SJC-12454

COMMONWEALTH vs. FRANKLIN KAPAIA.

Plymouth. September 12, 2022. - November 17, 2022.

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

Homicide. Evidence, Identity. Practice, Criminal, Opening statement, Argument by prosecutor, Capital case.

Indictment found and returned in the Superior Court Department on April 11, 2013.

The case was tried before Richard J. Chin, J.

Andrew S. Crouch for the defendant.
Mary Nguyen, Assistant District Attorney, for the Commonwealth.

LOWY, J. After a jury trial in the Superior Court, the defendant, Franklin Kapaia, was convicted of murder in the first degree on the theory of extreme atrocity or cruelty. He appeals from his conviction, arguing that (1) there was insufficient evidence to convict him, (2) errors in the Commonwealth's opening statement and closing argument warrant reversal, and (3)

we should reduce the verdict of murder in the first degree pursuant to G. L. c. 278, § 33E. We affirm.

Background. We recite the facts the jury could have found in the light most favorable to the Commonwealth, reserving some details for later discussion of specific issues. See Commonwealth v. Brown, 490 Mass. 171, 172 (2022), citing Commonwealth v. Latimore, 378 Mass. 671, 677 (1979).

The victim, Eric Dillard, lived with his girlfriend, Helena Ellis, and their three children in an apartment located in a multiunit building at the intersection of Montello Street and Lawrence Street in Brockton. At the time of the shooting, the victim's cousin, Michael Myers, also was staying at the apartment. The victim's apartment was on the first floor, and a small hallway led from the apartment to the building's Lawrence Street entrance. The victim sold "crack" cocaine and marijuana, while Ellis sold marijuana to her friends, including Shauna Matthews.

Matthews was the defendant's girlfriend. At the time of the shooting, Matthews lived in an apartment in Brockton and the defendant's longtime friend, Michael McNicholas, lived next door. The defendant and McNicholas had been acquainted for over a decade by the time of trial. McNicholas and the defendant would "h[a]ng out" and smoke marijuana together, often at Matthews's apartment. Additionally, McNicholas would buy

marijuana from Roy Mitchell, who lived in the same apartment building as the victim and Ellis. While Mitchell never had sold marijuana to the defendant, Mitchell had met the defendant and had observed him to have light facial hair, specifically, "a little mustache."

On March 6, 2013, the defendant and McNicholas smoked marijuana together during the afternoon. While the two were smoking, the defendant told McNicholas that he had "to go run a mission" but did not provide McNicholas with further details.

Later that evening, the defendant and Matthews drove around looking for marijuana. They stopped at two places near the victim's apartment where the defendant previously had bought marijuana. The first stop proved unsuccessful. At the second stop, the defendant got out of Matthews's car and walked away. According to Matthews, the defendant, who is a dark-skinned man, was wearing a black, puffy coat and a winter hat.. Matthews was "not sure" whether the defendant had a mustache on the night of the shooting.

That evening, the victim and Ellis were home with their three children and Myers. At 5:45 P.M., Matthews sent a text message to Ellis stating that she was "going to come grab a bag" of marijuana. Ellis responded to Matthews's message at 6:02 P.M., stating that she was out of marijuana. The doorbell to the apartment then rang almost immediately after the exchange of

text messages. The victim opened the door, entered the hallway, and closed the door behind him. The sounds of a struggle caught the attention of both Ellis and Myers. Ellis opened the door, and as a result, both she and Myers could see into the hallway. Ellis saw "a gun pulled out" and described "a lot of bullets flying." She did not see the face or body of the person holding the firearm nor how many people were in the hallway.[1] Myers[2] saw a tall "dark skinned male" who "may have had a mustache," wearing a black "hoodie," standing over the victim and holding a gun. The shooter made eye contact with Myers, looked back at the victim, and shot the victim again.

Wounded, the victim crawled back into his apartment. He was gasping for air and told Ellis to call 911. Ellis did so,

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[1] Ellis was unequivocal at trial that she did not see how many people were in the hallway. Her testimony was impeached by means of prior inconsistent statements where she previously had indicated that there were two people in the hallway in addition to the victim. Additionally, there was testimony from Ellis that she heard three voices in the hallway, one of them being the victim; she did not recognize the other voices. We acknowledge that this testimony was present and there was no request for a limiting instruction. See Commonwealth v. Ashley, 427 Mass. 620, 627-628 (1998) ("Where there is no objection . . . and no request for a limiting instruction," prior inconsistent statements introduced at trial "may be considered as substantive evidence" [citation omitted]). However, we review the evidence in the light most favorable to the Commonwealth. See, e.g., Commonwealth v. Bonner, 489 Mass. 268, 275 (2022).

[2] Myers was deemed unavailable at trial, and his prior statements were introduced through his grand jury testimony and State police Trooper Joseph Kalil's testimony.

and emergency personnel were dispatched to the apartment at 6:04 P.M. They arrived at the scene a few minutes later and found the victim lying on the kitchen floor with multiple gunshot wounds; he was not breathing and had a faint pulse. He died soon thereafter.

When the defendant returned to Matthews's car, "[h]e just had a look of just aggravation" and his nose was "a little flared." Matthews told the defendant that Ellis had responded to the text message indicating that she was out of marijuana. Later that night, the defendant again smoked marijuana with McNicholas during which McNicholas told the defendant that Mitchell's "neighbor got shot." At that point, the defendant told McNicholas that he had killed Mitchell's neighbor.

