SJC-11575

COMMONWEALTH vs. DA LIN HUANG.

Suffolk. December 10, 2021. - February 16, 2022.

Present: Lowy, Kafker, Wendlandt, & Georges, JJ.

Homicide. Jury and Jurors. Mental Impairment. Constitutional Law, Sentence. Evidence, Prior misconduct, Photograph, Expert opinion, Opinion, Prior inconsistent statement, Competency, Relevancy and materiality. Practice, Criminal, Jury and jurors, Challenge to jurors, Argument by prosecutor, Instructions to jury, Sentence, Capital case.

Indictment found and returned in the Superior Court Department on February 20, 2001.

The case was tried before Christine M. McEvoy, J., and a motion for a new trial, filed on April 9, 2019, was heard by Michael D. Ricciuti, J.

Susan J. Baronoff for the defendant.
David D. McGowan, Assistant District Attorney, for the Commonwealth.
Rebecca Kiley, Committee for Public Counsel Services, Tatum A. Pritchard, & Steven J. Schwartz, for Committee for Public Counsel Services & others, amici curiae, submitted a brief.

WENDLANDT, J. The defendant, Da Lin Huang, was convicted of murder in the first degree on a theory of extreme atrocity or

cruelty for the killing of his wife, Gin Hua Xu, who was bludgeoned by over forty blows, some of which pierced her skull and fractured her cheekbones, and manually strangled. The couple had separated a few months earlier, and the victim recently had announced her decision to file for divorce. On the day of the killing in late January 2001, she had returned to the couple's apartment apparently believing she would visit their minor children, ages ten and three. The children, however, were not there; earlier, the defendant had made an unusual decision to send the children on an approximately forty-five minute, midwinter walk to visit his brother, who lived about one and one-half miles away. The defendant presented a defense of diminished capacity at trial. Following his conviction, his motion for a new trial was denied by a judge who was not the trial judge.

In this consolidated appeal, the defendant contends that reversal of his conviction is required because the prosecutor improperly exercised a peremptory challenge to strike a male juror, the trial judge abused her discretion in connection with certain evidentiary decisions, the prosecutor made improper statements in his closing argument, and the jury instruction on mental impairment was insufficient. He also maintains that denial of his motion for a new trial constitutes an abuse of discretion because he is intellectually disabled, and, as such,

imposition of a mandatory sentence of life without parole on him violates the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights. Finally, the defendant asks us to exercise our authority under G. L. c. 278, § 33E, to order a new trial or a reduction in the verdict. We affirm the conviction and the order denying his motion for a new trial and discern no reason to grant relief under G. L. c. 278, § 33E.[1]

1. Background. a. Facts. The following facts find support in the evidence presented at trial.

In October 2000, approximately ten years into a marriage that had grown increasingly acrimonious, the victim moved out of the apartment that she and the defendant had shared with their two children -- a ten year old son and a three year old daughter. The victim, who worked outside the home to provide financial support for the family, told the defendant that she was going to file for divorce.

The couple had immigrated to the United States from China in 1993. They lived next door to the defendant's brother, who lived with his wife, two children, and a nephew; the defendant's

[1] We acknowledge the amicus brief submitted by the Committee for Public Counsel Services, the Center for Public Representation, and the Disability Law Center.

other brother lived about one and one-half miles away with his wife and children.

Since a car accident in 1999 in which he sustained injuries to his neck and back, the defendant had been the primary caregiver for the couple's children, providing them with meals, assisting his son with homework, and taking care of the apartment. The defendant's niece, who lived next door and saw him near daily, testified to her observations of the defendant taking care of the children, doing chores, and cooking meals. One of the defendant's nephews, who also saw him daily, testified that the defendant shopped for groceries, cooked, and checked in on the nephew. Neither the niece nor the nephew observed anything unusual about the defendant's intelligence or memory.

Over the years, the defendant and the victim argued about the defendant's daily gambling habit. The defendant's son testified that when the victim refused to give the defendant funds for gambling, the defendant would raise his voice, speak to the victim disrespectfully, and sometimes use physical force to get the money, several times shoving her and causing her to cry. The defendant's nephew also testified that the defendant would take money from the victim using physical force, raise his voice, and shove her. The son and nephew intervened on

occasion, physically blocking the defendant from striking the victim.[2]

In December 2000, approximately one month before the killing, the defendant and the victim met with the victim's lawyer to discuss whether the defendant would agree to a proposed joint separation agreement. Assisted by an interpreter, the victim's lawyer reviewed the separation agreement with the defendant. The lawyer testified that the defendant did not speak much during the meeting, but he apparently understood what was going on. The meeting ended when the defendant walked out, refusing to sign the agreement.

Approximately one week before the victim was killed, police officers responded to a report of a domestic dispute at the couple's apartment.[3] An argument between the victim and the defendant had arisen over the care of the couple's son. One of the responding officers, who had spoken to the defendant, testified that he did not notice anything unusual about him at that time.

The killing occurred in late January 2001. That day, around 11 A.M., the victim's friend, with whom she normally

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[2] The couple also had heated arguments about the victim's parents, who stayed with them when visiting from China.

[3] As set forth supra, by then the victim had moved out of the couple's apartment.

carpooled to work, drove her to the Chinatown train station so that she could visit her children at the defendant's apartment. Earlier that winter morning, however, the defendant had made the unusual decision to send the couple's children on a walk to the home of his older brother, about forty-five minutes away; he asked his nephew to accompany them.

