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SJC-12464

COMMONWEALTH vs. KIMBERLY PENO.

Bristol. April 10, 2020. - August 10, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, & Kafker, JJ.

Homicide. Evidence, Prior misconduct, Relevancy and materiality, Inflammatory evidence. Practice, Criminal, Argument by prosecutor, Instructions to jury, Capital case.

Indictment found and returned in the Superior Court Department on June 21, 2010.

The case was tried before Renee P. Dupuis, J.

Robert F. Shaw, Jr., for the defendant.  
Erica G. Sylvia, Assistant District Attorney, for the Commonwealth.

LENK, J. In the early morning hours of March 18, 2010, Joseph Peno and his wife rushed their two year old child, Timothy, to the fire and rescue center in Seekonk. He had visible facial injuries and was not moving. Doctors at the hospital where Timothy was transported discovered that he had been severely beaten and had suffered a traumatic brain injury.

He died two days later. Timothy's mother, the defendant, was charged with murder in the first degree in his death. His father pleaded guilty to child endangerment, under an agreement to receive a term of probation in exchange for his testimony at the defendant's trial. After an eight-day trial, the defendant was convicted of murder in the first degree on a theory of extreme atrocity or cruelty, and now appeals from her conviction.

The defendant argues that the Commonwealth secured the conviction by improperly portraying her as a bad mother. She maintains that much of the Commonwealth's evidence served only to inflame the jury's emotions and to turn them against her, and that the Commonwealth misused this evidence to argue that she, and not her husband, was the kind of person who could kill her own child. In the alternative, in the interests of justice, the defendant asks us to use our authority under G. L. c. 278, § 33E, to reduce the verdict or to order a new trial.

We agree that some of the evidence of the defendant's prior conduct, and of Timothy's struggles early in life, should not have been admitted, and that the prosecutor's closing at times crossed the line into impermissible argument. These errors, however, when weighed against the otherwise strong evidence of the defendant's guilt, do not require a new trial. Nor do we

conclude that we should use our extraordinary powers to reduce the degree of guilt. Accordingly, we affirm.

1. Background. We recite the facts the jury could have found, in the light most favorable to the Commonwealth, reserving a more detailed recitation of the challenged evidence for further discussion.

a. Relationship between the defendant and Timothy.

Timothy was born to the defendant and Joseph Peno<sup>1</sup> in October of 2007. At birth, he was diagnosed with fetal alcohol syndrome and addiction to cocaine. Accordingly, the Department of Children and Families (department) took temporary custody. For the first eighteen months of his life, Timothy lived with a foster mother. To address certain developmental issues associated with fetal alcohol syndrome, he received physical, social, and speech therapy. The department also assigned Timothy an early intervention social worker to provide him with additional support.

Approximately one month after Timothy was born, the defendant learned that she was pregnant again. During this pregnancy, she was monitored by the department and was required to undergo addiction counselling. At some point during this

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<sup>1</sup> Because the defendant and Joseph Peno share a last name, we refer to him by his first name.

pregnancy with their second son, Collin,<sup>2</sup> Joseph and the defendant were married.

Joseph and the defendant had multiple supervised visits with Timothy while he was in the foster mother's custody. The social worker who observed the visits noted that the defendant struggled to soothe Timothy, became frustrated quickly, and then would hand Timothy to Joseph.

The Penos began the process of reunification with Timothy during the summer of 2009. At the same time, in August of 2009, the social worker noted that Timothy was beginning to regress from spoken words to gestures. Shortly thereafter, the defendant asked that the social worker stop visiting. The defendant terminated departmental services because she no longer wanted outsiders in her home. Joseph also did not feel that Timothy had the developmental issues that the department reported and did not want the department involved any further in his family's life. The Penos were granted full custody of Timothy in October of 2009. Early in March of 2010, the defendant learned that she was pregnant again. She was torn between raising the child herself and giving it up for adoption.

b. Timothy's death. Approximately one week before Timothy's death, to make it easier to clean and maintain the

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<sup>2</sup> A pseudonym.

household, the Peno family began sleeping together in their finished basement. On March 17, 2010, the family drove to multiple locations so that the defendant could purchase alcohol and cocaine. When the family returned home, the defendant went to the basement with Timothy, while Joseph stayed upstairs with Collin to cook dinner.

At approximately 10 P.M., the defendant asked Joseph to go out for more alcohol. He responded that the liquor stores would be closed. Nonetheless, around 11 P.M., the defendant put Timothy and Collin in the family vehicle, roused Joseph from a nap, and told him to drive her to a store. When they got to the corner, she changed her mind and asked Joseph to drive them home. Timothy and the defendant went upstairs and headed toward the master bedroom, while Joseph returned to the couch, with Collin lying on the floor next to him; Collin was "doing fine where he was," and Joseph did not think to put him in his crib upstairs. Joseph heard the defendant tell Timothy to "go to bed," and then quickly fell asleep.

A short time later, Joseph woke to what sounded like "a muffler," or like Timothy's muffled voice coming from the basement. Joseph ran downstairs to the playroom door, where he was met by the defendant, who had blood on her mouth. Joseph asked her what had happened, and she replied that Timothy had bitten her. Joseph returned upstairs to get Collin, who was

sleeping, and headed downstairs again. He encountered the defendant, who was coming up the stairs carrying Timothy. He again asked her what had happened, and the defendant said that she would "take care of it." Joseph continued into the basement to "check[] out the room," and saw spots of blood on the floor. He put Collin down on the floor near a couch and began to clean up the blood.

A few minutes later, Joseph heard the defendant yelling from upstairs. He went upstairs, carrying Collin, and found the defendant in the hallway attempting to give Timothy mouth-to-mouth resuscitation. Both Timothy and the defendant had blood on their shirts. The defendant asked Joseph several times to telephone 911. Instead, Joseph decided that she should change Timothy's clothes and then he would drive them to the Seekonk fire and rescue center. Joseph thought this would be faster, because he was not sure where to find the handset to the landline telephone and the fire and rescue center was "just down the street" from the Penos' house. After placing Timothy on the bed, Joseph noticed that Timothy's face was red and his nose was bleeding; Timothy then threw up on the bed. Joseph decided not to attempt to change Timothy's clothes, and instead grabbed a blanket to wrap around him. Joseph then put Timothy in the front seat of his vehicle; Timothy whimpered as he was put down. The defendant was at the top of the stairs, acting upset, while

Collin had somehow gone downstairs. The defendant commented, "I'm going to do a lot of time for this." The defendant put Collin in the rear of the vehicle, and then sat in the front with Timothy in the middle between her and Joseph. During the three-minute drive, she picked him up and held him.