An autopsy revealed that the victim sustained a significant number of gunshot wounds to both the front and back of his body, specifically, three graze wounds, nine entrance wounds, and six exit wounds. The gunshot wounds were determined to be the victim's cause of death. The defendant was on probation at the time of the shooting and wore a global positioning system (GPS) ankle monitor. As part of the investigation, police obtained GPS data from the defendant's ankle monitor, which was admitted at trial. The evidence at trial showed that the location data from the device was ninety percent accurate within a radius from thirty to thirty-six feet of the point that appears on the map.

The GPS data showed the defendant moving toward the victim's apartment building just prior to the shooting. The data then showed the defendant stationary at the intersection where the victim's apartment was located at 6:02 P.M. The data from one minute later showed the defendant traveling away from the victim's apartment building at three miles per hour and then twenty miles per hour.[3]

Discussion. 1. Sufficiency of the evidence. The defendant was convicted of murder in the first degree on the theory of extreme atrocity or cruelty. The defendant had moved for a required finding of not guilty at the close of the Commonwealth's case, arguing that the evidence was insufficient to support a conviction of murder in the first degree. The motion was denied.[4] He reaffirms this argument on appeal, asserting that the admitted evidence is insufficient to prove

[3] The monitoring device updates GPS data points every minute that the bracelet is in motion.

[4] As relevant here, the defendant moved for a required finding of not guilty on the ground that the Commonwealth had not presented sufficient evidence to sustain a conviction of murder in the first degree. The judge allowed the motion as to felony-murder, and the case went to the jury on theories of deliberate premeditation and extreme atrocity or cruelty. The defendant was convicted on the theory of extreme atrocity or cruelty. In addition to the murder charge, the defendant had been indicted on charges of attempted armed robbery, unlawful possession of a firearm, and carrying a loaded firearm without a license. The judge allowed the defendant's motion for required findings of not guilty on those charges.

his identity as the shooter. Specifically, he argues that inconsistent descriptions of the shooter and himself on the night of the shooting, the imprecision of the GPS data, and the inconsistencies and unreliability of McNicholas's and Ellis's testimony prevented the Commonwealth from proving his identity as the shooter. We disagree.

"In assessing the sufficiency of the evidence, we consider 'whether, after viewing the evidence the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Commonwealth v. Davis, 487 Mass. 448, 462 (2021), quoting Latimore, 378 Mass. at 677. Ultimately, "[t]he denial of a motion for a required finding of not guilty will be affirmed if the Commonwealth's evidence, together with reasonable inferences from that evidence, is sufficient to persuade a rational jury of the defendant's guilt beyond a reasonable doubt" (quotation and citation omitted). Commonwealth v. Paige, 488 Mass. 677, 679 (2021). "Proof of the essential elements of the crime may be based on reasonable inferences drawn from the evidence, . . . and the inferences a jury may draw need only be reasonable and possible and need not be necessary or inescapable" (quotation and citation omitted). Commonwealth v. West, 487 Mass. 794, 800 (2021). "The relevant question is whether the evidence would permit a jury to find guilt, not whether the evidence requires

such a finding" (citation omitted). Commonwealth v. Norris, 483 Mass. 681, 685 (2019).

"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 Commonwealth was required to prove beyond a reasonable doubt that the defendant committed an unlawful killing with malice aforethought,[5] . . . and with extreme atrocity or cruelty . . . ." Commonwealth v. Melendez, 490 Mass. 648, 665 (2022).

Here, there was overwhelming evidence that the shooting at issue was an intentional killing committed with malice aforethought and with extreme atrocity or cruelty. In brief, the evidence showed that the victim was killed by repeated gunshots to both the front and back of his body while he was in the hallway of his apartment after the assailant rang the doorbell and the victim stepped into the hallway. Moreover, during the shooting, the assailant looked one of the witnesses in the eye and then turned to the already-wounded victim and shot him again. See Commonwealth v. Bonner, 489 Mass. 268, 276 (2022) ("conviction of murder in first degree on theory of

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[5] 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" (citation omitted). Commonwealth v. Melendez, 490 Mass. 648, 665 (2022).

extreme atrocity or cruelty requires evidence that defendant caused victim's death by method that surpassed cruelty inherent in taking life"). See also Commonwealth v. Robinson, 482 Mass. 741, 744-747 (2019).

As to the shooter's identity, the issue on which the defendant focuses his argument on appeal, the evidence that the defendant was the shooter was compelling. And while the pieces of evidence outlined infra might not individually "be sufficient to sustain a conviction, together they formed a 'mosaic' of evidence such that the jury could [reasonably] conclude, beyond a reasonable doubt, that the defendant was the shooter" (citation omitted). Commonwealth v. Jones, 477 Mass. 307, 317 (2017).

The defendant told McNicholas that he needed to "go run a mission," after which he and Matthews drove around looking for marijuana. The defendant was aware that McNicholas had previously purchased marijuana from the victim's upstairs neighbor, Mitchell. And the defendant's girlfriend, Matthews, specifically reached out to the victim's girlfriend, Ellis, to purchase marijuana mere minutes before the killing. Put simply, on the same night that the defendant was out looking for marijuana with his girlfriend, multiple people who potentially could provide him with marijuana lived in the victim's apartment building.

