SJC-12489

COMMONWEALTH vs. STEVEN WEST.

Worcester. March 5, 2021. - July 2, 2021.

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

Homicide. Malice. Practice, Criminal, Question by jury, Instructions to jury, Argument by prosecutor, Capital case. Evidence, Prior misconduct, Intent, State of mind, Accident. Intent.

Indictment found and returned in the Superior Court Department on December 20, 2012.

The case was tried before Janet Kenton-Walker, J.

Andrew S. Crouch for the defendant.
Michelle R. King, Assistant District Attorney, for the Commonwealth.

WENDLANDT, J. The defendant was convicted of murder in the first degree on a theory of extreme atrocity or cruelty, for killing his sister-in-law, Alyssa Haden. At trial, the Commonwealth proceeded on a theory that the defendant raped the victim, crushing her with his body weight until she died of

asphyxia. In his defense, the defendant maintained that he and the victim, a petite woman who weighed less than one-third of his weight, were having an affair, and that her death following consensual sexual intercourse was an accident.

On appeal, the defendant argues that there was insufficient evidence to support his conviction. He also contends that the judge did not adequately address a jury question, challenges some of the judge's evidentiary rulings, and argues that, during closing argument, the prosecutor misstated certain evidence. In addition, the defendant asserts that a reduction in the verdict would be more consonant with justice, and asks us to exercise our authority under G. L. c. 278, § 33E, to reduce the degree of guilt. We affirm the conviction and discern no reason to grant relief under G. L. c. 278, § 33E.

1. Background. a. Facts. We recite the evidence in the light most favorable to the Commonwealth, reserving some details for later discussion. See Commonwealth v. Combs, 480 Mass. 55, 57 (2018).

In 2010, the defendant, then nineteen, met the then eighteen year old victim, who was approximately four feet, eleven inches tall, and weighed 125 pounds, and her twin sister, through an online "chat room."[1] The defendant, who weighed over

[1] "A 'chat room' is a public or private Internet site that allows people to send 'real time' typed messages to others who

400 pounds, and the victim's sister commenced a romantic relationship. After eight months of conversing over the Internet and by telephone, the defendant moved from Indiana to Massachusetts to be with her. Within a year, they moved into an apartment together, got married, and had a son. At trial, the sister testified that when she and the defendant engaged in sexual intercourse, he did not put his weight on her.

Early in 2012, the victim moved in with the couple in their apartment in Spencer in order to care for their son and to assist with rental payments. In February of that year, the victim reported to police that items in her room had been vandalized and that her debit card was missing. The vandalized items (among them, a bikini bottom, a diploma, a doll, a Bible, and two calendars) had been defaced with vulgar, degrading comments, some specifically naming the victim, and two articles of clothing had had holes burned through them.

At trial, the defendant suggested that a former boyfriend of the victim had vandalized the items,[2] but a handwriting expert testified that the handwriting on the vandalized items was consistent with the defendant's handwriting and inconsistent

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are simultaneously connected to that Internet site." United States v. Tank, 200 F.3d 627, 629 n.2 (9th Cir. 2000).

[2] Two of the writings were signed using the nickname of the victim's former boyfriend.

with the former boyfriend's handwriting. An investigation revealed that the missing debit card had been used for purchases at a nearby store and also to make calls to "900 numbers."[3] The defendant later told his wife that he had used the card; he claimed that he had mistaken the name on the card and that he had paid the victim all of the money spent. The victim told police that the money had been repaid and that she did not want the defendant criminally charged for taking or using her card.

The victim moved out of the apartment in March or April of 2012. She complained to her sister and to one of her friends about the defendant's personal hygiene, telling her sister that the defendant was heavy and smelled, and remarking to her friend that the defendant was "disgusting." The victim also told the friend that she did not like the defendant, and mocked the defendant's weight, referring to him as "Lardo."

In September of 2012, the victim moved back in with her sister and the defendant. By then, the victim was dating a new boyfriend, and was saving money so that she and her boyfriend could move into their own apartment.