Shortly after 12:15 A.M. on March 18, 2010, the family arrived at the Seekonk fire and rescue center. The defendant banged on the front door and yelled that they needed assistance. She asked the officer at the front desk to come outside, without explaining the problem. Joseph carried Timothy into the center wrapped in a blanket. Timothy's face was visibly red, and his eyes were swollen shut. One of the police officers there telephoned 911 in order to alert paramedics. When asked what happened, Joseph said, "My wife had a breakdown."<sup>3</sup>

Paramedics were summoned to assess Timothy. Joseph seemed anxious, and said, "My wife, his mother . . . can you help him?" A paramedic determined that Timothy had no pulse and was not breathing, and began performing cardiopulmonary resuscitation. Within minutes, Timothy was placed in an ambulance and driven to the hospital; Joseph accompanied him in the front of the ambulance.

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<sup>3</sup> The Penos' arrival at the Seekonk fire and rescue center and the defendant's interview with Seekonk police officers were captured on video recordings, without audio.

When he arrived at the hospital, pediatricians observed that Timothy had serious injuries to his face, head, neck, chest and arms. Due to a lack of brain activity, the family ultimately decided to remove Timothy from life support, and he was pronounced dead. The cause of death was a traumatic brain injury. An autopsy later revealed lacerations that were consistent with Timothy having been punched in the face. He also had multiple skull fractures caused by blows to or compression of his head. The autopsy indicated that there had been at least five distinct traumatic injuries inflicted during a single event.

c. Investigation. While Timothy was en route to the hospital with Joseph, officers at the Seekonk fire and rescue center secured the Penos' vehicle and contacted the East Providence fire department to take charge of Collin. The defendant was escorted into the interview area. She appeared disheveled and "out of sorts." Her shirt had a brownish stain on the left shoulder, and her right hand was visibly swollen.

A detective and another officer interviewed the defendant. From the outset, the detective could detect an odor of alcohol coming from the defendant, who confirmed that she had drunk beer earlier that day. The defendant remarked that she did not want any more children. She also said that Timothy cried a lot,



whereas Collin did not. She said that Joseph had been sleeping at the time of the incident, and that he was "always" sleeping.

Eventually, the defendant became incoherent and appeared to be "crashing"; she was transported to a hospital for treatment. While en route, she said aloud, "The answer to every question is I don't know." Blood drawn at the hospital showed that her serum alcohol level at that time was .09. A department worker spoke to the defendant at the hospital. During this conversation, the defendant alternated between being agitated and unresponsive to his questions. When asked how Timothy was hurt, she said, "I don't remember what happened to the boy."

A Rehoboth police officer obtained a statement from Joseph at the hospital where Timothy was being treated.<sup>4</sup> According to the officer, Joseph appeared to be in a state of "stoic shock." Joseph then was transported back to the Seekonk fire and rescue center for an additional interview. He was not physically examined or photographed, and his clothing was not analyzed for evidence. After this second interview, Joseph returned to the hospital.

Rehoboth police officers obtained a search warrant for the Penos' house and found the house in a state of disarray. They

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<sup>4</sup> Although the Rehoboth police officer testified as to Joseph's demeanor during this conversation, the substance of Joseph's statement at the hospital was not before the jury.

observed several bloody pieces of children's clothing, as well as blood on the carpet, a child's chair and another chair in the basement, the mattresses in the upstairs bedrooms, a towel and blanket on the floor of the upstairs master bedroom, and a child's crib. In addition, the wooden paneling in an area above the bed in the basement, approximately one foot in diameter and sixteen inches above the bed, was damaged.

The defendant's hands were swabbed for evidence. These swabs showed two deoxyribonucleic acid (DNA) profiles: one matched the defendant, and one was consistent with Timothy, Collin, or Joseph. Chemists also found human blood on several pieces of clothing taken from the defendant at the hospital. DNA tests indicated that the blood found on items from the home matched Timothy. Joseph's hands were not swabbed, and his clothing was not tested for blood.

d. Procedural background. The defendant was indicted on a charge of murder in the first degree. Joseph was charged with child endangerment and entered into a plea agreement under which he agreed to testify at the defendant's trial in exchange for a sentence of three years' probation.

Prior to trial, the defendant moved to suppress statements she made to police at the Seekonk fire and rescue center, as well as her statements to police at the hospital where she was taken in the early morning hours of March 18, 2010. A Superior

Court judge, who was not the trial judge, agreed that the statements at the hospital, where the defendant had been taken after she appeared to be "crashing," were involuntary, and allowed her motion with respect to those statements. He denied the motion as to the statements at the fire and rescue center.

The Commonwealth proceeded against the defendant under theories of extreme atrocity or cruelty and deliberate premeditation. Following over five days of testimony, and jury deliberations extending over two days, the defendant was found guilty of murder in the first degree on a theory of extreme atrocity or cruelty. She timely appealed.

2. Discussion. There was no dispute at trial that Timothy's irreversible brain injuries were the result of a beating by an adult, and that only the defendant and her husband had been in the house on the night Timothy was fatally injured. Moreover, the only direct evidence as to which of them was responsible for what happened in the house that night was through testimony by the defendant's husband, pursuant to a plea agreement under which he received no jail time.

The Commonwealth introduced detailed evidence of the defendant's use of drugs and alcohol while pregnant, her lack of prenatal care, and Timothy's medical difficulties at birth and while in his foster mother's care, as well as various aspects of the defendant's parenting, to show the defendant's attitude

toward her son and to argue that the beating evinced a deliberate plan to kill him because of long-standing resentment.

The theory of the defense was that Joseph, and not the defendant, was responsible for Timothy's death, and that he had killed Timothy while the defendant, who was severely intoxicated due to binging on "crack" cocaine and alcohol, was on another floor of the house. In support of this argument, defense counsel sought to challenge Joseph's credibility by extensive cross-examination and by eliciting prior inconsistent statements that he made to other family members about the night of the beating. Counsel also called witnesses to paint a more positive picture of the defendant's relationship with Timothy, and to describe her demeanor hours before he was beaten.

On appeal, the defendant asserts two sets of errors relating to the Commonwealth's use of prior bad act evidence. She contends that the evidence pertaining to her prenatal conduct, Timothy's resulting developmental complications, and her relationship with Timothy served merely as impermissible propensity evidence, and thus was admitted improperly. This evidence, the defendant argues, was at best of minimal relevance, and was calculated to arouse the jury's emotions and to invite them to convict her out of anger or sympathy or based on the view that she was unfit to be a parent. Moreover, it struck at the core of her defense and created an intolerable

risk that the jury impermissibly would conclude that, by virtue of her character and her prior conduct, she was more likely than Joseph to have killed their child. The defendant maintains as well that the prosecutor's reliance on this evidence in her closing argument was improper, and was so inflammatory as to constitute a separate ground for a new trial.