At around 9 or 10 P.M., the defendant's sister-in-law sent the children home; she called the defendant's home telephone twice, but there was no answer. The defendant's niece and nephew, who lived next door, went to check on the defendant and were unable to open the front door of the apartment. The defendant's niece observed blood on and around the door. The landlord, who lived upstairs and had a key to the defendant's apartment, unlocked the door but could not open it; it was chained from the inside, and there was something on the floor behind the door, blocking it.

Police officers and emergency medical technicians responded to the scene. They observed blood smeared on the apartment door and the adjacent walls. After removing the door chain, they entered the apartment. Directly behind the door, they found the victim's body in a state of rigor mortis.

The victim had been badly beaten. Her body was bruised, her shirt and bra had been pulled up, and her pants pulled down. There was a long, metal object protruding from her vagina, which

later was determined to be an eighteen-inch knife-sharpening rod with a six-inch handle. Hair-covered pliers lay on her stomach.[4] The victim and the surrounding walls and door were splattered with blood, and the victim's socks were covered with blood and hair. The back door to the apartment was locked from the inside with two separate locks.

In the bedroom, officers found the defendant in a bed, unconscious and not breathing; he was covered in the victim's blood,[5] and a cell phone and a bottle of alcohol lay next to him. Two bloodstained pill bottle lids were also recovered from the bedroom. From the kitchen, officers retrieved five empty prescription pill bottles bearing the defendant's name on the label.[6] Paramedics administered Narcan to the defendant, after which he began to breathe on his own.

An autopsy of the victim showed that she had sustained at least forty-six laceration wounds to the head, face, and forehead, several of which went through the skin to the bone.

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[4] Testing revealed that deoxyribonucleic acid (DNA) matching the defendant was on the handle of the knife sharpening rod and on the handle of the pliers.

[5] The victim's DNA was found on the defendant's clothes.

[6] The bottles were covered in blood. DNA matching the victim was found on two of the bottles. Officers also found a mug with bloodstains on the outer lip and handle. Fingerprints, which were subsequently individualized to the defendant, were found on the mug and on a second mug found in the hallway, along with DNA matching the victim.

She had facial bruising and multiple fractures to the skull and cheekbones. Some lacerations on the victim's forehead matched the end of the pliers. Beneath her scalp, she had a hemorrhage, the diffuse nature of which indicated that she had been alive when the multiple wounds to her head, face, and forehead were inflicted. She had defensive wounds on the back of her hands. Her neck had contusions, four fractures, and hemorrhaging caused by blunt trauma or compression. The medical examiner concluded that the cause of death was blunt head trauma and manual strangulation. Additionally, there were lacerations and cuts through her nipples, and penetration into her vagina and bowel with the knife-sharpening rod, each of which appeared to have been inflicted after death.

b. Defendant's case. At trial, the defendant asserted a defense based on diminished capacity.[7] Clinical forensic

[7] "Although the mental impairment [defense] is often colloquially referred to as 'diminished capacity,' it is well established that 'there is no "diminished capacity" defense in this Commonwealth.' However, '[i]n accordance with Commonwealth v. Gould, 380 Mass. 672, 673 (1980), a defendant "may produce expert testimony on the issue whether or not the impairment of his mental processes precluded him from being able to deliberately premeditate,"'" Commonwealth v. Holland, 476 Mass. 801, 804 n.3 (2017), quoting Commonwealth v. Companonio, 445 Mass. 39, 45 n.7 (2005), or on the issue of intent, Commonwealth v. Santiago (No. 2), 485 Mass. 416, 422 (2020) ("a jury could find that, by virtue of a mental impairment, a defendant lacked the requisite intent to commit murder in the first degree"). See Commonwealth v. Velez, 487 Mass. 533, 538 n.6 (2021) ("There is no diminished capacity defense in the Commonwealth. A jury, however, may consider credible evidence of mental impairment in

psychologist Jeffery Long opined that the defendant had posttraumatic stress disorder and major depressive disorder so severe that he became psychotic at times, and that the defendant suffered from several psychiatric issues that "collectively impaired his ability to premeditate killing his wife, [to intend] to kill his wife, and [to understand] that his actions would lead to her death." On cross-examination, Long acknowledged that he had not been aware of some details of the killing; he testified that he might reconsider his opinion if he were to learn new details, such as that the victim was manually strangled,[8] and that the front door was locked with both a deadbolt and security chain.[9]

Dr. Rebecca Brendel, a psychiatrist who examined the defendant seven times between 2006 and 2010, concluded that it was "highly unlikely that [the defendant] was able to form specific intent at the time of the alleged offense," and that there was "significant uncertainty that [the defendant] was able

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deciding whether the Commonwealth has met its burden of proving the defendant's state of mind" [citation omitted]).

[8] Long testified that his understanding was that the defendant had killed his wife by stabbing her in the head with pliers, and that he did not know that the victim also had been manually strangled.

[9] Long testified that he was aware that the front door had been locked, but he was not aware that the chain also had been secured.

to premeditate at the time of the alleged offense." In addition, she testified that the defendant had limited cognitive functioning, perhaps attributable to the head injury he had sustained in the 1999 car accident and his intelligence quotient (IQ) being in the tenth percentile or below of all adults. On cross-examination, Brendel acknowledged that, when forming her opinion, she was not aware that the defendant had asked his nephew to take his children to a relative's house that was a forty-five minute walk away on the morning of the killing, that it would have been preferable to interview the defendant closer in time to the killing, and that jurors or others who heard more information about the defendant's functioning around the time of the killing might be better positioned than she to "make certain decisions about this case."[10]

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[10] In addition to Long and Brendel, Jody Schapiro, a forensic psychologist and court clinician who examined the defendant in March 2004, more than three years after the killing, opined that the defendant appeared to have psychotic symptoms and schematic delusions, as well as some memory problems and thought disorganization. She did not proffer an opinion as to the defendant's mental state at the time of the killing.