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[3] "Designation of a 900 area code reflects that information or services (such as sports scores, weather information, computer technical support, 'date lines,' or psychic readings) are being transferred over the carrier's lines. . . . When the end-consumer dials a 900 number, he or she is charged a fee by the information vendor." AT&T Communications of Md., Inc. v. Comptroller of Treasury, 405 Md. 83, 87 (2008).

On October 9, 2012, the victim's sister, who was nearly nine months pregnant, was spending the night at a nearby hospital. Late that evening, the victim and her boyfriend were exchanging text messages. At some point, the victim sent a message saying that she was afraid; there was no testimony explaining the reason for her fear.

On the morning of October 10, 2012, the victim's mother was concerned that the victim was not responding to calls to her cellular telephone, and asked the victim's brother to check on her. He found the victim's lifeless body lying on her bed, partially covered by blankets and a body pillow. The victim's pajamas were askew, and her pants had a hole in the crotch. There also was a zig-zag pattern on her back, which matched the pattern of the mattress, and a body pillow on the floor that had a red-brown stain. Although the victim's body was positioned on the back, face up, lividity was present on the forehead, where blood evidently had pooled after the victim's death. This condition indicated that the body likely had been positioned face down for a period of time after the victim's death, sufficiently long to allow blood to be pulled to the forehead after her heart stopped beating. The lividity also suggested that the victim had been turned over onto her back, to the position in which her body was found, sometime after her death.

An autopsy revealed that the victim died of "asphyxia due to compression of [her] face, neck, and chest." The compression was the result of significant force, such as that which could have been provided by the defendant's body weight on top of the victim. The medical examiner testified[4] that, if there were a "complete" loss of blood flow to the brain, through compression of the chest, face, and neck, the victim would have been conscious for at least thirty seconds, possibly longer, and death from "compression asphyxia" would have taken place five to ten minutes after the victim lost consciousness. If the loss of blood flow was not complete, so that some blood, and thus oxygen, were reaching the brain, these times would have been longer. On cross-examination, the medical examiner clarified that if the compression had been applied "consistently and completely," loss of consciousness would have occurred in under a minute, and the victim would have ceased moving at that time, although death would have occurred from five to ten minutes thereafter.[5]

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[4] Due to scheduling issues and the experts' availability, the parties agreed that the defendant's medical expert would testify out of order, during the Commonwealth's case. That testimony was followed immediately by the testimony of the medical examiner.

[5] The defendant's expert testified, similarly to the medical examiner, that the cause of death was asphyxia "due to compression of her torso and her face." The expert opined that, if there were a complete loss of blood flow to the brain,

Sperm cells collected from the victim's vaginal and external genital area matched the defendant's deoxyribonucleic acid profile. Forensic examination revealed that the defendant's laptop computer, which he shared with the victim's sister (his wife), had been used to conduct Internet searches that included the victim's name, the word "beastiality," and "I wanna fuck my sister-in-law."

Officers learned that, on the morning the victim's body was discovered, the defendant had left his son with a family friend; the friend said that the defendant was acting "strangely." Police interviewed the defendant that afternoon. He denied any involvement in the victim's death and gave conflicting statements to police in response to their questions. The officers asked the defendant whether he was having an affair with the victim and suggested that her death might have been an accident. The defendant denied both assertions. The defendant was arrested and charged with misleading a police officer.

Following his arrest, the defendant continued to make conflicting statements to the police, his wife, his mother-in-

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through "a very complete compression of the torso," and an "obstruction of the nose and mouth," the individual would be without oxygen "immediately," would be unable to move the chest wall, and "would become unconscious in maybe two to three minutes." Death would occur approximately five to ten minutes after the loss of consciousness, "depending on the completeness of the compression."

law, and his downstairs neighbor. During one jail visit, the defendant told his wife that gang members from Indiana had killed the victim in apparent retaliation for a conflict that they had with him. Weeks later, the defendant told police that he had fabricated this account, and then said that a man he knew named "Jacob Peterson" had killed the victim. By the end of that interview, however, the defendant had agreed that this statement also was fabricated.

The defendant then told the officers that he and the victim had been having a months-long affair. He explained that, on the evening of the victim's death, the two had been having sexual intercourse. He was positioned behind the victim, whose face was in a pillow, and whose hands were tied, when the victim suddenly went limp. He said that he disposed of the victim's cellular telephone. State police troopers searched for the telephone, but it was never found.