The asserted errors all relate to a single issue, i.e., the potential prejudice from the use of prior bad act evidence. Accordingly, we first address each of the defendant's claims to determine whether any error occurred, and then consider whether, if there were errors, their cumulative effect so prejudiced the defendant as to require a new trial. See Commonwealth v. Maynard, 436 Mass. 558, 570 (2002). Cf. Commonwealth v. Dwyer, 448 Mass. 122, 138-139 (2006); Commonwealth v. Kozec, 399 Mass. 514, 523 (1987).

We agree that some of the challenged evidence, specifically evidence pertaining to the defendant's prenatal care, and Timothy's developmental complications at birth and while in foster care, should not have been admitted. We also agree that the prosecutor's reliance on this evidence in closing was improper, as was the use of properly admitted prior bad act evidence to advance an argument grounded in propensity-based reasoning. While these errors are troubling, and the question

is a close one, ultimately we discern no reason to disturb the verdict.

a. Prior bad act evidence. "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Mass. G. Evid. § 404(b)(1) (2020). Such evidence may, however, "be admissible for another purpose," such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Mass. G. Evid. § 404(b)(2). Even where evidence is relevant to a permissible purpose, it "will not be admitted if its probative value is outweighed by the risk of unfair prejudice to the defendant." See Commonwealth v. Crayton, 470 Mass. 228, 249 (2014). A determination whether evidence of a defendant's prior bad acts is admissible at trial requires a two-part inquiry. First, the evidence must be relevant to something other than the defendant's propensity to commit the charged offense. See, e.g., id. at 249-251 (evidence of prior bad act was inadmissible because its relevance to case rested on propensity reasoning). Second, if the evidence is relevant, its prejudicial effect must not outweigh its probative value. Id.

"To be sufficiently probative the evidence must be connected with the facts of the case [and] not be too remote in

time" (citation omitted). Commonwealth v. Butler, 445 Mass. 568, 574 (2005). Temporal remoteness is not an exercise in line drawing; rather, a reviewing court focuses on the "'logical relationship'" between the [prior bad act] evidence and the crime charged" (citation omitted). See Commonwealth v. Facella, 478 Mass. 393, 405 (2017).

We review a judge's decision to allow the introduction of prior bad act evidence for abuse of discretion. Facella, 478 Mass. at 407. The decision will stand unless we conclude that the 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." See id., citing L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

When assessing whether the risk of unfair prejudice outweighs the probative value of the challenged evidence, the factors a reviewing court considers may include (1) whether the trial judge carefully weighed the probative value and prejudicial effect of the evidence introduced at trial, see Commonwealth v. Helfant, 398 Mass. 214, 229 n.14 (1986); (2) whether the judge mitigated the prejudicial effect through proper limiting instructions, see Commonwealth v. Bryant, 482 Mass. 731, 735 (2019); (3) whether the challenged evidence was cumulative of other admissible evidence, thereby reducing the risk of any additional prejudicial effect, cf. Commonwealth v.

Wilson, 427 Mass. 336, 348 (1998); and (4) whether the challenged evidence was so similar to the charged offense as to increase the risk of propensity reasoning by the jury, see Crayton, 470 Mass. at 251.

The evidence at issue falls into four categories: (i) the defendant's alcohol and drug use while pregnant with Timothy; (ii) the adequacy of the defendant's medical care while she was pregnant with Timothy; (iii) the developmental complications Timothy faced at birth and while in foster care as a result of the defendant's alcohol and drug use; and (iv) the defendant's relationship with Timothy.<sup>5</sup>

The Commonwealth argues that this evidence was indicative of the defendant's indifference or hostility towards Timothy,

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<sup>5</sup> Although she objected to the introduction of the challenged testimony prior to trial, the defendant did not object separately to each piece of prior bad act testimony at trial. The defendant did, however, object to the entirety of the testimony of Timothy's foster mother and to that of multiple department workers, and the judge noted that the defendant's objections were saved. These witnesses' testimony included (1) the fact that Timothy had been exposed to drugs in utero, (2) details of Timothy's complications at and after birth, and (3) the witnesses' observations of the defendant's interactions with Timothy. Because, as discussed supra, we review the cumulative prejudicial effect of the errors, at least some of which specifically were objected to at trial, we need not determine whether objections were preserved to each individual piece of prior bad act testimony. We note, however, that the better practice is for a defendant to raise specific objections at trial to ensure that his or her objections are considered and preserved for appeal. See Commonwealth v. Grady, 474 Mass. 715, 721 (2016).



and thus relevant to her motive or intent to kill him. Evidence of the relationship between a defendant and a victim indeed may be relevant to establish motive or intent. This is a fact-dependent inquiry. See, e.g., Commonwealth v. Carlson, 448 Mass. 501, 507-508 (2007) (evidence of prior arguments between defendant and victim, where defendant had threatened to hit victim, "tended to show that the defendant intentionally beat the victim as inducement to comply with his request to get some money"). See also Commonwealth v. Dung Van Tran, 463 Mass. 8, 15 (2012) (evidence of defendant's past abusive behavior toward his children and family was relevant to defendant's ongoing hostility toward his family, and to suggest revenge for perceived betrayal as possible motive for defendant setting himself on fire inside family apartment); Commonwealth v. Gallison, 383 Mass. 659, 672-673 (1981) (evidence that defendant abused one child during same time frame as other child's death was probative of defendant's "reckless and wanton state of mind as to the physical well-being of both children").

We therefore turn to examine the specific evidence at issue to determine whether its admission was proper in this case.

i. The defendant's prenatal use of drugs and alcohol. The Commonwealth introduced evidence that, while she was pregnant with Timothy, the defendant continued to use drugs and alcohol on at least a weekly basis, and also smoked a pack of cigarettes

every day. Indeed, Joseph testified that he was unable to control the defendant's alcohol and drug use. Timothy was born with cocaine in his system and suffering from fetal alcohol syndrome. The judge agreed with the Commonwealth's argument that the defendant's prenatal use of drugs and alcohol was indicative of her indifference towards Timothy, and thus relevant to her motive or intent to harm Timothy.

Absent evidence that a mother ingested harmful substances with the intent to harm her fetus, evidence of prenatal use of drugs or alcohol generally is inadmissible to establish the nature of the relationship between a mother and her unborn child, or an intent to harm that child years later. See Commonwealth v. Podkowka, 445 Mass. 692, 695-697 (2006) (where defendant father sought to introduce evidence of mother's prenatal drug and alcohol use to suggest that mother was responsible for child's death, it was proper to exclude such evidence because it "amounted to nothing more than improper evidence of bad character . . . [and] did not consist of 'acts . . . so closely connected in point of time and method of operation as to cast doubt upon the identification of [the] defendant as the person who committed the crime'" [citation omitted]).