The defendant also presented testimony from his brothers, who testified that their father had suffered from mental illness, that the defendant had looked unhappy since his car accident, and that he was quieter now than he had been in China. One brother testified that the defendant reported that "sometimes he doesn't know what he's doing and . . . his mind cannot be controlled" as a result of the pain medication he was prescribed following the accident.

c. Commonwealth's rebuttal. Dr. Gail Lee, who was the defendant's physician from March 1999 to July 2000, testified that she prescribed an opioid to the defendant to treat his pain after the 1999 car accident, and that she had observed no symptoms of mental illness, brain injury, or cognitive impairment.

Psychiatrist Dr. Alison Fife interviewed the defendant in January 2010, nine years after the killing, and examined documentary evidence, such as the defendant's medical records, grand jury minutes, police interviews, and photographs of the crime scene and autopsy. In view of the defendant's "level of functioning in his life preceding the crime [and] immediately after the crime," Fife opined that the defendant did not have a mental illness at the time of the crime.[11] She saw no signs of hallucinations, delusions, cognitive impairment, or psychotic symptoms, and concluded that the defendant's admission that he had attempted suicide following the killing evidenced his "awareness of responsibility, and a guilty feeling, an acknowledge[ment] of having done something for which he is responsible."

[11] Fife explained that in assessing the defendant's "level of functioning," she considered the defendant's self-care and activities of daily living, such as whether he was able to "shower, bathe, brush [his] teeth, prepare [his] food, [and] take adequate nutrition."

Psychologist Caleb Ho twice evaluated the defendant at Bridgewater State Hospital in February 2001, approximately one month after the killing, and concluded that the defendant "did not exhibit signs that would lead [Ho] to conclude that he was suffering from a major mental illness." Ho observed that the defendant appeared to have logical thought processes and noted that the defendant did not report experiencing hallucinations and did not believe himself to have a mental illness. Ho concluded that the defendant's symptoms of depression were "a function of situational stress," caused by the defendant's unfamiliarity with the protocol and procedures of the American legal system.

d. Procedural history. The defendant was indicted in 2001 by a grand jury in Suffolk County for murder, in violation of G. L. c. 265, § 1. In 2004,[12] the court allowed the defendant's motion for a referral to Bridgewater State Hospital for evaluation for competency and lack of criminal responsibility.[13]

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[12] Between 2001 and 2004, the defendant and the Commonwealth filed a series of motions related to evidence, witnesses, and fees. Status reviews were held at least every other month during this period.

[13] A court may order an examination of a defendant by a qualified physician or psychologist if it "doubts whether a defendant in a criminal case is competent to stand trial or is criminally responsible by reason of mental illness or mental defect." G. L. c. 123, § 15 (a).

Following a jury trial, which began in January 2010,[14] the defendant was convicted of murder in the first degree on a theory of extreme atrocity or cruelty. Prior to sentencing, the court granted defense counsel's request to have a court clinician evaluate the defendant for competence. The judge found "nothing in the [clinician's] report that indicates . . . that there's any issues in regard to competency today," and sentenced the defendant to the statutorily mandated sentence of life in prison without parole. The report also recommended commitment of the defendant to Bridgewater State Hospital for a period of six months pursuant to G. L. c. 123, § 18 (a), which the judge allowed. The defendant filed a direct appeal.

In April 2019,[15] the defendant filed a motion for a reduction in verdict or, in the alternative, a new trial, arguing that a postconviction neuropsychological examination, together with the evidence presented at trial, demonstrated that

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[14] Between 2005 and 2008, the court continued to hold regular status reviews and entered numerous continuances. The trial was scheduled for January 2008, but was delayed after the defendant filed a pro se motion to remove counsel and appoint new counsel. Defense counsel withdrew soon after, and new counsel was appointed. In 2008 and 2009, the defendant filed three motions to change the trial date, each of which was allowed; the parties agreed to a January 2010 trial date.

[15] Between 2014 and 2019, the court allowed several motions to stay or to extend appellate deadlines, which the defendant requested, to provide time for the defendant's medical evaluation and neurological testing and for the filing of a motion for new trial.

he is intellectually disabled, and that imposing a life sentence would violate his State and Federal constitutional rights. The motion judge, who was not the trial judge, held a nonevidentiary hearing and subsequently denied the defendant's motion in January 2021.

2. Discussion. The defendant argues that the trial judge erred in not requiring the Commonwealth to explain the use of a peremptory challenge to strike a male prospective juror, abused her discretion in connection with certain evidentiary rulings, allowed improper statements in the prosecutor's closing argument, and provided deficient jury instructions related to mental impairment. He further contends that the motion judge erred in denying his motion for a reduction in verdict or new trial. Finally, he asks that this court exercise its power under G. L. c. 278, § 33E, to order a new trial or a reduction in the verdict. We address each contention in turn.

a. Peremptory challenge against male prospective juror. On the second day of jury selection, the prosecutor exercised a peremptory challenge to strike prospective juror no. 56, a male law school student. Defense counsel objected, noting that the prosecutor had used seven of its ten challenges against male prospective jurors. The trial judge denied the defendant's challenge without requiring the prosecutor to explain the basis for the peremptory challenge. On appeal, the defendant

maintains that the objection was sufficient to raise an inference of gender discrimination, and that the judge should have required the prosecutor to give a gender-neutral explanation for the challenge.

