SJC-12565

COMMONWEALTH vs. ANTWAN GONSALVES.

Middlesex. October 8, 2021. - January 13, 2022.

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

Homicide. Evidence, Motive, Prior misconduct, Impeachment of credibility, Opinion, Hostile witness, Cross-examination, Religious beliefs. Witness, Impeachment, Hostile witness, Cross-examination. Practice, Criminal, Capital case, New trial, Assistance of counsel, Cross-examination by prosecutor, Failure to object.

Indictment found and returned in the Superior Court Department on October 30, 2015.

The case was tried before Thomas P. Billings, J., and a motion for a new trial, filed on July 11, 2019, was heard by Kathe M. Tuttman, J.

Elizabeth Caddick for the defendant.
Lindsay Russell, Assistant District Attorney, for the Commonwealth.

KAFKER, J. A jury convicted the defendant, Antwan Gonsalves, of murder in the first degree based on extreme atrocity or cruelty for the stabbing of Tywann D. Jones. The

defendant appeals from his conviction and from the denial of his motion for a new trial. First, he argues that there was insufficient evidence to prove extreme atrocity or cruelty. Second, the defendant argues that it was prejudicial error to admit evidence that he sold marijuana as a potential motive for the crime. Finally, he claims his trial counsel was ineffective for a variety of reasons, including (1) failing to impeach two important witnesses for the Commonwealth with their criminal records; (2) failing to object to testimony, and its reference by the Commonwealth during closing arguments, in which one witness said the defendant was a "murderer";(3) failing to object to a witness claiming she "spoke to God" before deciding to change her testimony to support the Commonwealth; and (4) failing to seek a curative instruction after the prosecutor asked a witness questions implying that he was afraid of the defendant and his brother and when the jury, allegedly in response to this line of questioning, sent a note during deliberations asking who had access to their personal information. The defendant also requests that we exercise our power under G. L. c. 278, § 33E, to reduce his conviction to murder in the second degree.

We conclude that there was no reversible error. Having thoroughly reviewed the record, we also conclude that there is no reason to grant relief under G. L. c. 278, § 33E.

Background. 1. Events surrounding the stabbing. We begin by summarizing the facts as the jury could have found them, drawing all reasonable inferences in favor of the Commonwealth and reserving other facts for discussion of specific issues.

The defendant was in the Central Square area of Cambridge on the night of September 11, 2015, into the early morning of September 12 with Georgette Bethune and Maurice Rascoe. Bethune had known the defendant for two and one-half to three years, but had been dating him and letting him stay with her and her son at her apartment for a couple months. Rascoe had known the defendant for about ten years and considered him a friend. Both had met the defendant because he regularly sold them small amounts of marijuana. Neither had met the other before, and they did not speak again after September 12, 2015.

The two met up with the defendant at around 11 P.M. at a restaurant in Cambridge. Bethune testified that the defendant was wearing khaki pants and a black shirt. They then left to go to a bar in the defendant's car. The car was a dark blue, two-door Mercedes-Benz "hatchback." It had a "for sale" sign in the rear passenger's side window. Registry of motor vehicles (RMV) records show that the defendant owned a blue, two-door Mercedes-Benz at the time.

The three then went to a bar on Massachusetts Avenue. They were only there about twenty minutes when Rascoe asked to be

driven home to Malden. Around this time, Rascoe realized his cell phone's battery was dead, and borrowed the defendant's cell phone to call his girlfriend to let her know that he was coming home. Cell phone records show two short calls from the defendant's cell phone to Rascoe's girlfriend's cell phone at 1:35 A.M. and 1:36 A.M.; Rascoe testified that he made these calls either inside or in front of the bar as they were leaving. The three got into the car with the defendant in the driver's seat, Bethune in the front passenger's seat, and Rascoe in the back.