Also, during the defendant's and Matthews's search for marijuana, the defendant got out of the car at a stop near the victim's apartment and walked away. As to what happened when the defendant was out of the car, the evidence at trial established a tight timeline of events. Ellis responded to Matthews's text message at 6:02 P.M., and emergency personnel were dispatched to the victim's apartment at 6:04 P.M. The shooting itself occurred within those two minutes. The data from the defendant's ankle monitor showed the defendant approaching the victim's apartment building in the minutes immediately before the shooting, present at the victim's apartment at 6:02 P.M., and fleeing one minute later. When considered together and in the light most favorable to the Commonwealth, this is compelling evidence that the defendant was present at the time of the shooting and "permit[s] the reasonable inference that the defendant was the shooter."[6] Davis, 487 Mass. at 462-464 (GPS data establishing defendant's

[6] The defendant's argument that the GPS data "showed that [the defendant] was present on Lawrence Street next to the sidewalk . . . near but not inside the house" and moving away from the apartment before the shooting is inaccurate. The evidence at trial was that the GPS data was ninety percent accurate within a radius of between thirty and thirty-six feet. That the GPS point for 6:02 P.M. appears just outside the apartment building does not demonstrate conclusively that the defendant could not have been the shooter. Rather, the defendant could have been standing anywhere within a radius of from thirty to thirty-six feet of that point, which encompasses the victim's apartment building.

location and speed before, during, and after shooting helped permit reasonable inference that defendant was shooter). See Commonwealth v. Barbosa, 477 Mass. 658, 667 (2017) (GPS data placing defendant at scene contributed to sufficiency).

Furthermore, the defendant's appearance and clothing were similar, albeit not identical, to Myers's description of the shooter. See Jones, 477 Mass. at 318 ("similarity between [the defendant's] clothing and the clothing worn by the sole person seen fleeing the scene" contributed to sufficiency). And perhaps most significantly, McNicholas testified at trial that the defendant admitted to killing the victim on the night of the shooting.

While the defendant describes witness testimony and various pieces of evidence as inconsistent or unreliable, "[i]t does not matter that some of the evidence could be characterized as equivocal or contradictory," Commonwealth v. James, 424 Mass. 770, 785 (1997), quoting Commonwealth v. Ruci, 409 Mass. 94, 97 (1991), as "[c]redibility is a question for the jury to decide; they may accept or reject, in whole or in part, the testimony presented to them" (citation omitted), Norris, 483 Mass. at 686. Put another way, the defendant's claim that certain witnesses were unreliable or that the testimony from some witnesses was inconsistent with the testimony from others and therefore insufficient to sustain a conviction "is nothing more than an

issue of credibility, an issue that is solely within the province of the jury." Id., quoting James, supra.

2. Commonwealth's opening statement and closing argument. The defendant makes several arguments relating to the Commonwealth's opening statement and closing argument. Specifically, he contends that the prosecutor impermissibly appealed to the jurors' sympathy and misstated the expected evidence in the opening statement; he further argues that the prosecutor[7] once again misstated the evidence and improperly vouched for a witness during the closing argument. Finally, he argues that these errors collectively warrant reversal. We address each argument in turn.

a. Opening statement. The defendant first contends that the prosecutor improperly appealed to the jurors' sympathy by repeatedly referencing the personal characteristics of the victim and his family members and "by making detailed descriptions of the 'horrific final memories'" that the family had of the victim. He also argues that the prosecutor impermissibly misstated the anticipated GPS evidence.

"The proper function of an opening is to outline in a general way the nature of the case which the counsel expects to

[7] Two prosecutors represented the Commonwealth during the trial. One gave the Commonwealth's opening statement, and the other delivered the Commonwealth's closing argument.

be able to prove or support by evidence" (citation omitted). Commonwealth v. Fazio, 375 Mass. 451, 454 (1978). "[A] claim of improper [opening statement] by the prosecutor must be judged in light of the entire [statement], the judge's instructions to the jury, and the evidence actually introduced at trial." Barbosa, 477 Mass. at 669, quoting Commonwealth v. Jones, 439 Mass. 249, 260-261 (2003). "Because defense counsel did not object to the Commonwealth's opening statement . . . , we determine whether any error created a substantial likelihood of a miscarriage of justice." Commonwealth v. Cheng Sun, 490 Mass. 196, 210 (2022). "For an error to have created a substantial likelihood of a miscarriage of justice, it must have been likely to have influenced the jury's conclusion." Id., quoting Commonwealth v. Wilson, 486 Mass. 328, 333 (2020). We agree that the prosecutor's emphasis on the victim's family members' final memories of the victim and statements regarding the precision of the GPS evidence were improper, but we conclude that they did not create a substantial likelihood of a miscarriage of justice.

i. Appeals to sympathy. As to the defendant's first argument, "[t]he prosecutor is entitled to tell the jury something of the person whose life ha[s] been lost in order to humanize the proceedings" (citation omitted). Cheng Sun, 490 Mass. at 209. But "the prosecutor must refrain, when personal characteristics are not relevant to any material issue, . . .

from so emphasizing those characteristics that it risks undermining the rationality and thus the integrity of the jury's verdict" (quotations and citation omitted). Id. Moreover, and particularly relevant here, the prosecutor "must avoid slip[ping] into emotionally provocative argument" (quotation and citation omitted). Id. "[W]here a prosecutor chooses to provide background information about a victim, he or she must take care not to cross the line from permissibly humanizing the proceedings to making an improper appeal to sympathy 'to ensure that the verdict was "based on the evidence rather than sympathy for the victim and [his] family."'" Id. at 209-210, quoting Commonwealth v. Mejia, 463 Mass. 243, 253 (2012).