We do not believe that, standing alone, the fact that a mother ingested harmful substances while pregnant is indicative

of an intent to harm her child before or after birth, or of her future relationship with that child. See Weisberg & Vandervort, *A Liberal Dilemma: Respecting Autonomy While Also Protecting Inchoate Children from Prenatal Substance Abuse*, 24 *Wm. & Mary Bill Rts. J.* 659, 703 (2016) ("many pregnant women who abuse substances do so because they are addicted").

Nonetheless, the specific facts of this case afford this evidence a more nuanced relevance. The jury heard testimony by Joseph, officers at the Seekonk fire and rescue center, and several department staff, from which the jury reasonably could have inferred that the defendant resented Timothy for his imposition on her life, namely, his interference with her ability to consume drugs and alcohol as she wished. The properly admitted evidence established that, as a result of her use of drugs and alcohol while pregnant, and Timothy's ensuing developmental complications, the department took custody of her child and became involved in her life. Joseph and a department worker also testified that, even after Timothy was returned to the Penos' care, the defendant was frustrated by the department's continued involvement in their lives. When the defendant became pregnant again shortly after giving birth to Timothy, the department monitored the pregnancy, thereby restricting the defendant's ability to continue to use drugs and alcohol.

In the days prior to Timothy's death, the defendant learned that she was again pregnant. According to Joseph, the defendant was anxious about this pregnancy; the defendant herself told police that she did not want any more children. After she had regained custody of Timothy, the defendant also explicitly stated that she did not want further involvement by the department in her life and demonstrated this implicitly by not responding to any of the department's efforts at outreach after she terminated home visits by an early intervention social worker. From this evidence, the jury reasonably might have inferred that the defendant's anxiety about being pregnant again could have rekindled her feelings of resentment toward Timothy, given that his complications at birth had led to the department's intrusion in her life and had interfered with her ability to consume drugs and alcohol throughout her subsequent pregnancy with Collin. While the defendant's use of drugs and alcohol did not, by itself, establish anything about her feelings toward Timothy, it did provide some context for a particular facet of their later relationship and some explanation, albeit attenuated, of her subsequent feelings of resentment toward him.

Accordingly, the evidence was probative of a material fact concerning the defendant's motive. Cf. Dung Van Tran, 463 Mass. at 14-15 (prior bad act evidence had greater probative value

than prejudicial effect "in light of 'the seemingly inexplicable nature of the assault'"); Commonwealth v. Guy, 454 Mass. 440, 443-444 (2009) (evidence that defendant had spoken to coworkers about serial killings and often read books about serial killings and murder was relevant to establish defendant's fascination with murder to explain "what otherwise might be seen as an inexplicable act of violence"); Commonwealth v. Marrero, 427 Mass. 65, 68 (1998) (detailed evidence regarding defendant's prior drug dealing was admissible in light of fact that Commonwealth's theory of case was that defendant killed victim because he owed defendant money for drugs or had stolen defendant's drugs, and evidence supplied context for Commonwealth's theory); Commonwealth v. Bradshaw, 385 Mass. 244, 269-270 (1982) (evidence of defendant's activities prior to killing was "relevant to show intent or motive" where evidence was "inextricably intertwined with the description of events on the [day] of the killing" [citation omitted]).

The evidence of the defendant's prenatal use of drugs and alcohol also was not so similar to the fatal beating that the jury would have inferred from this evidence a propensity to commit murder. Compare Commonwealth v. Veiovis, 477 Mass. 472, 486 (2017) (abuse of discretion to allow evidence that defendant possessed spiked baseball bat, where weapon could not have been used in crimes, because evidence that defendant possessed this

type of weapon "posed a needless risk of unfair prejudice"); Crayton, 470 Mass. at 251 (evidence that defendant possessed hand-drawn sketches of nude or partially nude young girls gave rise to risk of unfair prejudice where defendant was charged with viewing child pornography). Moreover, in light of the extensive testimony pertaining to the impact of the defendant's use of drugs and alcohol on her relationship with Timothy, any additional prejudicial effect was likely to have been minimal. See Wilson, 427 Mass. at 348.

In addition, while her instructions were generic, the judge undertook some effort to mitigate the risk by instructing the jury during her final charge that they were not to consider evidence of the defendant's prior bad acts as evidence that she committed the crime charged. Contrast Commonwealth v. Anestal, 463 Mass. 655, 673 (2012) (absence of any limiting instruction permitted jury to consider evidence for improper purpose). Accordingly, despite our significant reservations about the reliance on evidence of the prenatal use of drugs and alcohol to establish the nature of the subsequent relationship between a mother and her child, we cannot conclude that the judge abused her discretion in allowing the introduction of such evidence in these particular circumstances.

ii. Adequacy of the defendant's prenatal medical care.

The Commonwealth also introduced evidence that the defendant had

not sought adequate prenatal medical care while she was pregnant with Timothy. The evidence on this point was vague and mixed: Joseph testified that he remembered driving the defendant to a location where she could have received prenatal medical care, and that the defendant "could have gone" to seek such care; he also testified, however, that he never attended a doctor's visit while the defendant was pregnant with Timothy. Medical records introduced in evidence from the time of Timothy's birth include notes indicating that the defendant had received almost no prenatal care.

The Commonwealth argued -- and the trial judge agreed -- that the defendant's inadequate prenatal medical care showed her indifference toward Timothy. Even if we accept that such evidence could have some probative value in some circumstances, we nonetheless conclude that any probative value here was at best marginal and unquestionably outweighed by the risk of unfair prejudice to the defendant.

This court has urged caution when relying upon evidence of a defendant's poor parenting to establish a parent's intent to harm his or her child. See, e.g., Podkowska, 445 Mass. at 696 (while "[p]oor parenting may provide a basis for the State to intervene in the parent-child relationship, . . . standing alone, it does not tend to show that a parent had the motive seriously to injure or kill [his or] her child"). Our

misgivings about such evidence grow greater still where the evidence seeks to draw an inference about the relationship between a mother and her child based on the mother's conduct while pregnant, and even more so two and one-half years after the child's birth. See Commonwealth v. Pugh, 462 Mass. 482, 484, 495 n.21 (2012) (where mother was on trial for involuntary manslaughter after child died during unassisted childbirth, evidence that defendant smoked or drank while pregnant was of "minimal probative value but potentially high prejudicial effect").