Peremptory challenges may not be used to discriminate against a potential juror on the basis of gender. See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130 (1994); Commonwealth v. Soares, 377 Mass. 461, 488-489, cert. denied, 444 U.S. 881 (1979). "A challenge to a peremptory strike, whether framed under State or Federal law, is evaluated using a burden-shifting analysis." Commonwealth v. Carter, 488 Mass. 191, 195-196 (2021), quoting Commonwealth v. Ortega, 480 Mass. 603, 606 (2018). "First, the burden is on the objecting party to establish a prima facie showing of impropriety sufficient to overcome[] the presumption of regularity afforded to peremptory challenges" (quotations omitted).[16] Carter, supra at 196, quoting Commonwealth v. Henderson, 486 Mass. 296, 311 (2020). "The issue here is whether the judge abused her discretion by concluding that the defendant[] had not made a prima facie

[16] If the judge finds that the objecting party has satisfied this burden, the burden shifts to the party exercising the challenge to provide a "group-neutral" reason for the challenge. Commonwealth v. Henderson, 486 Mass. 296, 311 (2020), quoting Commonwealth v. Jones, 477 Mass. 307, 319 (2017). The judge then evaluates "whether the proffered reason is both adequate and genuine" (quotations omitted). Henderson, supra, quoting Commonwealth v. Robertson, 480 Mass. 383, 391 (2018).

showing of [gender] discrimination as to . . . the peremptory challenge[] of" prospective juror no. 56. Carter, supra.

The burden of raising an inference that a prospective juror was struck because of his or her protected status is not onerous. See Commonwealth v. Sanchez, 485 Mass. 491, 513-514 (2020), citing Johnson v. California, 545 U.S. 162, 170 (2005).

> "In determining whether a prima facie case of discriminatory purpose has been established, a judge may consider all relevant circumstances, including (1) the number and percentage of group members who have been excluded; (2) the possibility of an objective group-neutral explanation for the strike or strikes; (3) any similarities between excluded jurors and those, not members of the allegedly targeted group, who have been struck; (4) differences among the various members of the allegedly targeted group who were struck; (5) whether those excluded are members of the same protected group as the defendant or the victim; and (6) the composition of the jurors already seated" (citation and quotations omitted).

Carter, 488 Mass. at 196-197, quoting Henderson, 486 Mass. at 311-312.

Although we agree with the defendant that the record supports a differential in the prosecutor's strike rate between male and female prospective jurors,[17] a neutral explanation for the exclusion of prospective juror no. 56, who was a law school student at a law school where the trial judge taught a class, plainly emerges from the record. See Commonwealth v. Lopes, 478

[17] The prosecutor exercised strikes against indifferent male prospective jurors at a rate of fifty percent and against indifferent female prospective jurors at a rate of about eighteen percent.

Mass. 593, 601 (2018) (finding prospective juror's "two significant experiences with the law provided a sufficient and obvious basis for the prosecutor's peremptory challenge"). Also, although we do not give it undue weight, see Sanchez, 485 Mass. at 512 n.16, the jury at that point comprised six male jurors and four female jurors.[18]

b. Evidentiary rulings. The defendant challenges the admission of three categories of evidence: testimony concerning specific bad acts of the defendant, testimony about and photographs of the victim's postmortem injuries, and lay and expert testimony relating the defendant's mental capacity. He further contends that he should have been permitted to introduce additional evidence of his mental condition. We review evidentiary decisions of the trial judge for an abuse of discretion. See Commonwealth v. Andre, 484 Mass. 403, 414 (2020); Commonwealth v. Bishop, 461 Mass. 586, 596 (2012).

[18] Although we discern no abuse of discretion in the decision to allow the exercise of a peremptory challenge to strike juror no. 56 without further explanation, we again "urge judges to think long and hard before they decide to require no explanation from the prosecutor for the challenge and make no findings of fact," so as to avoid a "needless risk of reversal by failing to require the prosecutor to explain [his or her] reasons" for the challenge. Commonwealth v. Issa, 466 Mass. 1, 11 n.14 (2013). See Ortega, 480 Mass. at 607 n.9; Jones, 477 Mass. at 325-326.

i. Bad acts. Through the testimony of the defendant's niece,[19] nephew,[20] and son,[21] and the officer who responded to a report of a domestic dispute at the defendant's apartment about a week before the killing,[22] the prosecution introduced evidence that the defendant and the victim argued, sometimes with physical contact, about the defendant's gambling, childcare issues, and the victim's parents visiting from China. The defendant maintains that evidence of these acts had minimum probative value and significant prejudicial effect, and thus should have been excluded.

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[19] The defendant's niece testified that, after the defendant and victim had separated, the defendant and the victim argued over the defendant taking care of their son, and that police were called.

[20] The defendant's nephew testified that the defendant and the victim argued about the defendant's gambling, that he saw the defendant push the victim during an argument, and that, on occasion, the defendant's son would ask the nephew to help separate the defendant and the victim.

[21] The defendant's son testified that his parents argued on more than one occasion about his grandparents visiting from China, and that the arguments were "quite heated." The son also testified that when the defendant and the victim argued about the defendant's gambling, the defendant sometimes would shove the victim, take money from her by force, and make her cry, and that he would get between them when these physical assaults occurred.

[22] The officer testified that, approximately one week before the killing, he responded to a domestic disturbance call at the defendant's apartment, spoke to the victim and the defendant, and made sure that the defendant was "going to take custody of the child as opposed to leaving him at the wife's workplace at eleven o'clock at night."