Thereafter, the defendant's explanations concerning what had happened to the victim continued to change. He wrote a letter to his mother-in-law stating that he and the victim were having an affair and also claiming that the victim drugged and raped him; he asserted that the victim blackmailed him into beginning, and continuing, the affair. The defendant also wrote to his former downstairs neighbor, saying that the victim had raped him and that, on the night of the victim's death, he had

been hit on the head by a third party, regained consciousness, and awakened to find the victim dead.

b. Trial proceedings. The defendant was indicted on one count of murder in the first degree. At trial, the Commonwealth proceeded on theories of deliberate premeditation, extreme atrocity or cruelty, and felony-murder. The theory of the defense was that the defendant and the victim had been having a consensual affair. The defendant maintained that the victim's death was an accident, following sexual intercourse during which the victim voluntarily allowed herself to be tied up. The defendant moved for a required finding of not guilty at the close of the Commonwealth's case and at the end of all the evidence. The former motion was allowed with respect to the offense of murder in the first degree on a theory of felony-murder and denied on all of the other charges, and the latter was denied.

The case went to the jury on murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty; murder in the second degree based on malice and felony-murder; and involuntary manslaughter. The judge instructed the jury that in order to convict the defendant of murder in the first degree, the Commonwealth had to prove beyond a reasonable

doubt that the victim's death was not an accident.[6] Following a question concerning the jury instructions, discussed infra, the jury returned a verdict of guilty of murder in the first degree on a theory of extreme atrocity or cruelty.

2. Discussion. a. Sufficiency of the evidence. The defendant contends that there was insufficient evidence to support a finding of extreme atrocity or cruelty, and thus that his motions for a required finding of not guilty should have been allowed. In reviewing the denial of a motion for a required finding, the court must determine "whether the evidence, in its light most favorable to the Commonwealth, notwithstanding the contrary evidence presented by the defendant, is sufficient . . . to permit the jury to infer the existence of the essential elements of the crime charged." Commonwealth v. O'Laughlin, 446 Mass. 188, 198 (2006), quoting Commonwealth v. Latimore, 378 Mass. 671, 676–677 (1979). "Because the defendant moved for required findings at the close of the Commonwealth's case and again at the close of all the evidence, '[w]e consider the state of the evidence at the close of the Commonwealth's case to determine whether the defendant's motion should have been granted at that time. We also consider

[6] The judge also informed the jury that her instructions on accident were applicable to the offense of murder in the second degree based on malice, as well as involuntary manslaughter.

the state of the evidence at the close of all the evidence, to determine whether the Commonwealth's position as to proof deteriorated after it closed its case.'" O'Laughlin, supra, quoting Commonwealth v. Sheline, 391 Mass. 279, 283 (1984). To meet its burden, the Commonwealth may rely entirely upon circumstantial evidence. See Commonwealth v. Lao, 443 Mass. 770, 779 (2005), S.C., 450 Mass. 215 (2007) and 460 Mass. 12 (2011). Proof of the essential elements of the crime may be based on reasonable inferences drawn from the evidence, see Combs, 480 Mass. at 61-62, and the inferences a jury may draw "need only be reasonable and possible and need not be necessary or inescapable," Commonwealth v. Casale, 381 Mass. 167, 173 (1980).

At the time of the defendant's trial, to convict a defendant of murder in the first degree on a theory of extreme atrocity or cruelty, the jury had to find beyond a reasonable doubt that the defendant committed an unlawful killing with malice aforethought and the presence of at least one of the so-called Cunneen factors indicating extreme atrocity or cruelty. See Commonwealth v. Williams, 475 Mass. 705, 712-713 (2016); Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983).[7] The

[7] The Cunneen factors include "indifference to or taking pleasure in the victim's suffering, consciousness and degree of suffering of the victim, extent of physical injuries, number of blows, manner and force with which delivered, instrument

defendant challenges the sufficiency of the evidence as to malice and the presence of the factors set forth in Cunneen.[8]

i. Malice. Malice is "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." Commonwealth v. Sokphann Chhim, 447 Mass. 370, 377 (2006). The evidence before the jury, viewed in the light most favorable to the Commonwealth, was that the defendant raped the victim and, while doing so, intentionally placed his heavy weight on top of her so as to smother her. The victim lost consciousness after at least thirty seconds, ceased moving, and died five to ten minutes later, all while the defendant continued to compress her. Contrary to the defendant's assertions, this evidence would have permitted the jury to find malice beyond a reasonable doubt, that is, that the defendant

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employed, and disproportion between the means needed to cause death and those employed." Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983).