Here, the prosecutor directed the jury's attention not only to the horrendous nature of the scene and victim's injuries but also to the victim's age, his status as a father, and his relationship with Ellis. The prosecutor also repeatedly focused on the "horrific final memories" that Ellis and his children would have of the victim. Undoubtedly, the prosecutor was allowed to tell the jury about the scene and the extent of victim's injuries so as prove extreme atrocity or cruelty. See Commonwealth v Alemany, 488 Mass. 499, 511 (2021) ("A prosecutor may use the opening to set the scene . . . even if that scene is unfavorable to the defendant"). Cf. Commonwealth v. Henley, 488 Mass. 95, 131-132 (2021) (no error in prosecutor's opening and

closing where "[a]lthough . . . evidence may have been upsetting, it was 'inherent in the odious . . . nature of the crime[] committed'" [citation omitted]). Moreover, he was entitled to tell the jury something about the victim, his age, and his family "to humanize the proceedings" (citation omitted). Cheng Sun, 490 Mass. at 209. Furthermore, as the prosecution was proceeding on a theory of extreme atrocity or cruelty, the prosecutor permissibly could discuss "the presence of the victim's [family] and the viciousness of the crime . . . because this evidence was relevant to the determination whether the defendant's actions constituted extreme atrocity or cruelty."[8] Commonwealth v. Johnson, 429 Mass. 745, 748 (1999). See Commonwealth v. Murphy, 426 Mass. 395, 402 (1998) ("evidence . . . victim's young son was in the [room] and possibly witnessed her assault and death was relevant to establish the

[8] "The defendant's trial occurred in February 2017, before our decision in Commonwealth v. Castillo, 485 Mass. 852, 865-867 (2020), prospectively changed the requirements of finding extreme atrocity or cruelty." Commonwealth v. Gonsalves, 488 Mass. 827, 834 (2022). "Under our case law as it existed at the time of the defendant's trial, a verdict could be sustained by a finding of the presence of at least one Cunneen factor." Id. "These include[d] the '[1] indifference to or taking pleasure in the victim's suffering, [2] consciousness and degree of suffering of the victim, [3] extent of physical injuries, [4] number of blows, [5] manner and force with which delivered, [6] instrument employed, and [7] disproportion between the means needed to cause death and those employed.'" Id., quoting Cunneen v. Commonwealth, 389 Mass. 216, 227 (1983).

victim's own emotional suffering"). See also Commonwealth v. Gonsalves, 488 Mass. 827, 834 (2022).

But the opening statement here went beyond humanizing the proceedings and setting the stage; rather, the prosecutor slipped into impermissible "emotionally provocative argument" (citation omitted). Cheng Sun, 490 Mass. at 209. Broadly speaking, the inflammatory rhetoric regarding the nature of the scene and the family's memories of the victim was a predominant theme of the prosecutor's opening, particularly during the early part. Ultimately, the repetitive use of emotionally provocative language, focusing the jury's attention on the victim's family's last memories of the victim, constituted an erroneous appeal to the jurors' sympathy. See id. at 209, 211-212. Cf. Commonwealth v. Bois, 476 Mass. 15, 34 (2016) (five references to defendant as "monster[] that come[s] out at night" in closing was error).

"Having determined that there was error, we consider, in the context of the arguments and the case as a whole, whether the [unobjected to] improper statement[s] . . . created a substantial likelihood of a miscarriage of justice" (quotations and citation omitted). Cheng Sun, 490 Mass. at 212. The defendant relies heavily on Commonwealth v. Niemic, 472 Mass. 665 (2015) (Niemic I), and Commonwealth v. Niemic, 483 Mass. 571 (2019) (Niemic II), in support of his position that the

prosecutor's appeals to sympathy and emotion created a substantial likelihood of a miscarriage of justice. Admittedly, in both Niemic I and Niemic II, we scrutinized similar appeals to sympathy in the context of the prosecutor's closing argument.[9] In Niemic I, we explained that "[w]e [had] serious concerns about the effect of the improprieties in the prosecutor's closing argument on the jury's deliberations." Niemic I, supra at 677. And in Niemic II, we explained that the prosecutor's improper comments in closing argument "went to the very heart of the case . . . [,] struck impermissibly . . . at the defendant's sole defense, and sought to impeach his only witnesses." Niemic II, supra at 598. While both Niemic cases are instructive, they are also distinguishable.