Nearly all aspects of a woman's conduct while pregnant have the potential to affect her unborn child. See Remy v. MacDonald, 440 Mass. 675, 677-678 (2004) (discussing "unique symbiotic relationship" between mother and unborn child, where "almost all aspects of a woman's life may have an impact, for better or for worse, on her developing fetus"). Hence, absent clear evidence indicating that a defendant's decision not to seek adequate prenatal medical care was motivated by specific feelings toward her unborn child, there is a strong possibility that the defendant's conduct had nothing whatsoever to do with any feelings toward her unborn child. In this case, for example, Joseph testified that, while she was pregnant, the



defendant was unable to curb her use of drugs and alcohol.<sup>6</sup> See Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 *Wis. J.L. Gender & Soc'y* 241, 264-265 (2011) (explaining that women who use drugs while pregnant often are reluctant to seek prenatal care for fear of criminal repercussions). Because there was no indication that the defendant's decision not to seek adequate prenatal care was motivated by her attitude toward Timothy, the evidence lacked a sufficient "logical relationship" to the issues in the case, see Facella, 478 Mass. at 405, and it should not have been introduced.

iii. Timothy's postbirth complications. Beyond establishing that Timothy was born drug-addicted and with fetal alcohol syndrome, the Commonwealth presented detailed evidence, over the defendant's repeated objections, pertaining to Timothy's developmental complications early in life. For example, his foster mother, who cared for Timothy for the first eighteen months of his life, described her difficulties feeding

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<sup>6</sup> As stated, evidence was introduced at trial that the defendant suffered from substance use disorder and other mental health issues. There also was evidence, from Joseph and the defendant's sister, concerning the defendant's pattern of binge drinking with her sister. In his closing argument, defense counsel reminded the jury of the evidence of the defendant's substance use disorder and suggested that she had been bingeing on drugs and alcohol on the evening that Timothy was fatally injured.

Timothy and his disturbed sleep patterns until he was six to eight weeks old. The foster mother and a caseworker from the department both testified that Timothy's condition improved under the foster mother's care, but that, when he was returned to the defendant's custody, he continued to require physical therapy and speech therapy.

The Commonwealth argues that the detailed evidence was relevant to show that the defendant could have grown frustrated with Timothy's deficits, and this in turn could have increased her resentment toward Timothy. We do not share the Commonwealth's view that this and other evidence of Timothy's developmental complications was admissible for this purpose. It is unclear how the foster mother's difficulties feeding Timothy, or his initially disturbed sleep while in the foster mother's care, would have increased the defendant's frustration with or resentment toward Timothy.

We agree with the defendant that this piled-on evidence instead served to invoke juror sympathy for Timothy and to besmirch the defendant's character by implying that Timothy's foster mother was a far better parent. Cf. Podkowka, 445 Mass. at 695-697. Because this evidence of Timothy's developmental complications while in the care of his foster mother was not probative of a material fact, see Crayton, 470 Mass. at 249, its introduction was error.

iv. The defendant's relationship with Timothy. The defendant challenges the introduction of extensive evidence pertaining to her interactions with Timothy well before the fatal incident. This evidence included, inter alia, the defendant's struggles to bond with Timothy, her indifference to his ongoing developmental needs, and her approach to parenting.

Timothy's foster mother testified, for example, that the defendant struggled to bond with Timothy while he remained in her care and after visitation had begun; the foster mother pointed to a six-month progress meeting with the department where Timothy was present and the defendant did not appear to interact much with Timothy. In addition, the foster mother testified that multiple one-hour visits between the Penos and Timothy ended early, with Timothy being returned to her crying. In a similar vein, multiple witnesses described the defendant's dismissive attitude toward Timothy as compared to her attitude toward her younger son Collin.

There was also evidence to suggest that the defendant was indifferent to Timothy's ongoing developmental needs once he was returned to the Penos' custody. The jury heard that the defendant terminated early intervention services for Timothy because she "didn't want people in [her] home anymore,"<sup>7</sup> and both

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<sup>7</sup> The same department worker also testified on cross-examination, however, that she had made three home visits after

the defendant and Joseph seemed to minimize Timothy's developmental challenges.

The defendant's approach to parenting also featured prominently throughout the trial. One conspicuous example was the defendant's draconian approach to "potty training" Timothy beginning shortly after his second birthday. If Timothy soiled himself, which he did apparently on a daily basis, the defendant would punish him by making him stand in a corner for twenty minutes. On one occasion the defendant forcibly grasped Timothy's arm and placed him on a toilet seat. At times the defendant handled Timothy roughly in other contexts as well. For instance, a department worker reported that she once saw the defendant place Timothy -- who was secured in a child safety car seat -- on the ground with "excessive force," and the defendant's sister described an instance where the defendant grabbed Timothy by the arm and pulled him onto a rug in front of the television.

The relevance of this evidence, which was probative of the defendant's relationship with Timothy, and thus of motive or

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Timothy was returned to the Penos' custody, and that everything went well at those visits, the children seemed "happy," and she had no issues or concerns about either of the children at that time. Moreover, an early intervention counsellor also explained that, after she started working with Collin, the defendant requested similar services for Timothy, and the counsellor provided both boys services once a week for approximately one year.

intent, is not in dispute. See, e.g., Dung Van Tran, 463 Mass. at 15. The question remains, however, whether the probative value of this evidence was outweighed by a risk of unfair prejudice. See Crayton, 470 Mass. at 249. This decision is left to the discretion of the trial judge and will be disturbed only where there is "a clear error of judgment . . . such that the decision falls outside the range of reasonable alternatives." Facella, 478 Mass. at 407.

"[T]rial judges must take care to avoid exposing the jury unnecessarily to inflammatory material that might inflame the jurors' emotions and possibly deprive the defendant of an impartial jury" (citation omitted). Commonwealth v. Carey, 463 Mass. 378, 390 (2012). As stated, see part 2.a, supra, in deciding whether challenged evidence was more prejudicial than probative, a number of factors may be relevant. See Commonwealth v. Santiago, 425 Mass. 491, 500 (1997), S.C., 427 Mass. 298 and 428 Mass. 39 (1998). To determine whether the evidence of the defendant's relationship with Timothy after he was returned to her custody was more prejudicial than probative, two of these factors are relevant: (1) whether the judge thoughtfully weighed the risks of unfair prejudice, and (2) whether she gave limiting instructions adequate to mitigate any additional prejudice from the introduction of this evidence.

v. Weighing risk of unfair prejudice. Only after "careful and reasoned" scrutiny of the contested evidence "will the judge truly appreciate the substance and purpose of the evidence, thus enabling him [or her] fairly to balance the submission's prejudicial impact against its probative value." See Carey, 463 Mass. at 390. A record of the thoughtful weighing of the risks of unfair prejudice, and the weight of the contested evidence, as well as steps the judge took to limit its quantity, may indicate a reasonable exercise of discretion. See Facella, 478 Mass. at 407.