[8] In Commonwealth v. Castillo, 485 Mass. 852, 865-866 (2020), the court reformulated application of the Cunneen factors to focus on the intentional acts of the defendant, and to preclude a conviction on a theory of extreme atrocity or cruelty "based only on the degree of a victim's suffering, without considering whether the defendant's conduct was extreme in either its brutality or its cruelty." This reformulation, however, was prospective only, and is inapplicable here. See id. at 867.

intended to act knowing (as a reasonable person would have known) that the circumstances created a plain and strong likelihood that death would follow. See Commonwealth v. Forde, 392 Mass. 453, 456 (1984) ("An inference of malice arises from the intentional doing of an act likely to cause death or grievous harm").

Although the defendant argued that the victim's death was an accident during a consensual sexual encounter, the jury heard evidence that would have allowed them to conclude that the encounter was not voluntary, that the defendant raped the victim, and that her death was intentional. The victim's defaced and burned personal property would have allowed the jury to infer that the defendant harbored rage toward the victim. The jury also could have found that the defendant's Internet searches suggested an obsession with the victim that was sexual in nature. Compare Commonwealth v. Bregoli, 431 Mass. 265, 269-270 (2000) (evidence of defendant's obsessive and increasingly hostile attitude toward victim supported inference of malice). Moreover, the evidence before the jury concerning the victim's attitude toward the defendant included her repeated comments about his weight and body odor, and her distaste for him, including her references to him as "Lardo" and "a lazy sack of shit." In response to a question whether the victim had wanted to have a sexual relationship with the defendant, one of the

victim's friends responded, "Not even close." The jury heard no evidence of statements or actions by the victim indicating that she found the defendant attractive or was interested in having a sexual relationship with him.

The jury also reasonably could have concluded from the evidence before them that the defendant purposefully pressed his weight of more than 400 pounds against the upper half of the victim's body, knowing that doing so would create a plain and strong likelihood that death would follow, and remained in that position for five to ten minutes after the victim had stopped moving. The jury heard from the medical examiner that the defendant applied a "significant amount of force" to the victim, and that the defendant would have had to compress the victim for five to ten minutes, continuing even after she lost consciousness and stopped moving, in order for the complete lack of blood flow and oxygen to result in her death.

The defendant's wife (the victim's twin sister) testified that when she and the defendant were engaged in sexual intercourse, he did not to put his weight on her and, indeed, that she often was positioned "on top" or on her "hands and knees," rather than under him, due to his weight. In other words, the defendant likely knew that putting his body weight on his wife during sexual intercourse was dangerous. The jury reasonably could have inferred that the defendant's position on

top of the victim was no accident and that, as he put his full weight on the victim's upper body for such an extended period, he would have known that the victim's chest and neck would be crushed and she would die from being smothered. See Commonwealth v. Perry, 432 Mass. 214, 222 (2000); Forde, 392 Mass. at 456 (evidence that victim died because of manual strangulation lasting minimum of one to two minutes was sufficient to raise inference of malice). Compare Commonwealth v. Vizcarrondo, 427 Mass. 392, 397-398 (1998), S.C., 431 Mass. 360 (2000) and 447 Mass. 1017 (2006) (evidence may be sufficient to permit inference of malice, even if malice is not "ineluctably inferred").