Around this time, the victim was also socializing with some friends in Central Square. At around 1:30 A.M., the group visited a convenience store on Massachusetts Avenue, near the bar. The victim left to find a bathroom while his friends were still in the store.

Devon Queen, who was smoking cigarettes outside the convenience store, approached the victim to ask him for marijuana. He did not know the victim, but thought the victim sold marijuana because he could smell it on the victim. The victim said to hold on and walked down the street to the defendant's car. Queen could hear yelling, but not specifically what was being said, although he did hear the victim say something about drugs.

The victim had approached the front passenger's side window, where Bethune was sitting, and began talking about drugs.[1] The victim said that he "got it all" and asked if they wanted "crack" cocaine. According to Bethune, the defendant asked something like, "Why is this guy out here?" or "Why are you guys out here?" Rascoe testified that he responded by laughing, but took it as an insult because he did not think the group looked like the type of people who would buy crack cocaine. The defendant responded by saying, "Get the fuck away from my car." He was not yelling, but his tone was serious. The victim backed up onto the sidewalk and did not initiate any further contact with the people in the car, but the defendant got out of the car and approached him, and Rascoe got out to follow the defendant. Rascoe testified that the defendant was arguing with the victim with "arms flailing" and that the defendant brushed off Rascoe's attempts to pull him away from the altercation.

Bethune saw the defendant "punching" the man with an underhand motion three times. The man had one hand in or on his pocket and was holding the defendant by the shirt with his other hand. She did not see anyone else involved in the fight,

[1] Rascoe testified that two people approached the car, but said that the second man was no longer at the scene when he and the defendant left the car or during the fight.

including Rascoe. Rascoe also testified that, besides his attempts to pull the defendant away, no one tried to interfere with the fight.

The victim came back towards the convenience store and fell down in front of Queen. At some point Rascoe picked up the victim's cell phone. He made conflicting statements on whether he picked it up from the ground, took it from the victim's pocket, or did not remember from where he got it. He also said he did not know that it was the victim's cell phone, but admitted that he knew it was not his or the defendant's.

The defendant and Rascoe reentered the car through the driver's side and made a U-turn to head towards Harvard Square. The defendant had a bloody knife in his hand, which he wiped off on his shirt and threw out the window at some point during the drive. Bethune testified that it was a black switchblade with a dragon on the handle, and that she had seen the knife before. The defendant repeatedly said that he "poked the n---- up" or that he "poked the kid." Bethune was upset that the defendant had gotten in a fight with the man in front of a group of people, and was worried that the man's friends would retaliate. Upon learning that the defendant had stabbed someone, Rascoe threw the cell phone he had picked up out of the window.

The victim came back into the convenience store, bleeding but conscious, and collapsed again. The cashier called 911

while the victim's friends attempted to help him. Eventually some off-duty doctors who were in the area entered the store and began to treat the victim. An ambulance arrived and took the victim to Massachusetts General Hospital. He was pronounced dead at 4:21 A.M.

The cause of death was stab wounds to the chest and abdomen. The autopsy revealed five separate stab wounds. The first stab wound was one and one-half to two inches deep and passed between two ribs at a slightly upward angle into the right lung, causing bleeding into the chest cavity and air to escape the lungs. The second wound penetrated the sternum and pierced the heart. The third penetrated about two inches into the victim at a slightly upward angle, and passed between two ribs into the liver. The fourth penetrated four inches into the victim and hit both the liver and a major blood vessel. The fifth wound was three inches deep and passed through the abdominal wall at an upward angle into the liver. One of the stab wounds caused two separate injuries to the liver, indicating either that the victim moved while the knife was in his abdomen or that the knife was partially withdrawn and then stabbed inwards again. Each of the stab wounds could have been independently fatal.

2. Defendant's movements after the stabbing. The group drove to Rascoe's house in Malden, where they continued to

drink. Bethune testified that the defendant changed his shirt at Rascoe's house. The defendant and Bethune stayed for one to one and one-half hours before driving to Bethune's apartment.