As discussed, see note 5, supra, defense counsel often did not object to individual pieces of prior bad act testimony as it was introduced. Instead, counsel routinely objected to a particular witness's testimony in a blanket fashion: for example, counsel objected to the testimony of Timothy's foster mother, and of the department workers, in their entirety; these global objections were overruled. Because defense counsel did not consistently later raise more tailored objections to specific portions of testimony, the judge rarely was called upon to weigh the probative value and prejudicial effect of individual portions of prior bad act testimony.

This is not, however, a case where the judge failed to exercise any discretion by making no effort at all to scrutinize the contested evidence. Contrast Carey, 463 Mass. at 391-392

(error where judge did not review video recording of victim being strangled to death and simply accepted Commonwealth's description of recording); Commonwealth v. Manning, 47 Mass. App. Ct. 923, 923 (1999) (error where judge did not weigh evidence based on mistaken belief that judge was required to allow evidence to be introduced). Both before and during trial, for example, the judge expressed misgivings about the volume of prior bad act evidence the Commonwealth sought to introduce, the distance in time of the evidence from the crime at issue, and the basis of knowledge of some of the challenged evidence.

The judge also struck some testimony on the defendant's objection and excluded certain portions of the Commonwealth's proffered testimony. For example, the judge struck the testimony by a department worker regarding a visit between the defendant and Timothy where the defendant apparently put Timothy's snowsuit on too early before the end of the visit. The judge also excluded testimony pertaining to an incident in which the defendant left Timothy with Joseph in a vehicle for an extended period of time while she and Collin visited a relative.

At a particularly regrettable juncture of the trial, when Joseph's daughter referred to the defendant as "the uterus," the judge sua sponte intervened. She first excused the jury, and then warned the daughter that she would be held in contempt if she continued to testify in that manner, and that such testimony

would risk a mistrial. When the jury returned, the judge instructed them that they should disregard the testimony, and that they could consider evidence of a witness's bias when assessing that witness's credibility.

vi. Limiting instructions. We next consider whether the judge's use of limiting instructions was sufficient to mitigate any risk that the jury might misuse the prior bad act evidence. Despite his evident focus on excluding the prior bad act evidence, and his objections to its introduction, defense counsel did not request that contemporaneous limiting instructions be given regarding evidence of the defendant's relationship with Timothy as it was introduced at trial, and none was given. The judge instead instructed the jury as to the permissible uses of prior bad act evidence in her final charge.

To be sure, we have not said that a judge is required to give contemporaneous limiting instructions if a defendant does not request them. See Commonwealth v. Leonardi, 413 Mass. 757, 764 (1992). Where, however, the risk of unfair prejudice is apparent, as it was here, contemporaneous limiting instructions are much to be preferred; such instructions would have mitigated further any prejudicial effect of the prior bad act evidence. See Bryant, 482 Mass. at 737 (although contemporaneous limiting instructions were not requested, "[b]est practice would certainly have been to give a limiting instruction at the time



the evidence of the defendant's drug dealing history was admitted"); Commonwealth v. Linton, 456 Mass. 534, 551 n.12 (noting that limiting instructions should be given at time testimony is introduced in order to better mitigate risk of prejudice). "The timing of a limiting instruction is, however, ultimately in the discretion of the trial judge." Bryant, supra at 737-738.

Moreover, in her final charge, the judge properly instructed the jury that they were to consider the prior bad act evidence only for permitted purposes such as motive or intent. She also instructed them that "emotion or sympathy, passion or prejudice [had] no place in [their] deliberations." We presume that the jury followed these instructions. See Commonwealth v. Bois, 476 Mass. 15, 35-36, (2016).

In sum, evidence pertaining to the defendant's prior interactions with Timothy was clearly relevant to the question of motive. It is apparent that the judge understood the risks of this prior bad act evidence and took steps to exclude unduly prejudicial evidence. Although contemporaneous limiting instructions would have been a more effective way to mitigate the risk of prejudice, defense counsel did not request such instructions, and the judge gave clear and proper instructions regarding this type of evidence during her final charge. Ultimately, we discern no abuse of discretion in the judge's

conclusion that the probative value of this evidence was not outweighed by its prejudicial effect.

b. Improprieties in prosecutor's closing argument. The defendant also asserts error in the prosecutor's closing argument with respect to the prior bad act evidence, both with regard to the discussion of evidence that should not have been admitted, and the improper propensity arguments made concerning properly admitted evidence. The defendant argues that the prosecutor's statements compounded the prejudicial effect of the evidence introduced; the Commonwealth maintains that the prosecutor simply marshalled the evidence that had been introduced. We agree with the defendant that certain statements were improper.

The prosecutor began and ended her closing by commenting on Timothy's developmental complications stemming from the defendant's prenatal use of drugs and alcohol. Early in her argument, the prosecutor said:

"Because [Timothy] was drug dependent, he had tremors. He shook all the time. He couldn't sleep. He cried all the time. He was born with developmental delays, and one of the issues he had was he couldn't suck properly; and as a result, it would take hours and hours [to feed him]."

Later, the prosecutor argued that Timothy "came into this world suffering from crack," and "left the world the same way." At the end of the prosecutor's closing, defense counsel objected to these statements.

While trial counsel did not make this argument, the defendant also asserts on appeal that the prosecutor used the prior bad act evidence to invite the jury to engage in propensity-based reasoning. In particular, the defendant challenges the following statement by the prosecutor:

"Now, you may ask yourself what kind of mother would do this to her own child? The same mother who would abuse alcohol throughout her pregnancy, the same mother who would smoke crack throughout her pregnancy, the same mother who never sought any prenatal treatment during her pregnancy, the same mother who when giving birth to a child who's drug-dependent refuses to tell doctors what drug she had taken so they could treat her sick child who was suffering from withdrawal."

"A prosecutor is entitled to argue forcefully for the defendant's conviction"; "[e]nthusiastic rhetoric, strong advocacy, and excusable hyperbole are not grounds for reversal" (quotation and citations omitted). See Wilson, 427 Mass. at 350. At the same time, prosecutors have "a particular obligation" to argue in a manner that "inspires confidence that the verdict was reached based on the evidence rather than sympathy for the victim." See Santiago, 425 Mass. at 494.