Taken together, the evidence supported a finding beyond a reasonable doubt that the defendant acted with the requisite malice.

ii. Cunneen factors. Turning to the Cunneen factors, we conclude that the evidence of the victim's "consciousness and degree of suffering" was sufficient to support the jury's verdict that the defendant killed the victim with extreme atrocity or cruelty. See Cunneen, 389 Mass. at 227. In similar circumstances, where juries have heard evidence of access to air being cut off for an extended period, we have concluded that the evidence supported such a verdict. See, e.g., Williams, 475 Mass. at 713-714 (testimony that it would have taken eight to

ten seconds of sustained strangulation before victim lost consciousness, and several more minutes for strangulation to cause death); Commonwealth v. Mejia, 461 Mass. 384, 393 (2012) (one victim's strangulation and another victim's asphyxiation caused both victims to endure conscious suffering for at least three minutes); Commonwealth v. Smith, 460 Mass. 318, 324 (2011) (evidence that victim would have been conscious for thirty to sixty seconds while being strangled); Commonwealth v. Linton, 456 Mass. 534, 546-547 (2010), S.C., 483 Mass. 227 (2019) (ninety seconds of constant or near-constant pressure on the victim's airway before victim lost consciousness and ceased breathing). See also Commonwealth v. Witkowski, 487 Mass. 675, 683 (2021) (victim would have been conscious and "felt fear and terror" for sixty seconds as she was being strangled).

Contrary to the defendant's argument, the fact that the defendant used his body weight alone, rather than his hands or another instrument to asphyxiate the victim, did not preclude the jury from resting their finding of extreme atrocity or cruelty on the slow and painful nature of the killing. See Linton, 456 Mass. at 547 ("A murder committed through a method of killing that is by its nature slow and painful need not be shown slower or more painful than the average murder employing that method to be found extremely atrocious or cruel").

Accordingly, the judge did not err in denying the defendant's motions for required findings.

b. Supplemental jury instruction. After one and one-half days of deliberating, the jury sent a note to the judge asking, "Is causing and/or allowing someone's death to take place synonymous with killing?" The judge consulted with counsel and responded with a written note referring the jury back to her prior instructions on murder and manslaughter, highlighting her instructions on accident, and emphasizing, "In order to prove any of these crimes the Commonwealth must prove beyond a reasonable doubt that [the defendant] caused the death of [the victim]" (emphasis in original).[9] The defendant objected to the instruction insofar as it did not specifically instruct that "allowing" a death was not a crime.

Less than two hours later, the jury returned a verdict of guilty of murder in the first degree on a theory of extreme atrocity or cruelty. On appeal, the defendant contends that the judge's response was prejudicial error because it permitted the

[9] The full instruction explained, "Please refer to my instructions on murder in the First Degree (both theories) & murder in the Second Degree -- the first theory, as well as Involuntary Manslaughter. In order to prove any of these crimes the Commonwealth must prove beyond a reasonable doubt that [the defendant] caused the death of [the victim]. Also, refer to all of my instructions regarding accident (pp. 21-22), as those instructions are fully applicable here. This does not apply to murder in the Second Degree under the theory of felony-murder."

jury to find the defendant guilty of murder in the first degree simply for allowing the victim's death and not calling for assistance once the victim lost consciousness.

The response to a jury question is within the sound discretion of the trial judge. See Commonwealth v. Stokes, 440 Mass. 741, 750 (2004); Commonwealth v. Watkins, 425 Mass. 830, 840 (1997), S.C., 460 Mass. 311 (2011) ("The necessity, scope, and character of a judge's supplemental jury instructions are within his or her discretion"). "The proper response to a jury question must remain within the discretion of the trial judge, who has observed the evidence and the jury firsthand and can tailor supplemental instructions accordingly." Commonwealth v. Waite, 422 Mass. 792, 807 n.11 (1996). We evaluate the adequacy of a supplemental instruction in the context of the entire charge. See Commonwealth v. Santiago, 485 Mass. 416, 429 (2020). Because the defendant objected to the supplemental instruction, we review for prejudicial error. See Commonwealth v. Kelly, 470 Mass. 682, 687 (2015).