Most notably, reversal in the Niemic cases was not based solely on the prosecutor's improper appeals to sympathy. In Niemic I, we addressed concerns with the prosecutor's closing argument but did not decide whether the errors "created a substantial likelihood of a miscarriage of justice." Niemic I, 472 Mass. at 677. Rather, we concluded that defense counsel's

[9] We recognize that Niemic II referenced improper appeals to sympathy in the prosecutor's opening statement. See Niemic II, 483 Mass. at 587 n.29, 590 & n.31. And while we categorized some of the language used in the prosecutor's opening as "highly improper, emotionally charged discussion," id. at 590 n.31, quoting Niemic I, 472 Mass. at 675, we did not determine whether the appeals to sympathy in the opening statement alone created a substantial likelihood of a miscarriage of justice.

failure to request a reasonable provocation instruction "in combination with the errors in the prosecutor's closing argument[] require[d] a new trial." Id. In Niemic II, our conclusion that the closing argument constituted reversible error was based on "the confluence of the asserted errors in closing," including improper appeals to sympathy and the misuse of evidence admitted for a limited purpose. Niemic II, 483 Mass. at 596.

Here, the prosecutor's repeated references to the impact of the shooting on the family's final memories of the victim were improper, but the other claims of error raised by the defendant, and discussed in detail infra, were isolated and less consequential than the numerous significant errors that contributed to our conclusions in Niemic I and Niemic II. To the extent that we indicated reversal was warranted solely on the prosecutor's improper appeals to sympathy in Niemic II, it is significant that defense counsel in Niemic II objected to the prosecutor's appeals to sympathy. See Niemic II, 483 Mass. at 596, 598-599. By contrast, here, no objection was lodged to the Commonwealth's opening statement or to the closing argument. Therefore, the appeals to sympathy at issue in Niemic II were reviewed under a standard that is more favorable to the defendant than our standard of review in this case. See Commonwealth v. Murphy, 442 Mass. 485, 508-509 (2004) (where

defendant objects, he or she receives more favorable standard of review of prejudicial error rather than review for substantial likelihood of a miscarriage of justice). See also Commonwealth v. Burgos, 470 Mass. 133, 143 n.8 (2014) (describing substantial likelihood of miscarriage of justice as less favorable to defendant than prejudicial error); Commonwealth v. Linton, 456 Mass. 534, 560 n.19 (2010), S.C., 483 Mass. 227 (2019) (prejudicial error is "standard more generous to a defendant than the substantial likelihood of a miscarriage of justice standard").

Additionally, unlike in Niemic II, where the prosecutor's improper comments in closing argument "went to the very heart of the case . . . [,] struck impermissibly . . . at the defendant's sole defense, and sought to impeach his only witnesses," Niemic II, 483 Mass. at 598, here the defendant's defense was one of identity. And while the prosecutor's repeated references to the impact of the crime on the victim's family were improper, those statements did not go to the heart of the case or strike impermissibly at the defendant's defense that he was not the shooter. Indeed, the improper comments were unrelated to any contested issue at trial. Cf. Commonwealth v. Lutskov, 480 Mass. 575, 581 (2018), quoting Commonwealth v. Gabbidon, 398 Mass. 1, 5 (1986) (in context of erroneous jury instructions, "no harm accrues to a defendant if an error does not relate to

an issue actively contested at trial"); Commonwealth v. Rogers, 459 Mass. 249, 266, cert. denied, 565 U.S. 1080 (2011) (no prejudicial error where erroneous testimony by substitute medical examiner was not relevant to any contested issue).

In addition to being distinguishable from the Niemic cases, other aspects of the trial bolster our conclusion that the prosecutor's appeals to sympathy did not create a substantial likelihood of a miscarriage of justice. Those reasons include the trial judge's instructions to the jury and the lack of objection from defense counsel.

The first reason is grounded in the trial judge's role in guiding the jury during the trial and providing them with instructions. "The parties are entitled to have a jury appropriately guided at all stages by the trial judge, whose proper participation is essential to fair trial by jury." Commonwealth v. Rollins, 354 Mass. 630, 638 (1968). "It is the judge's function to act as the 'guiding spirit and controlling mind at a trial'" (citation omitted).[10] Commonwealth v. Rivera, 441 Mass. 358, 368 (2004).

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[10] Former Supreme Judicial Court Justice Henry T. Lummus, "whose treatise all trial judges would be well advised to study . . . described the responsibility of the trial judge at trial" as follows: "The judge who discharges the functions of his office [is] . . . the directing and controlling mind at the trial, and not a mere functionary to preserve order, and lend ceremonial dignity to the proceedings." Agnes, Guided Discretion in Massachusetts Evidence Law: Standards for the

During jury empanelment, the judge specifically discussed the importance of the legal presumption of the defendant's innocence with the venire and explained that the presumption cannot "be discarded or disposed of . . . by caprice, passion or prejudice." Additionally, both before the opening statements and before jury deliberations, the judge gave the jury detailed instructions on opening statements. He instructed before opening statements that "opening statements are not evidence," and instructed after closing arguments that "[t]he opening statements and the closing arguments of the attorneys are not a substitute for the evidence" but are meant "only . . . to assist [the jury] in understanding the evidence." Also, before the opening statements, he outlined what was permissible evidence and stated that if the jury "try the issues without fear or prejudice, or bias or sympathy, [it] will arrive at a true and just verdict." He likewise instructed on permissible evidence in the final charge and stated:

> "You should determine the facts based solely on a fair consideration of the evidence. You are to be completely fair and impartial. You are not to be swayed by prejudice, by sympathy, or any personal likes or dislikes towards either side."[11]

Admissibility of Prior Bad Acts against the Defendant, 13 Suffolk J. Trial & App. Advoc. 1, 5 n.18 (2008), quoting H.T. Lummus, The Trial Judge 19 (1937). See Whitney v. Wellesley & Boston St. Ry., 197 Mass. 495, 502 (1908).