Evidence of a defendant's prior bad acts is inadmissible "for the purposes of showing [the defendant's] bad character or propensity to commit the crime[s] charged." Commonwealth v. Helfant, 398 Mass. 214, 224 (1986). See Commonwealth v. Woollam, 478 Mass. 493, 500 (2017), cert. denied, 138 S. Ct. 1579 (2018); Commonwealth v. Gomes, 475 Mass. 775, 783 (2016); Mass. G. Evid. § 404(b)(1) (2021). Such evidence, however, may be admissible if it is relevant for other purposes. See, e.g., Commonwealth v. West, 487 Mass. 794, 806 (2021), quoting Commonwealth v. Carlson, 448 Mass. 501, 508-509 (2007) ("Evidence of a hostile relationship 'that tends to explain the purpose of a crime is relevant to the issue of malice or intent' . . ."); Mass. G. Evid. § 404(b)(2). Even where such evidence is relevant for a permissible purpose, it is inadmissible if "its probative value is outweighed by the risk of unfair prejudice to the defendant." Commonwealth v. Crayton, 470 Mass. 228, 249 n.27 (2014) (clarifying that "'other bad acts' evidence is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk").[23]

[23] Although the defendant's trial took place before our decision in Crayton, the trial judge did not abuse her discretion under either standard, so we "need not decide whether the new standard we articulated in Commonwealth v. Crayton, 470 Mass. 228, 249 n.27 (2014), applies retroactively." Commonwealth v. Andre, 484 Mass. 403, 414 n.21 (2020).

> "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."

West, supra at 807, quoting Commonwealth v. Peno, 485 Mass. 378, 386 (2020).

The challenged evidence was relevant to show the volatile nature of the relationship between the defendant and the victim in the weeks and months preceding the murder and to explain "the defendant's . . . state of mind toward the victim." West, 487 Mass. at 806. The evidence was also probative of the defendant's intent. See id.

Moreover, the trial judge carefully weighed the probative value against the possible prejudicial effect of the evidence, as demonstrated by the specific findings she made during sidebar discussions. See Peno, 485 Mass. at 394 ("A record of the thoughtful weighing of the risks of unfair prejudice . . . may indicate a reasonable exercise of discretion"). Further, the evidence was not "so similar to the charged offense as to increase the risk of propensity reasoning by the jury." West,

487 Mass. at 807, quoting Peno, supra at 386. Accordingly, the judge did not abuse her discretion.

ii. Postmortem injuries. The trial judge admitted testimony and photographs of the postmortem injuries inflicted on the victim. The defendant contends that the evidence should have been excluded.

"[T]he intent to inflict an injury may be inferred from, among other things, the condition of the body after death." Commonwealth v. Harvey, 397 Mass. 803, 810 (1986), citing Commonwealth v. Amazeen, 375 Mass. 73, 81 (1978). Evidence of actions done to the victim's body postmortem may be "relevant to show the defendant's state of mind and hence malice." Commonwealth v. Casavant, 426 Mass. 368, 369 (1998) (admission of evidence of aerosol can placed in victim's vagina following her death not abuse of discretion). Moreover, "[p]hotographs depicting the extent of a victim's injuries, such as the force applied and the number of wounds, may be probative of whether a defendant acted with deliberate premeditation or with extreme atrocity or cruelty." Commonwealth v. Walters, 485 Mass. 271, 283 (2020). "It is also well settled that, if the photographs possess evidential value on a material matter, they 'are not rendered inadmissible solely because they are gruesome or may have an inflammatory effect on the jury.'" Commonwealth v.

Vazquez, 419 Mass. 350, 354 (1995), quoting Commonwealth v. Bys, 370 Mass. 350, 358 (1976).

Here, the photographs and the challenged testimony were relevant to the defendant's intent, see Harvey, 397 Mass. at 810, and malice, see Casavant, 426 Mass. at 369. See also Vazquez, 419 Mass. at 354. The trial judge carefully considered the probative value and risk of prejudice of the evidence, noting that the prosecutor did not seek to introduce all available photographs of the victim's body, excluded the more gruesome autopsy photographs in favor of less graphic evidence, and redacted parts of some photographs depicting certain postmortem injuries. See West, 487 Mass. at 807. Further, the judge gave contemporaneous limiting instructions, cautioning that the jurors must not decide the case based on sympathy for the victim; she repeated these instructions in the final jury charge. See Walters, 485 Mass. at 284 (concluding that there is "no cause to disturb the verdict" where "[t]he judge limited the number of photographs that could be shown," "repeatedly cautioned the jurors that, despite the gruesome nature of the photographs, they were to render a verdict based on the evidence, rather than on sympathy, anger, or passion," and "prevented the prosecutor from displaying enlarged versions of the autopsy photographs"). Therefore, the judge did not abuse her discretion.

iii. Testimony concerning mental capacity. A. Lay observations. The defendant next contends that it was error for the trial judge to allow the prosecutor to elicit testimony concerning the defendant's intelligence, memory, and mental state from lay witnesses, including the defendant's son,[24] niece,[25] and nephew,[26] and the attorney with whom the victim and defendant had met regarding the divorce agreement.[27]

Lay witnesses may testify about "facts observed," but not "about whether another person suffered from mental illness." Commonwealth v. Sliech-Brodeur, 457 Mass. 300, 330 n.43 (2010), quoting Commonwealth v. Monico, 396 Mass. 793, 803 (1986). See

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[24] When asked whether he "observe[d] anything about [the defendant's] mental functioning that prevented him from being a parent," the son testified, "No, there weren't," and when asked the same about his observations of the defendant's physical functioning, the son testified, "No, there weren't."