Here, when viewed along with the judge's earlier instructions on the burden of proof, accident, and murder in the first degree, there was no abuse of discretion in the judge's supplemental response. See Commonwealth v. Andrade, 481 Mass. 139, 144-145 (2018). The response addressed any potential confusion between "causing" and "allowing" in the jury's note;

it emphasized that the Commonwealth had to prove beyond a reasonable doubt that the defendant "caused" the victim's death. See Commonwealth v. Santiago, 425 Mass. 491, 503-504 (1997), S.C., 427 Mass. 298 and 428 Mass. 39, cert. denied, 525 U.S. 1003 (1998). In conjunction with the judge's prior instructions, to which she referred, it also was made clear that the jury had to find that the defendant caused the victim's death, not that the defendant merely allowed it to happen. The instructions on extreme atrocity or cruelty, for example, explained that the Commonwealth had to prove beyond a reasonable doubt that the defendant caused the victim's death, and that the defendant acted with the requisite intent. Moreover, the instruction on accident provided that "an accident is an unintentional event occurring through inadvertence, mistake, or negligence. If an act is accidental, it is not a crime." We presume that the jury followed the judge's instructions. See Commonwealth v. Silva, 482 Mass. 275, 290 (2019). Because the supplemental instruction appropriately responded to the jury's question by clarifying that the defendant had to have caused the victim's death, there was no error. See Commonwealth v. Cannon, 449 Mass. 462, 472 (2007).

c. Prior bad acts. The defendant contends that the judge erred in allowing the introduction of prior bad act evidence. The challenged evidence included an incident of vandalism, in

which the victim's personal property was defaced and her debit card went missing, as well as a portion of the defendant's Internet search history.[10] Before trial, the Commonwealth moved in limine to admit this and other evidence on the ground that it was relevant to the defendant's intent, state of mind, and pattern of conduct. The judge allowed the motion with respect to this evidence, over the defendant's opposition. At the hearing on the motion, the judge stated that the evidence of vandalism was relevant and material, and that its probative value outweighed its risk of prejudice. The judge further stated that the Internet searches were relevant and material.[11]

Evidence of a defendant's prior bad acts is not admissible to demonstrate the defendant's bad character or propensity to commit the crime charged. See Commonwealth v. Almeida, 479 Mass. 562, 568 (2018); Mass G. Evid. § 404(b)(1) (2021). Such

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[10] Approximately eight months prior to the victim's death, she reported to police that there had been a break-in at the apartment she shared with her sister and the defendant. Several items of the victim's personal property had been defaced with vulgar, demeaning comments directed at the victim. Among the vandalized items were scrawled markings such as, "BIG CUNT," "FUCK ALYSSA," "FAKE Pussy," and "ALY = CUNT." The victim also told police that her debit card was missing. The defendant's Internet searches, which took place sometime after July 28, 2012, included the victim's name, the victim's name and the word "beastiality," and "I wanna fuck my sister in-law."

[11] The judge denied the motion with respect to certain additional evidence, as more prejudicial than probative, and reserved rulings on some other evidence.

evidence may be admissible, however, for other purposes, such as to establish motive, opportunity, or intent. See Commonwealth v. Crayton, 470 Mass. 228, 249 (2014); Mass. G. Evid. § 404(b)(2). Even where relevant for a permissible purpose, the evidence is admissible only if its probative value is not outweighed by its prejudicial effect. See Commonwealth v. Peno, 485 Mass. 378, 385-386 (2020). In order for evidence to be sufficiently probative, there must be a "logical relationship" between the prior bad act and the crime charged. See Commonwealth v. Facella, 478 Mass. 393, 405 (2017).

Evidentiary rulings determining relevance, probative value, and prejudice are left to the sound discretion of the trial judge. See Commonwealth v. Spencer, 465 Mass. 32, 48 (2013). We will affirm a judge's decision to allow the admission of prior bad act evidence unless 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." Facella, 478 Mass. at 407. Because the defendant objected, we review for prejudicial error. See Peno, 485 Mass. at 387 n.5; Commonwealth v. Cruz, 445 Mass. 589, 591 (2005).