The next morning, the defendant was "uncomfortable and frantic." He asked Bethune why she did not stop him from getting out of the car. He said that he was going to get rid of his car and asked Bethune to remove the "for sale" sign from the window, although she did not comply. He left Bethune's apartment that morning without telling her where he was going, and Bethune never saw him again until she testified at trial. At some point he called her to say that "the guy died," which, up to that point, Bethune did not know. She communicated with the defendant a few more times by telephone over the next couple days, although he told her not to call him on his old number because it was "gone" and when he called Bethune his telephone number would appear as "unknown."

At around the time the defendant left Bethune's apartment, Rascoe realized he had left his cell phone in the defendant's car. Unaware of the victim's condition, he arranged to meet the defendant. Rascoe brought along his girlfriend and two of their children. The defendant arrived in the two-door Mercedes-Benz, but Rascoe noticed that the "for sale" sign had been removed. Thereafter, he did not see the defendant or have any contact

with him until trial, despite trying to get in touch with him after hearing about the death in Central Square.

Later on September 12, the defendant went to a prearranged rendezvous in Framingham with Keila Gonzalez, another woman he had been seeing for a couple of weeks. The two usually met up on weekends in Connecticut, where Gonzalez lived. However, that weekend they were instead meeting in Framingham so that the defendant could go back to Cambridge for the sixtieth birthday party of Debra Gonsalves, his aunt and adoptive mother. Without explaining why, the defendant canceled his plans to attend the party, and they spent the rest of the weekend in Hartford, Connecticut, instead. The defendant left on the following Monday and did not contact Gonzalez again. During this time, the defendant was driving the Mercedes-Benz, but Gonzalez did not mention seeing the "for sale" sign. Police were unable to locate the vehicle.

3. Investigation into the killing. The police requested surveillance footage from inside the convenience store and the surrounding streets. None showed the stabbing or the fight that led up to it. However, footage did show the victim fall down outside the doors of the store, where he was approached by a man wearing khaki pants and a man wearing a large watch, who bent over to pick something up. It also showed a dark, two-door car

make a U-turn on Massachusetts Avenue and be driven away from the scene of the murder.

Two witnesses that were on Massachusetts Avenue told police they saw a dark-colored, two-door Mercedes-Benz with a "for sale" sign around the time of the murder. One said he saw a fight break out on the sidewalk before the Mercedes-Benz made a sharp turn and went towards Harvard Square. The other, the doorman at the bar, remembered seeing the Mercedes-Benz being parked illegally in a handicap spot and telling the driver to move into a legal spot. The driver, who the doorman described as "real small," told the doorman that his mother, "Debbie," was already at the bar. Evidently, this led the police to Debra Gonsalves, and her adoptive son, the defendant. RMV records revealed that the defendant was five feet, two inches tall and owned a car matching the descriptions given by the eyewitnesses.

The defendant's cell phone records showed two calls to Rascoe's girlfriend's cell phone around the time of the murder. Police went to her apartment to interview her, but no one answered the door. They noticed that the name "Rascoe" was on the mailbox. When they returned later, they noticed that the name had been removed. While interviewing Rascoe's girlfriend at her apartment, she revealed that Rascoe had been the one using the defendant's cell phone, and that Rascoe was upstairs. Rascoe went with the officers to the police station, where he

consented to having his cell phone searched, and gave a two and one-half hour long interview. He initially denied witnessing or being involved in the murder, but later admitted that he got out of the car as a "peacemaker" and that the defendant said he "poked" the victim. He also volunteered that he was the man wearing the large watch who could be seen removing something from the defendant's pocket in the convenience store's surveillance video recording.