We need not dwell at length on the Commonwealth's reference to the details of Timothy's developmental complications at and after birth. As discussed, this evidence should not have been

introduced; the references to the evidence at closing only served to compound the effect of that error.<sup>8</sup>

With respect to the improper propensity arguments, we also agree with the defendant that the prosecutor's suggestion that the defendant was the "kind of mother" who would harm her child was blatant propensity reasoning. The meaning of the prosecutor's statement was clear: because the defendant had used drugs and alcohol during her pregnancy and had not sought adequate prenatal care, she was more likely to have killed her child. This line of argument was out of bounds. See Commonwealth v. Howard, 469 Mass. 721, 744 (2014), S.C., 479 Mass. 52 (2018) ("using [evidence of] bad acts directly as propensity evidence [in closing argument] . . . is forbidden").

c. Prejudicial error. Having determined that there were several errors in the admission of the disputed evidence, as well as in aspects of the prosecutor's closing argument, we turn to consider whether the cumulative effect of the identified errors -- the introduction of evidence pertaining to prenatal

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<sup>8</sup> The prosecutor's statement that Timothy "came into this world suffering from crack," and "left the world the same way," was not improper, although "close to the line" of impropriety, and in context was essentially a dramatic flourish. See Commonwealth v. Vuthy Seng, 436 Mass. 537, 555-556, cert. denied, 537 U.S. 942 (2002). Evidence that Timothy had been exposed to drugs in utero, and that the defendant's use of drugs and alcohol was ongoing at the time of Timothy's death, was properly before the jury.

medical care and to Timothy's medical complications at and after birth, and the prosecutor's improper statements at closing -- warrants a new trial. While a close call, we conclude that it does not.

Where, as here, the errors concern the improper introduction of, and reference to, prior bad act evidence, a fundamental concern is that the jury impermissibly will conclude that the defendant had a propensity to commit the charged offense, and will render a guilty verdict on the basis of that conclusion without carefully scrutinizing all of the evidence before them. See Crayton, 470 Mass. at 250-251, 254. More specifically, a concern in these circumstances is that the jury unfairly would be inclined to believe Joseph's testimony implicating the defendant, and to disbelieve the defendant's contention that Joseph was responsible for Timothy's death. See Commonwealth v. Santos, 460 Mass. 128, 137-138 (2011).

A second and equally fundamental concern resulting from the piling on of impermissible prior bad act evidence, particularly involving a young child and a brutal crime, is that the erroneously admitted evidence, highlighted by the prosecutor's improper closing argument, could so inflame the jury's passion or sympathy that they would be unable to remain impartial. Thus, they might reach a verdict based on passion and a need to avenge the victim, rather than on having scrutinized the

evidence thoroughly and rationally to determine whether the Commonwealth has met its burden as to each element of the charged offense. See Commonwealth v. Rutherford, 476 Mass. 639, 645 (2017), quoting Bois, 476 Mass. at 34 ("Prosecutorial 'appeals to sympathy . . . obscure the clarity with which the jury would look at the evidence and encourage the jury to find guilt even if the evidence does not reach the level of proof beyond a reasonable doubt'").

Where the nature of the properly admitted evidence itself is highly inflammatory, the dangers from throwing improper propensity arguments on an already smoldering flame are exacerbated. See Carey, 463 Mass. at 391-392. Here, specifically, the risk is that the improperly admitted evidence, viewed, as the prosecutor urged, as propensity evidence, could arouse the jury's emotions such that they could reach a conviction even if the evidence actually were insufficient to determine beyond a reasonable doubt which of two individuals was responsible for Timothy's death. See id.

Where, as here, an objection was preserved and the question is not a constitutional one, "[t]he standard for determining whether a conviction must be reversed" is whether the improprieties at trial constituted prejudicial error. Santiago, 425 Mass. at 500. See Commonwealth v. Daggett, 416 Mass. 347, 352 n.5 (1993). "An error is nonprejudicial only" if we are

convinced "that the error did not influence the jury, or had but very slight effect." Commonwealth v. Vinnie, 428 Mass. 161, 163, cert. denied, 527 U.S. 1007 (1998), quoting Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994).

To decide whether the errors at trial amounted to prejudicial error, "we must determine, 'after pondering all that happened without stripping the erroneous action from the whole, [whether] the judgment was not substantially swayed by the error'" (citation omitted). See Anestal, 463 Mass. at 672. Numerous aspects of a proceeding may be relevant to a determination whether the errors were likely to have "substantially swayed" the jury. These include, inter alia, the strength of the Commonwealth's case, Commonwealth v. Clary, 388 Mass. 583, 590-591 (1983); the jury's ability to distinguish between permissible and excessive lines of argument in the attorneys' closings, Bradshaw, 385 Mass. at 277; whether "defense counsel seasonably objected," Santiago, 425 Mass. at 500; whether "the errors . . . went to the heart of the issues at trial or concerned collateral matters," id.; and whether the judge adequately mitigated the errors with proper limiting instructions, id.

Where otherwise strong evidence links a defendant to a crime, the impact on the jury from the introduction of improper evidence is significantly lessened. See Commonwealth v.

Gambora, 457 Mass. 715, 728-729 (2010) (due to strength of Commonwealth's case, improper evidence had but "slight effect" on jury's deliberations [citation omitted]).

Here, only two people -- the defendant and Joseph -- could have been responsible for Timothy's death. Some of the strongest evidence at trial supporting an inference that the defendant, and not Joseph, was responsible came from the defendant's own statements. Joseph's testimony that the defendant had been with Timothy at the time of his injuries, and then told Joseph that she was "going to do a lot of time," was particularly damning. To some extent the defendant later seemed to adopt this statement in speaking to police. When she was interviewed by police after Timothy had been taken to the hospital, the defendant, who smelled of alcohol and said that she had been drinking earlier,<sup>9</sup> told police that Joseph had been sleeping at the time of the incident. Thus, by her own words, in her first interview with police, the defendant implicated herself, and not her husband, in the fatal beating. The defendant also told police that Timothy cried a lot, that her other son did not cry as often, that Joseph was "always sleeping," and that she did not want any more children.

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<sup>9</sup> The defendant's blood alcohol level was tested at the hospital several hours later and found to be elevated at that point.



The jury also could have viewed the defendant's actions at the police station that night as additionally compelling. A police officer on duty testified that while the defendant was sitting in an interview room at the fire and rescue center, he noticed that her right hand was red and visibly swollen, and when she saw him looking at it resting on her leg, she immediately covered it with her left hand. Another officer testified that, while she was being interviewed, the defendant kept her left hand clasped around her right hand, and both hands held between her legs.<sup>10</sup> The jury also saw a video recording of the defendant in the interview room doing as the officer described. Joseph's hands showed no visible injuries. In light of testimony from the medical examiner that Timothy's injuries were consistent, at least in part, with being punched, the jury reasonably could have concluded that the defendant's hand was swollen from repeatedly punching him. Moreover, while in the ambulance on the way to the hospital after her collapse, the defendant recited aloud, "The answer to every question is I don't know."