Here, the evidence was relevant for a permissible purpose, to show the defendant's intent and state of mind toward the victim. A central issue at trial was whether the defendant and

the victim were engaged in a consensual sexual relationship. Evidence that the defendant vandalized the victim's personal property, and covered it with threatening comments, supported the Commonwealth's contention that the defendant harbored animosity or rage toward the victim.[12] See Almeida, 479 Mass. at 568. Similarly, the defendant's Internet searches also supported the Commonwealth's theory that this animosity was, or had become, sexual in nature. See Commonwealth v. Vera, 88 Mass. App. Ct. 313, 321 (2015) (relevance of Internet searches for certain pornography was not outweighed by prejudicial effect to defendant of jury learning of these searches, where defendant was charged with sex offenses). Evidence of a hostile

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[12] The defendant argues that the evidence of vandalism was not sufficiently connected to the defendant to be admissible; this argument is unavailing. The Commonwealth's handwriting expert pointed to a number of similarities between the defendant's handwriting and the handwriting on the vandalized items, including discussing the manner in which certain letters were formed. The expert's description of specific upper and lower case letters showed that the style in which they were written was distinct from the way in which the victim's former boyfriend wrote those letters. The jury reasonably could have concluded from this testimony that the defendant vandalized the victim's property; in any event, it was for the jury to decide the weight and credibility of this testimony. See Commonwealth v. Teixeira, 486 Mass. 617, 627-629 (2021) ("Before evidence of a prior bad act may be introduced against a defendant, 'the Commonwealth must satisfy the judge that the "jury . . . reasonably [could] conclude that the act occurred and that the defendant was the actor"'" [citation omitted]); Mass. G. Evid. § 104(b) (2021). The defendant also was connected to the evidence of vandalism by virtue of having acknowledged taking the victim's missing debit card, which the victim reported missing at the same time she reported the defaced property.

relationship "that tends to explain the purpose of a crime is relevant to the issue of malice or intent," regardless of whether that hostility was homicidal. See Commonwealth v. Carlson, 448 Mass. 501, 508-509 (2007).

In addition, the evidence tended to negate the defendant's contention that the sexual intercourse was consensual and that the victim's death was accidental. This was so even though the vandalism took place at least eight months prior to the suffocation, and the timing of the Internet searches could not be defined more clearly than that they had occurred after July 28, 2012, two and one-half months before the killing. Cf. Facella, 478 Mass. at 405 (conduct from thirteen to twenty-four years prior to charged offense was admissible to show that defendant's capacity to restrain himself from violence was not meaningfully altered by medication he took seven to eight years before charged offense); Commonwealth v. Helfant, 398 Mass. 214, 228 (1986) (conduct from three years prior to offense was admissible due to "distinctiveness and near-identicality" of prior conduct and charged conduct).

"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 . . . ;

(2) whether the judge mitigated the prejudicial effect through proper limiting instructions . . . ; (3) whether the challenged evidence was cumulative of other admissible evidence, thereby reducing the risk of any additional prejudicial effect . . . ; and (4) whether the challenged evidence was so similar to the charged offense as to increase the risk of propensity reasoning by the jury." Peno, 485 Mass. at 386.

Here, the judge appeared carefully to consider the Commonwealth's motion to introduce prior bad act evidence. After two hearings, the judge allowed the motion with respect to three categories of prior bad act evidence, and denied it as to others. This is not a case "where the judge failed to exercise any discretion by making no effort at all to scrutinize the contested evidence." Peno, 485 Mass. at 394-395. Contrast Commonwealth v. Carey, 463 Mass. 378, 391-392 (2012) (error where judge did not personally review video recording of victim being strangled and instead 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 judge's mistaken belief that judge was required to allow introduction of that evidence). In addition, the judge provided limiting instructions at multiple points throughout the trial, including when evidence of the vandalism incident was introduced, when the Commonwealth's expert

testified that the handwriting on the vandalized items matched the defendant's handwriting, and in the final charge. See Almeida, 479 Mass. at 569; Commonwealth v. Forte, 469 Mass. 469, 480-481 (2014).

Furthermore, the victim's comments about the defendant's weight, poor hygiene, and laziness supported the Commonwealth's view that the victim and the defendant were unlikely to have engaged in a consensual sexual relationship. The challenged evidence thus was cumulative of other properly admitted evidence, thereby reducing the risk of added prejudice. Compare Commonwealth v. Wilson, 427 Mass. 336, 348 (1998). Moreover, the challenged evidence was not so similar to the charged offense so as to increase the risk of impermissible propensity reasoning. See Peno, 485 Mass. at 389-390.