[11] That defense counsel critiqued the Commonwealth's appeal to sympathy in his closing argument serves to further mitigate

Because there was no objection from defense counsel, these instructions were not tailored specifically to correct the prosecutor's appeals to sympathy. However, even standard instructions, such as those given in this case, contribute to mitigating the harm created by improper appeals to sympathy. See Commonwealth v. Gonzales, 465 Mass. 672, 680-681 (2013) ("Both before the opening statements and after the closing arguments of counsel, the judge instructed the jury that opening statements . . . are not evidence. . . . The jury are presumed to follow [the] instructions"). Contrast Commonwealth v. Santiago, 425 Mass. 491, 501 (1997), S.C., 427 Mass. 298 and 428 Mass. 39, cert. denied, 525 U.S. 1003 (1998) (instruction not sufficient to remedy prosecutor's error where judge failed to mention sympathy). On this record, the judge fulfilled his role as the "directing and controlling mind at the trial," see Whitney v. Wellesley & Boston St. Ry., 197 Mass. 495, 502 (1908), and in doing so his numerous instructions helped to mitigate the effect of the prosecutor's repeated references to the impact of the crime on the victim's family.

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any prejudice created by the opening, because to the extent that it reminded the jurors of the error, it likewise reminded them that appeals to sympathy are improper. The improper nature of the prosecutor's repeated references to the impact of the crime on the victim's family was reinforced shortly thereafter by the judge's explicit instruction that the case was not to be decided on prejudice or sympathy.

Second, in addition to the judge's instructions, which the jury are presumed to follow, see Commonwealth v. Roy, 464 Mass. 818, 829 (2013), the lack of an objection from defense counsel regarding the opening statement provides "some indication that the tone, manner, and substance of the now challenged aspect[] of the [prosecutor's opening] [was] not unfairly prejudicial." Commonwealth v. Moore, 489 Mass. 735, 754 (2022), quoting Commonwealth v. Maynard, 436 Mass. 558, 570 (2002).

Ultimately, we conclude that "although portions of the prosecutor's opening statement . . . were improper, when considered in the context of the whole case, the errors did not create a substantial likelihood of a miscarriage of justice." Cheng Sun, 490 Mass. at 213.

ii. Misstating anticipated evidence. The defendant next takes issue with the prosecutor's description of GPS data and its accuracy, specifically, the prosecutor's statement that the GPS evidence would be "so specific and so accurate, it's going to show . . . that this defendant was facing in, looking in the hallway, from outside Lawrence [Street]. We are going to put the defendant right there."

"A prosecutor's opening statement may reference anything that he or she reasonably believes in good faith will be proved by evidence introduced during the course of the trial." Commonwealth v. Copeland, 481 Mass. 255, 261 n.5 (2019), quoting

Commonwealth v. DePina, 476 Mass. 614, 627 (2017). "Absent a showing of bad faith or prejudice . . . the fact that certain evidence fails to materialize is not a ground for reversal" (citation omitted). Commonwealth v. Sylvia, 456 Mass. 182, 188 (2010).

We agree with the defendant that the statement at issue misstated the accuracy of GPS data and that the prosecutor reasonably should have known as much. Against the backdrop of the entire case, however, we conclude that this error did not create a substantial likelihood of a miscarriage of justice.

Here, the GPS evidence did put the defendant at the scene of the shooting. While not presented by means of GPS data, there also was evidence that put the shooter in the Lawrence Street hallway, specifically eyewitnesses. Additionally, the statement suggesting that the GPS data would place the defendant "looking in the hallway," although erroneous, was made once in the opening statement and was not repeated during closing argument. Moreover, as noted supra, the judge properly instructed the jury twice that opening statements are not evidence, and we presume the jury follow these instructions. See Commonwealth v. Salazar, 481 Mass. 105, 118 (2018). See also Cheng Sun, 490 Mass. at 213 ("the judge's instructions [that the jury determine evidence and what conclusions to draw]

were sufficient to mitigate the impact of the prosecutor's improper statements").

Admittedly, the GPS data was an important piece of the Commonwealth's case, but our conclusion that there was no substantial likelihood of a miscarriage of justice is further buttressed by the lack of an objection from defense counsel and by the strength of the GPS evidence that was permissibly admitted and argued. Cf. Davis, 487 Mass. at 463-464 (GPS evidence establishing defendant's location and speed "helped to establish his identity as the shooter by matching his movements to those of . . . the shooter"); Commonwealth v. Holley, 476 Mass. 114, 127 (2016) ("The lack of objection to this statement, the judge's earlier charge explaining that opening statements are not evidence, and the detailed expert testimony on random match statistics made the prosecutor's imprecise phrasing of the random match probability relatively inconsequential in the context of the entire trial"); Commonwealth v. Lally, 473 Mass. 693, 705-708 (2016) (prosecutor's assertion in opening statement regarding deoxyribonucleic acid [DNA] evidence was inconsistent with DNA evidence elicited at trial; reversal not required where "trial counsel did not object, the judge's instructions mitigated the errors, and the comments were not likely to influence the jury's conclusion where . . . [the] case did not hinge on the DNA evidence" [citation omitted]). See