[25] The niece described the defendant's intelligence as "[l]ike ordinary people," and that his memory was "[j]ust like ordinary. No big problem." When asked if she ever saw the defendant "do anything that was very unusual," she testified that she "saw him do the family chores and eating, and he was very ordinary."

[26] The nephew described the defendant's intelligence as "like general people" and described his memory by testifying, "In general, he's just like ordinary people."

[27] The attorney testified that, during her meeting with the defendant and the victim, she did not observe any signs that the defendant was hearing voices or mumbling or anything unusual about his attire or personal hygiene, and "saw nothing that led [her] to conclude or suspect [that he had] a mental illness." She also said that the defendant did not speak much during the meeting but was nodding in apparent understanding.

Mass. G. Evid. §§ 701, 702. The challenged testimony of the defendant's son, niece, and nephew concerned their direct observations of the defendant's memory, level of intelligence, and ability to parent, as did the attorney's observations that the defendant was not mumbling and did not appear to be hearing voices during their meeting, that she did not notice anything unusual about his attire or hygiene, and that he nodded as they reviewed the separation agreement. The trial judge did not abuse her discretion by admitting these "facts observed." Sliech-Brodeur, supra, quoting Monico, supra.

The defendant is correct, however, that it was error to allow the attorney to testify that she "saw nothing that led [her] to conclude or suspect [that the defendant had] a mental illness." See Sliech-Brodeur, 457 Mass. at 330 & n.43 ("[I]t was error for the prosecutor, as part of the Commonwealth's case-in-chief, to ask three lay witnesses whether the defendant ever showed 'overt signs of a mental illness.' These witnesses were not qualified to give such an opinion" [footnote omitted]). See also Commonwealth v. Bruno, 432 Mass. 489, 511 (2000) ("Whether a person suffers from a mental abnormality . . . [is a] matter[] beyond the range of ordinary experience and require[s] expert testimony"). However, given the properly

admitted expert testimony,[28] it is unlikely that the attorney's lay opinion concerning the defendant's lack of mental illness created a substantial likelihood of a miscarriage of justice.[29] Commonwealth v. Perez, 460 Mass. 683, 689-690 (2011).

B. Expert testimony. The defendant argues that Fife's rebuttal testimony that the defendant did not suffer from mental illness at the time of the killing should have been excluded because it violated G. L. c. 233, § 23B,[30] which prohibits the admission of statements made by a defendant during a psychiatric examination on issues other than his mental condition or that constitute a confession of guilt.[31] Fife testified that she

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[28] The prosecutor introduced expert testimony from Fife and Ho, who each opined that the defendant did not suffer from a mental illness.

[29] The defendant did not object to the admission of this testimony.

[30] General Laws c. 233, § 23B provides:

> "In the trial of an indictment or complaint for any crime, no statement made by a defendant therein subjected to psychiatric examination pursuant to [G. L. c. 123, §§ 15 and 16,] for the purposes of such examination or treatment shall be admissible in evidence against him on any issue other than that of his mental condition, nor shall it be admissible in evidence against him on that issue if such statement constitutes a confession of guilt of the crime charged."

[31] The defendant also contends that Fife's testimony should have been excluded because her expert report "only contained an opinion as to criminal responsibility, which was not at issue" in the trial. To the contrary, Fife's report disclosed her opinion that the defendant

disbelieved the defendant's statements that he did not have problems in his marriage or with managing money, was not bothered by the separation, and did not have a memory of the killing.

The defendant's statements were neither "a confession of guilt of the crime charged" nor "inculpatory statements constituting admissions short of a full acknowledgement of guilt." Blaisdell v. Commonwealth, 372 Mass. 753, 763 (1977). Compare Commonwealth v. Callahan, 386 Mass. 784, 787-788 (1982), S.C., 401 Mass. 627 (1988) (statements by defendant that he "was enraged, picked up the gun and shot her, with the thought beforehand that, 'shoot her . . . [and] you're going to jail for murder,'" "constituted a confession of guilt and were inadmissible under the provisions of [§ 23B]"). Accordingly, G. L. c. 233, § 23B, does not prohibit such statements on the issue of the defendant's mental condition. See note 30, supra; Commonwealth v. Street, 388 Mass. 281, 288 n.6 (1983) ("We

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> "did not have a mental illness at the time he allegedly killed his wife. Because he did not have a mental illness, there is no relationship in this case between mental illness at the time of the crime and the issues of substantial lack of appreciation of wrongfulness or substantial ability to conform behavior."

Fife's conclusion that the defendant did not have a mental illness at the time of the crime was properly disclosed, and was a central issue of the case; thus, the trial judge did not err by admitting her testimony.

perceive no problem in the admissibility of statements made by the defendant to the psychiatrist who examined him . . . . [T]he statement in the case before us was admissible on the issue of his mental condition"). Fife explained that each statement was "relevant to the work [she] did, and the opinions [she] came to" regarding the defendant's mental condition. The statements "helped [her] to understand that he had no mental illness," because she "saw that the defendant had the capacity to manipulate information such that he presented things in a way that put him in a positive light and denied anything that would place him in a negative light," making her "consider that the defendant is malingering mental illness, and that he does not truly have a legitimate mental illness."[32]

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[32] The defendant also apparently asserts that Fife's testimony should have been excluded for noncompliance with a discovery order under Mass. R. Crim. P. 14 (c) (2), as appearing in 442 Mass. 1518 (2004). Fife examined the defendant pursuant to court order, with the assistance of an interpreter. Following the examination, the defendant filed a motion alleging that the interpretation of the examination was inaccurate. The trial judge allowed the defendant's request for a continuance to allow a different interpreter to review the recording of the examination and determine whether the interpretation was accurate.