Notwithstanding the defendant's contention, the prior bad act evidence did not overwhelm the case. Compare Commonwealth v. Dwyer, 448 Mass. 122, 128-129 (2006) (prejudicial error where jury heard more about uncharged crimes than charged offenses). The trial featured extensive testimony about the discovery of the victim's body and its appearance; medical testimony regarding the victim's cause of death; forensic testimony concerning the crime scene; testimony from the victim's family and friends about the victim's relationship with the defendant; testimony about the victim's sex life; and more than six hours

of recorded statements of the defendant, in which he gave varying accounts of the events that evening. Accordingly, the judge did not abuse her discretion in allowing admission of the prior bad act evidence.

d. Prosecutor's closing argument. The defendant argues that the prosecutor misstated the evidence during his closing argument. The prosecutor stated:

> "You heard [the victim's boyfriend]. He took the stand, and he had to talk about his sex life. He tells you they had sex, and she was tied up a couple of times at his suggestion. And she was always on her back, never face down.
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> "Now, why, why is the fact she is face down important? Why does that matter to the defendant's lie? Because he knows what happened. He knows. He put a pillow over her face. He has to explain why the pillow is there. And so, suddenly, they are having sex face down from behind, and it's rough.
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> "What do we know about [the victim]? She never had sex that particular way; and she never did it in her apartment, certainly not when her nephew is down the hallway. That evidence is a distraction; nothing more, nothing less, just an attempt to get you to look away from the actual evidence."

The defendant argues that the statement that the victim "never" had sexual intercourse in the way the prosecutor described was error.

A prosecutor's closing argument must be limited to the facts in evidence and the fair inferences to be drawn therefrom. See Commonwealth v. Rutherford, 476 Mass. 639, 643 (2017). "Such inferences need only be reasonable and possible based on

the evidence before the jury." Commonwealth v. Parker, 481 Mass. 69, 74 (2018). A prosecutor may not misstate the evidence. See id. Because the defendant did not object to the challenged statement at trial, we review for a substantial likelihood of a miscarriage of justice. See Commonwealth v. Walters, 485 Mass. 271, 292 (2020).

The challenged statement was consistent with the evidence before the jury. In context, see Commonwealth v. Whitman, 453 Mass. 331, 347 (2009) (prosecutor's remarks must be read in context), it appears that the prosecutor's statement that the victim "never had sex that particular way" referred to sexual intercourse while she was tied and face down. The victim's boyfriend testified that sometimes he and the victim engaged in sexual intercourse during which the victim would be positioned on her back with her hands tied. The boyfriend also testified that he and the victim would not engage in this particular type of sexual interaction when they were at the victim's apartment and that, whenever they did engage in sexual intercourse while the boyfriend was visiting, they would keep quiet so as not to wake the defendant's young son. No testimony suggested that the victim had engaged in sexual intercourse while tied and face down.

Even if the prosecutor's statement crossed a line of hyperbole, there was no substantial likelihood of a miscarriage

of justice. Whether a misstatement of the evidence in a prosecutor's closing argument results in reversible error depends on consideration of four factors: "(1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusions" (citation omitted). Commonwealth v. Reyes, 483 Mass. 65, 77 (2019).

Here, the defendant did not object. At the beginning of trial and in her final charge, the judge instructed the jury that the attorneys' arguments were not evidence. The possible exaggeration by the prosecutor -- that the victim never had sexual intercourse in the manner the defendant claimed -- in the context of accurately describing the victim's sexual relationship with her boyfriend likely would not have influenced the jury's thinking. See Parker, 481 Mass. at 75; Commonwealth v. Marquetty, 416 Mass. 445, 451 (1991) (jury are assumed to be capable of sorting out hyperbole and speculation). Accordingly, there was no substantial likelihood of a miscarriage of justice in the jury having heard the challenged statements.

e. Review under G. L. c. 278, § 33E. After a review of the entire record, we discern no error warranting relief under

G. L. c. 278, § 33E. The fact that the defendant was only twenty-one years of age at the time of the victim's death does not, as the defendant argues, without more, render the verdict not consonant with justice. See Commonwealth v. Tate, 486 Mass. 663, 677 (2021).

Judgment affirmed.