Commonwealth v. Toro, 395 Mass. 354, 360 (1985); Commonwealth v. Oliveira, 74 Mass. App. Ct. 49, 56 (2009), citing Toro, supra.

b. Closing argument. The defendant also argues that several reversible errors occurred during the prosecutor's closing argument. The defendant contends that the prosecutor improperly vouched for McNicholas's credibility and improperly attributed a statement to the defendant. "We examine [all] the challenged statements 'in the context of the entire closing, the jury instructions, and the evidence introduced at trial.'" Cheng Sun, 490 Mass. at 217, quoting Commonwealth v. Wilkerson, 486 Mass. 159, 180 (2020). Where there was no objection to the prosecutor's closing argument, we review the challenged statements for error and, if they constitute error, for a substantial likelihood of a miscarriage of justice. See Commonwealth v. Fernandes, 478 Mass. 725, 742 (2018).

i. Vouching. "It is improper for an attorney to vouch for a witness's credibility." Cheng Sun, 490 Mass. at 219. "However, it is permissible to comment and draw inferences regarding the evidence at trial" (citation omitted). Id. Improper vouching need not be explicit; it "includes suggestions that the prosecutor has personal knowledge of the veracity of a witness's testimony or knowledge about the case independent of the evidence before the jury." Commonwealth v. Silvelo, 486 Mass. 13, 20 (2020). And "[w]hile a prosecutor may not vouch

for the truthfulness of a witness's testimony, . . . where the credibility of a witness is an issue, counsel may 'argue from the evidence why a witness should be believed'" (citation omitted). Commonwealth v. Brewer, 472 Mass. 307, 315 (2015). Indeed, "an advocate can 'provide the jury with the reasons why they should find a witness's observations to be accurate, but she cannot tell the jury that the witness speaks the truth'" (citation omitted). Gonsalves, 488 Mass. at 841.

In the statement the defendant challenges, the prosecutor asserted:

> "Counsel wants you to believe that the police threatened [McNicholas], scared him, and drew guns at him. But I ask you again, does that make sense? According to the defense's theory, the police threaten him the first time they meet him. And they coerced him into saying that the defendant said: I killed him. They convinced him to say that. Then he comes here to testify before the grand jury and he decides: Oh, I'm not so scared anymore. And changes his story, then goes through all of that again and having the police threaten him and intimidate him again. Would someone who has anxiety, just keep having the police harass him and beat him into submission of what they want to hear? Or would he just stick to the story if that's really what happened.
>
> "How about his friend of at least ten years, confessed to murder to him, to somebody who has anxiety and bipolar and PTSD? I would suggest that would be rather traumatic."

As an initial matter, defense counsel put McNicholas's credibility at issue both during cross-examination and closing argument. Defense counsel's cross-examination of McNicholas included questions about inconsistencies in McNicholas's

statements, his marijuana use, his mental health conditions, the medications he was taking, and alleged threats by police. During closing argument, defense counsel dedicated a significant portion of his time to discrediting McNicholas on those bases. In fact, he emphatically told the jury multiple times, "Don't believe McNicholas" and "McNicholas epitomizes the witness [the jury] should not believe."

"We have often stated that defense counsel's trial tactics are not immune from comment in a prosecutor's closing argument provided the comment is based on evidence heard by the jury." Commonwealth v. Cohen, 412 Mass. 375, 388 (1992). "Because defense counsel had placed [McNicholas's] credibility at issue both during his cross-examination of [him] and in his closing argument, the prosecutor was entitled to respond within the limits of the evidence and to provide the jury with reasons for believing [him]." Gonsalves, 488 Mass. at 842, quoting Commonwealth v. Sanders, 451 Mass. 290, 297 (2008). "[T]he prosecutor's statements that the jury should find [McNicholas] credible were made in the context of the defendant's vehement attack on [McNicholas's] credibility during his own closing argument." Commonwealth v. Kebreau, 454 Mass. 287, 304 (2009). On this record, the prosecutor was not impermissibly injecting outside knowledge regarding McNicholas's mental health; rather, she was critiquing the inferences articulated in defense

counsel's closing and suggesting an alternate competing basis for McNicholas's inconsistencies and why his testimony should be believed. See Cohen, supra at 384 ("If he speaks with propriety on matters on the record before the jury, a prosecutor may properly comment on the trial tactics of the defence and on evidence developed or promised by the defence"). See also Commonwealth v. Mitchell, 428 Mass. 852, 857 (1999) (prosecutor's use of phrase "I suggest," viewed squarely in proper context, did not imply prosecutor had personal knowledge or was stating personal belief).

"In sum, we conclude that the prosecutor's remarks at issue did not vouch for [McNicholas's] credibility by stating or implying that the government has special knowledge by which it can verify [McNicholas's] testimony" (quotation and citation omitted). Commonwealth v. Grier, 490 Mass. 455, 471 (2022). See Kebreau, 454 Mass. at 304-305 (no vouching where defense counsel made extensive statements concerning witness's lack of credibility, including calling witness "liar" and arguing witness "twisted," "turned," and "sp[un]" events; "prosecutor was entitled to respond to these statements with a forceful argument, based on the evidence and the jury's common sense understanding of the events"). "Last, the judge's careful and clear instructions concerning the role of the closing arguments and how to determine the credibility of witnesses adequately

offset any semblance of impropriety, were we to determine that one occurred."[12] Brewer, 472 Mass. at 315.

ii. Statement not in evidence. The defendant next contends that the prosecutor made a misstatement of evidence during her closing when she stated, "in the defendant's own words, he executed [the victim]." "Although 'counsel may argue the evidence and the fair inferences which can be drawn from the evidence,' . . . 'a prosecutor should not . . . misstate the evidence or refer to facts not in evidence'" (citations omitted). Cheng Sun, 490 Mass. at 221. Such arguments are improper. Id. "References to facts not in the record or misstatements of the evidence have been treated as serious errors where the misstatement may have prejudiced the defendant" (citation omitted). Id.