The reviewing interpreter determined that the examination interpreter had used Cantonese rather than the defendant's native Toisanese, and suggested that the examination be redone. With the agreement of both the prosecutor and defense counsel, Fife reexamined the defendant with the assistance of an interpreter translating in Toisanese. We discern no discovery order violations related to Fife's examination of the defendant that would be sanctionable under Mass. R. Crim. P. 14 (c) (2).

C. Excluded evidence related to defendant's mental condition. The defendant next contends that the trial judge erred by excluding his son's video-recorded statement and evidence that the defendant was unable to handle his financial affairs and was placed under guardianship.

I. Video recording. The defendant sought to introduce video footage of his then ten year old son's interview with a prosecutor, recorded following the killing, in which the son stated that his father was a good man who went "nuts" after his car accident. The defendant argues that, despite the son's testimony at trial that he could not remember either making this statement or observing conduct that made him think his father was "nuts," the statement should nonetheless have been admitted as a past recollection recorded or as a prior inconsistent statement. There was no abuse of discretion.

A recording may be admissible under the hearsay exception for past recollection recorded if "(i) the witness has insufficient memory to testify fully and accurately, (ii) the witness had firsthand knowledge of the facts recorded, (iii) the witness can testify that the recorded statement was truthful when made, and (iv) the witness made or adopted the recorded statement when the events were fresh in the witness's memory." Mass. G. Evid. § 803(5). Here, the son did not testify that the statement was truthful when made. See Commonwealth v. Morgan,

449 Mass. 343, 365-366 (2007) (third prong of test not met where witness was unable to confirm at trial that his recorded statement to police was truthful when made). In addition, the son did not make the statement when the events were fresh in his memory; the car accident occurred in 1999, and the son made the recorded statement shortly after the killing in 2001.

"A party has a right to impeach an adverse witness's testimony by means of prior inconsistent statements . . . ." Commonwealth v. Basch, 386 Mass. 620, 623 (1982). The defendant's attempt to introduce the video recording on cross-examination, however, was not to impeach the son. Rather, trial counsel confirmed when asked by the judge that he sought to use the video recording to refresh the son's memory as to his observations of the defendant's mental state following the car accident, and stated that the recording raised an issue under Commonwealth v. Bowden, 379 Mass. 472 (1980).

II. Guardian ad litem. The defendant also contends that the judge erred by precluding him from admitting evidence that a guardian ad litem was appointed in October 2001 to oversee his financial affairs related to a personal injury lawsuit in New Hampshire. The appointment of the guardian was triggered by an ex parte motion that the defendant was not competent to stand trial, which the judge allowed. There was no error.

A finding of incompetency is distinct from a finding of mental impairment. See Vuthy Seng v. Commonwealth, 445 Mass. 536, 545 (2005), S.C., 456 Mass. 490 (2010), quoting Baqleh v. Superior Court, 100 Cal. App. 4th 478, 495 (2002) ("A competency examination is not directed to the ultimate issue to be decided -- whether the defendant is guilty of the crime . . . . A competency exam does not bear on the defendant's guilt, but on his or her current ability to understand the proceedings and participate in the defense. These are collateral to, and 'cannot directly result in[,] the functional equivalent of criminal adjudication of guilt'"). The evidence of the appointment was thus not relevant to the defendant's mental state at the time of the crime. Because the evidence did not "tend[] to prove an issue in the case or render a desired inference more probable than it would be without [the evidence]" (citations and quotations omitted), Commonwealth v. Sicari, 434 Mass. 732, 750 (2001), cert. denied, 534 U.S. 1142 (2002), the trial judge did not abuse her discretion by excluding the testimony.

c. Prosecutor's closing argument. The defendant contends that several statements made in closing argument were improper. Remarks made during closing argument are considered in the context of the entire argument, together with the evidence presented at trial and the judge's instructions to the jury.

See Commonwealth v. Barros, 425 Mass. 572, 581-582 (1997); Commonwealth v. Kozec, 399 Mass. 514, 516-517 (1987).

i. False mental health defense. The defendant first challenges the prosecutor's suggestion that the defendant's mental health defense was fabricated. A "prosecutor is entitled to make a fair reply to the defendant's closing argument," Commonwealth v. Smith, 404 Mass. 1, 7 (1989), and "may properly comment on the trial tactics of the defen[s]e and on evidence developed or promised by the defen[s]e," Commonwealth v. Grimshaw, 412 Mass. 505, 507 (1992), quoting Commonwealth v. Dunker, 363 Mass. 792, 800 (1973). The prosecutor's statements here were responsive to the defendant's mental health defense and the defense's statement in closing argument that "[t]he issue in this case is not did he do it. He did. The issue is what was he thinking? How was he feeling?" See Commonwealth v. Lewis, 465 Mass. 119, 130 (2013), citing Commonwealth v. McCravy, 430 Mass. 758, 764 (2000) ("A prosecutor may address a particular point in defense counsel's closing argument as a sham, but he may not characterize the entire defense as such").