The properly admitted evidence of the defendant's indifference or hostility toward Timothy, proffered through her

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<sup>10</sup> The judge properly denied the Commonwealth's motion to introduce a comment purportedly made by the defendant to one of the officers when he asked if he could take a photograph of her hand, "Fuck that. I want a lawyer."

own statements and actions toward him on the night of the incident, as well as from the time Timothy first was returned to the Penos' care, undoubtedly was powerful, and oft repeated throughout the trial. In other ways, many of the most compelling of the defendant's statements were introduced only in testimony by Joseph, whose behavior was far from that of a model father, who at best enabled the defendant's drug and alcohol use, and whose vagueness about the events of the evening, among other things, would have allowed the jury reasonably to question his credibility. It is particularly concerning in this regard that the prosecutor structured her entire closing, from the first word to the last, around exhorting the jury impermissibly to infer that the defendant was a failure at that most fundamental role -- motherhood -- and thus necessarily the killer. The jury were told, "Now, you may ask yourself what kind of mother would do this to her own child? The same mother who would abuse alcohol throughout her pregnancy, the same mother who would smoke crack throughout her pregnancy . . . ." See United States v. Richards, 719 F.3d 746, 766 (7th Cir. 2013) ("Although the prosecution did not misstate the evidence, it 'invited the jury to make an improper inference from the evidence, an action with a similar effect'" [citation omitted]).

Ultimately, however, we are persuaded that the jury were not so unduly swayed by the inadmissible evidence or the

prosecutor's repeated urging in closing that they, too, engage in an impermissible, propensity-based calculus so as to require a new trial. While they were generic, the judge's instructions accurately explained, *inter alia*, (1) the permissible uses of prior bad act evidence, (2) that closing arguments are not evidence, and (3) the jury's obligation not to decide the case based on emotion, passion, prejudice, or sympathy.

We presume that the jury were capable of following these instructions. See Bois, 476 Mass. at 35-36. The verdict suggests that they did just that and did not rely upon these prohibited propensity arguments. See Bradshaw, 385 Mass. at 277 ("The jury could be expected to take both arguments with a grain of salt"). The jury were instructed on murder in the first degree as to both the theory of deliberate premeditation and the theory of extreme atrocity or cruelty. They convicted the defendant on the theory of extreme atrocity or cruelty, as to which the evidence was ample,<sup>11</sup> and did not convict on the theory

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<sup>11</sup> "To convict a defendant of murder in the first degree on a theory of extreme atrocity or cruelty, the Commonwealth must prove that the defendant committed an unlawful killing with malice aforethought and with extreme atrocity or cruelty." See Commonwealth v. Szlachta, 463 Mass. 37, 45 (2012). "Malice is defined in these circumstances as an intent to cause death, to cause grievous bodily harm, or to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would follow" (citation omitted). Id. at 45-46. A jury can consider "a number of factors . . . in determining whether a murder was committed with extreme atrocity or cruelty,"

of deliberate premeditation. This also suggests that the jury carefully considered the evidence, without passion, and did not fully adopt the Commonwealth's narrative that the defendant plotted to kill Timothy out of deep-seated resentment. See Commonwealth v. McLaughlin, 431 Mass. 506, 510-512 (2000) (no prejudicial error where, although "prosecutor erred egregiously," verdicts "show[ed] that the jury were able to distinguish wheat from chaff").

Taken as a whole, we conclude that "neither the introduction of the challenged evidence," nor the prosecutor's exhortations that the evidence be used for improper propensity purposes, "so infused the trial with unfairness as to deny due process of law" (citation omitted). Estelle v. McGuire, 502 U.S. 62, 75 (1991).

d. Review under G. L. 278, § 33E. The defendant urges us to exercise our extraordinary power under G. L. 278, § 33E, either to grant her a new trial or to reduce the verdict to a lesser degree of guilt. In addition to her other arguments, the defendant contends that her struggles early in life and her history of "mental illness, hospitalizations, and lifelong

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including "indifference to or taking pleasure in the victim's suffering, consciousness and degree of suffering of the victim, extent of physical injuries, number of blows, manner and force with which delivered, instrument employed, and disproportion between the means needed to cause death and those employed" (citation omitted). See id. at 47-48.

addiction" make a verdict of murder in the first degree not consonant with justice.

"Our duty under G. L. c. 278, § 33E, is to consider broadly the whole case on the law and the facts to determine whether the verdict is 'consonant with justice.'" Commonwealth v. Imbert, 479 Mass. 575, 587 (2018), quoting Commonwealth v. Gould, 380 Mass. 672, 680 (1980). "If upon our examination of the facts, we should, in our discretion, be of [the] opinion that there was a miscarriage of justice in convicting the defendant of murder in the first degree, and that a verdict of guilty of murder in the second degree or of manslaughter would have been more consonant with justice, it is now our power and duty so to declare." Commonwealth v. Brown, 477 Mass. 805, 823-824 (2017), cert. denied, 139 S. Ct. 54 (2018), quoting Commonwealth v. Baker, 346 Mass. 107, 109 (1963).

Even so, "our power under [G. L. c. 278, § 33E,] is to be used with restraint," and "[w]e do not sit as a second jury to pass anew on the question of the defendant's guilt." Commonwealth v. Schnopps, 390 Mass. 722, 726 (1984), quoting Commonwealth v. Reddick, 372 Mass. 460, 464 (1977). The properly admitted evidence at trial was sufficient to sustain the verdict, and the errors were not so egregious that they called into question the fundamental fairness of the trial.

After carefully reviewing the entire record, we also are not convinced that a reduction in the verdict would be appropriate.

The defendant also asks us to take account of more than 1,000 pages of additional documents, consisting largely of mental health records, dating from approximately 1986 through 2012, that were submitted with her appeal but were not before the jury. The documents appear to describe the defendant's struggles early in life, her serious mental health illnesses, and a long-standing substance use disorder. While these documents well could have been relevant to her capacity to commit the offense, or to a defense of diminished capacity, they were not part of the record of the trial that is the subject of our review. As the trial judge commented on at least one occasion, defense counsel made a clear strategic decision to pursue a defense that her husband, and not the defendant, was the one responsible for Timothy's death. The proper method by which to seek consideration of these records, or to challenge trial counsel's decision not to pursue what might have been a powerful defense, is through a motion for a new trial in the Superior Court. Accordingly, we are not persuaded that a reduction in the verdict would serve the interests of justice.

Judgment affirmed.