We similarly reject the defendant's argument that the prosecution "trivialized" the reasonable doubt instruction during the Commonwealth's closing argument, thus warranting reversal of the defendant's convictions. Nothing in the prosecution's closing argument misrepresented the beyond a reasonable doubt standard. See Commonwealth v. Daye, 435 Mass. 463, 475-476 (2001).

v. Reference to statement not in evidence. The defendant argues, and the Commonwealth concedes, that the prosecutor erroneously attributed a statement to Dawson during his closing. The prosecutor said that Dawson testified the defendant stated: "the poor bastard had to watch," and the prosecutor continued to explain: "That's why Ed Frampton and Robert Chadwell had those horrible slices up their abdomen and David Glasser didn't."[15] However, we do not find this error prejudicial, as it was unlikely that the jury were influenced by a narrative regarding whether the victims had to watch the killings, see Graham, 431 Mass. at 288, and the Commonwealth presented compelling evidence from numerous witnesses directly identifying the defendant as the perpetrator of these crimes, including the defendant's own admissions. For these reasons, we cannot conclude that this error is prejudicial or amounts to prosecutorial misconduct.

vi. Disregard of evidentiary rulings. Finally, the defendant contends that the prosecutor engaged in misconduct by "fail[ing] to heed the trial court's evidentiary rulings." The defendant argues that one police officer witness "blurted out" inadmissible comments that were highly inflammatory and unfairly prejudicial during direct examination by the Commonwealth. Specifically, the officer referenced a comment the defendant

[15] Based on our review of the record, there is no testimony from any witness attributing this statement to the defendant.

made to him that "[i]t ain't my duty to chase down niggers that do shit in the city," and that he "didn't like it that they were trying to ask fifteen-year-old girls and offer them a hundred dollars for a blow job." The court had previously ruled on a motion in limine barring the prosecution from eliciting this testimony regarding the defendant's inflammatory statement. However, there is nothing in the record to show that the prosecutor did not act in good faith when he led the witness and asked him not to use offensive words. We cannot conclude that he sought to elicit either the racial epithet or the words "blow job" as statements of the defendant. Further, the trial judge immediately gave an instruction to the jury to disregard the use of the racial epithet. In sum, we cannot conclude that the prosecutor engaged in misconduct here, or that any error resulted in prejudice given the overwhelming evidence against the defendant, as discussed supra.

h. Moffett arguments. The defendant's many Moffett claims and the arguments raised in his various subsequent filings do not warrant extended discussion. See Commonwealth v. Moffett, 383 Mass. 201, 208-209 (1981). We have given due consideration to all the issues raised and reject them as without merit.

3. Conclusion. Given the foregoing, and upon review of the entire record, we conclude that the verdicts of murder in the first degree are consonant with justice, and we decline to

exercise our authority under G. L. c. 278, § 33E, to order a new trial or direct the entry of verdicts of a lesser degree of guilt. We reverse the defendant's kidnapping conviction for the conduct in 2010, as it was based on an inveiglement theory previously dismissed by the motion judge, but affirm all other judgments.

So ordered.