ii. Son "hanging off" defendant during assaults. Next, the defendant challenges the prosecutor's characterization of the defendant's son as "hanging off" of the defendant while he assaulted the victim on prior occasions. The statement was based on the evidence, which showed that the son would "get

between" his parents when the defendant used force against the victim. Excusable hyperbole in closing arguments is acceptable, see Commonwealth v. Wilson, 427 Mass. 336, 350 (1998), quoting Commonwealth v. Sanna, 424 Mass. 92, 107 (1997) ("'[E]nthusiastic rhetoric, strong advocacy, and excusable hyperbole' are not grounds for reversal"), and juries are expected to exercise a degree of skepticism, see Wilson, supra (jurors "have a certain measure of sophistication in sorting out excessive claims on both sides"). Thus, the prosecutor's characterization was not improper.

iii. Request for accountability. Finally, the defendant challenges the prosecutor's statement: "There does come a time in every man's life for accountability. Even for Da Lin Huang there is a time for accountability. Ladies and gentlemen, now is the time for Da Lin Huang to be held accountable for what he did to Gin Hua Xu." This statement by the prosecutor was improper. See Commonwealth v. Jenkins, 458 Mass. 791, 797 (2011) ("prior cases have suggested that holding the defendant accountable is improper language").

The statement, to which the defendant did not object, did not create a substantial likelihood of a miscarriage of justice. See id. at 796, citing Commonwealth v. Semedo, 456 Mass. 1, 15 (2010). The statement was made in the context of the entire closing argument, which properly marshalled the evidence against

the defendant and demonstrated the strong case against him. Moreover, the judge instructed the jury that closing arguments are not evidence, that their memory of the evidence controls, and that they should not be swayed by sympathy for the victim. See Jenkins, supra at 797 (concluding that reference to accountability in closing argument did not create substantial likelihood of miscarriage of justice where "[t]he Commonwealth's case was strong, and the judge instructed the jury that closing arguments are not evidence and that the jurors must consider the evidence impartially without bias, prejudice, or sympathy").

d. Jury instructions on mental impairment. The trial judge's instructions on murder in the first degree mirrored the Model Jury Instructions on Homicide 61-62 (1999). In Commonwealth v. Szlachta, 463 Mass. 37, 49 (2012), we declined to revise the model jury instructions to include language concerning a defendant's ability to appreciate the consequences of his choices. We reasoned that

> "while reduced mental capacity is relevant to the jury's exercise of their broad discretion as a reflection of the community's conscience, there is no greater mens rea required for murder by extreme atrocity or cruelty than there is for murder in the second degree, and the crime does not require that the defendant be aware that his acts were extremely cruel or atrocious."

Id. at 45, 48-49, quoting Commonwealth v. Oliveira, 445 Mass. 837, 848-849 (2006). The defendant has not presented, and we do

not discern, any reason to abandon our analysis in Szlachta and the cases preceding it.

e. Sentence. On appeal from the denial of his motion for a new trial, the defendant argues that the imposition of a life sentence violates the Eighth Amendment and art. 26 because he is intellectually disabled. Following his conviction, the defendant was evaluated by Dr. Doriana Chialant, a neuropsychologist, on two occasions in 2016. She administered standardized tests but noted that due to the defendant's illiteracy, lack of formal education, and lack of English, as well as the fact that the tests were developed for the American population and there were no available tests developed for the Chinese population, the defendant "cannot be evaluated completely and to the same level of scientific accuracy that could be obtained under different circumstances." After noting these limitations, Chialant concluded that "[the defendant's] performance across a relatively wide range of tests indicated significant and widespread deficits and was overall suggestive of a low intellectual capacity," and that he had an "overall intellectual index score of 77, which falls at the 6th [percentile] and is equivalent to the performance of individuals younger than 6 years of age."

On appeal, the defendant contends that the motion judge abused his discretion because Chialant's report, along with the

reports of the expert witnesses at trial, show significant limitations in the defendant's functional capacity and indicate that he is intellectually disabled,[33] and that, therefore, the imposition of a life sentence without the possibility of parole violates his constitutional rights. See Commonwealth v. Grassie, 482 Mass. 1017, 1017-1018 (2019); Commonwealth v. Burgos, 462 Mass. 53, 60, cert. denied, 568 U.S. 1072 (2012). Experts at trial, including those called by the defendant, did not opine that the defendant had an intellectual disability. To the contrary, the evidence at trial was that the defendant had reasonably high-level adaptive functionality, including testimony that he cooked, cleaned, and cared for his children, and helped his son with math homework. Indeed, even Chialant's evaluation placed the defendant's IQ above the usual cutoff for intellectual disability. See Hall v. Florida, 572 U.S. 701, 720

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[33] "Person with an intellectual disability" is "characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social and practical adaptive skills and beginning before age [eighteen], and consistent with the most recent definition provided by the American Association on Intellectual and Developmental Disabilities." G. L. c. 123B, § 1. The American Association on Intellectual and Developmental Disabilities defines "intellectual disability" as "a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of [twenty-two]." American Association on Intellectual and Developmental Disabilities, Definition of Intellectual Disability, https://www.aaidd.org/intellectual-disability/definition [https://perma.cc/9KP7-SE9U].

(2014). We therefore decline to consider whether the imposition of a life sentence on a person with an intellectual disability constitutes cruel and unusual punishment. See Commonwealth v. Jones, 479 Mass. 1, 18 (2018) ("Whether it is cruel and unusual under the Eighth and Fourteenth Amendments or cruel or unusual under art. 26 to impose a mandatory sentence of life without parole on a person with an intellectual disability is a difficult question that is not before us here . . .").

f. Review under G. L. c. 278, § 33E. After careful review of the entire record, we conclude that there is no reason to exercise our power under G. L. c. 278, § 33E, to order a new trial or reduce the verdict.

Judgment affirmed.

Order denying motion for a new trial affirmed.