Here, there can be no doubt that the statement attributed to the defendant was that he "killed" the victim, not that he "executed" the victim. As such, the prosecutor misstated the evidence. Because the prosecutor's statement was improper, "we

[12] The defendant also claims the prosecutor's statement in closing argument that defense "[c]ounsel wants you to believe that the police . . . drew guns at [McNicholas]" was not supported by the evidence. We disagree. The prosecutor's statement was a fair response to defense counsel's trial strategy. See Henley, 488 Mass. at 131 ("A prosecutor [is] permitted to comment on the defense strategy and tactics, and even to argue that the strategy was intended to confuse" [quotations and citation omitted]).

are guided by the following factors when deciding whether" the error created a substantial likelihood of a miscarriage of justice: "[(1)] whether defense counsel seasonably objected to the arguments at trial . . . [(2)] whether the judge's instructions mitigated the error . . . [(3)] whether the errors in the arguments went to the heart of the issues at trial or concerned collateral matters . . . [(4)] whether the jury would be able to sort out the excessive claims made by the prosecutor . . . and [(5)] whether the Commonwealth's case was so overwhelming that the errors did not prejudice the defendant" (quotations and citation omitted). Commonwealth v. Teixeira, 486 Mass. 617, 635 (2021).[13]

[13] These factors are a nonexclusive list of considerations for evaluating an error created during closing arguments and its impact on the case. We have considered these same factors in cases involving various standards of review. See, e.g., Commonwealth v. Harris, 443 Mass. 714, 732-733 (2005) (substantial risk of miscarriage of justice); Maynard, 436 Mass. at 570 (substantial likelihood of miscarriage of justice); Santiago, 425 Mass. at 500 (prejudicial error). Moreover, the exact words used to outline the factors have not been the same in every case dealing with an error in closing argument. See, e.g., Commonwealth v. Rutherford, 476 Mass. 639, 647 (2017). We take this opportunity to clarify that the factors, irrespective of the specific language used, are merely a list that may be considered in all cases where errors occur in closing argument, regardless of the applicable standard of review. While the factors remain relevant considerations, no one factor is dispositive and the reviewing court's ultimate focus must be on the harm created by a purported error through the lens of the appropriate standard of review.

While the prosecutor's statement was improper, we conclude that it did not create a substantial likelihood of a miscarriage of justice. Given the manner in which the victim was killed, the prosecutor permissibly could have described the killing as an execution;[14] she just could not attribute the word "executed" to the defendant. See, e.g., Commonwealth v. Camacho, 472 Mass. 587, 589-590, 608-609 (2015) (shooting permissibly could be labeled execution where defendant fired gun at victim's group inside club, chased group out of club, and shot victim two more times in back while he lay on floor). Here, the statement misattributing the word "executed" to the defendant happened only once in the prosecutor's thirteen-page closing argument. Additionally, defense counsel did not object, see Maynard, 436 Mass. at 570, and the judge instructed the jury that closing arguments are not evidence and that, to the extent an attorney's statement conflicts with their memory, it is the jury's memory that controls. See Salazar, 481 Mass. at 118 (where judge properly instructed jury that closing arguments were not evidence, brief isolated statement was "not egregious enough to infect the whole of the trial"). Furthermore, "[w]e ascribe a certain level of sophistication to the jury, and, [on this record], have little doubt that they would not have been swayed

[14] We note that defense counsel explicitly stated that the victim had been executed twice in his closing argument.

by this [misstatement]" (quotation and citation omitted). Wilkerson, 486 Mass. at 181.[15]

3. Review under G. L. c. 278, § 33E. "The defendant has asked us to reduce the verdict in consideration of the fact that he was [nineteen] years old at the time of the shooting." Commonwealth v. Gamboa, 490 Mass. 294, 311 n.13 (2022). Put differently, "the defendant asks us to consider his youth and immaturity in mitigation of his sentence." Commonwealth v. Denson, 489 Mass. 138, 154 (2022). "However, we have never held that a defendant over the age of eighteen could not be convicted of murder in the first degree," Gamboa, supra, "and there is nothing in the record that indicates a reduction in the verdict on this basis is warranted." Denson, supra. Having reviewed the entire record, pursuant to G. L. c. 278, § 33E, we discern no basis to set aside or reduce the verdict or to order a new trial.

Judgment affirmed.

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[15] "The defendant [also] argues that his conviction requires reversal because of the cumulative effect of the errors at trial. Given our conclusions, there was no risk that any error requires reversal." Commonwealth v. Roy, 464 Mass. 818, 836 (2013). Here, "the cumulative [effect of the] errors . . . were no more prejudicial than any individual errors, which had minimal impact, if any." Commonwealth v. Duran, 435 Mass. 97, 107 (2001).