The police also attempted to interview Bethune. At first she denied any knowledge of the stabbing. The police seized her cell phone, so she bought a new one to get in touch with the defendant to tell him that the police "pretty much [knew] every single thing." She was subpoenaed to appear before the grand jury but failed to appear and was arrested. After spending the night in jail, she testified before the grand jury, admitting that she saw the defendant fighting with the victim, that he had a bloody knife when he got back into the car, and that he had admitted to the stabbing on the car ride to Rascoe's home.

The defendant turned himself in to police on September 24.

4. Procedural history. The defendant was indicted on a charge of murder in the first degree in October 2015. He was tried before a jury in February 2017. The Commonwealth proceeded on theories of deliberate premeditation and extreme atrocity or cruelty. The trial judge denied motions for a

directed verdict of not guilty, both at the close of the Commonwealth's case and at the close of all evidence. He declined the defendant's request for a manslaughter instruction, but he did instruct the jury on intoxication. The defendant was convicted of murder in the first degree based on extreme atrocity or cruelty, but not deliberate premeditation. He was sentenced to life in prison without parole.

The defendant filed a notice of appeal in March 2017 and a motion for a new trial in July 2019. The motion for a new trial was remanded to the Superior Court, to another judge, as the trial judge had retired. After a nonevidentiary hearing, the motion was denied, and the defendant appealed. The appeal from his motion for a new trial was consolidated with his direct appeal.

Discussion. 1. Direct appeal. The defendant raises two issues on direct appeal: (1) the sufficiency of the evidence of extreme atrocity or cruelty and (2) the admission of evidence that he sold marijuana.

a. Extreme atrocity or cruelty. In evaluating the sufficiency of the evidence supporting a conviction, we "determine whether, viewing the evidence in the light most favorable to the Commonwealth, any rational finder of fact could have found each of the elements of the offense beyond a reasonable doubt." Commonwealth v. Andrade, 488 Mass. 522, 543

(2021), quoting Commonwealth v. Jones, 477 Mass. 307, 316 (2017).

General Laws c. 265, § 1, defines murder in the first degree as "[m]urder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life." 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. As such, the jury were instructed to consider the seven so-called Cunneen factors. These include 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." Cunneen v. Commonwealth, 389 Mass. 216, 227 (1983). 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. See Commonwealth v. Hunter, 416 Mass. 831, 837 (1994), S.C., 427 Mass. 651 (1998).

The evidence before the jury could have supported a finding of extreme atrocity or cruelty based on at least three factors.

First, the defendant stabbed the victim five times in vital areas, and may have stabbed him a sixth time without fully withdrawing the blade. Each could have been independently fatal, indicating the attack was "brutal and disproportionate." Commonwealth v. Rodriquez 461 Mass. 100, 104-105 (2011) (unarmed victim stabbed seven times in "areas in the body that were likely to cause serious injury and pain").

Also, after committing the stabbing, the defendant repeatedly said that he "poked the n---- up" or "poked the kid." This is evidence of indifference to the suffering he had just inflicted on the victim. Moreover, Rascoe responded by calling him an "idiot" and asking if he was trying to impress his girlfriend, indicating that he interpreted the remark as a boast or celebration. See Rodriquez, 461 Mass. at 104 (rejecting argument that defendant saying "I got him" after stabbing only reflected that defendant was "glad to have prevailed in the fight" because jury could have construed words to express pleasure in having killed victim); Commonwealth v. Anderson, 445 Mass. 195, 202 (2005) (finding of extreme atrocity or cruelty supported by sufficient evidence where defendant said he "murked" victim and "got my body for the summer").

Finally, the victim's consciousness and degree of suffering is also apparent from the wounds inflicted on his chest and abdomen, the eyewitness accounts at the convenience store, and

the surveillance footage. The victim was stabbed in the lungs, heart, and liver. He was able to walk back down the sidewalk to the convenience store and into the store itself. He knelt down, holding his stomach, and attempted to say something to his friends, although they "couldn't clearly hear what he was saying." See Commonwealth v. Noeun Sok, 439 Mass. 428, 430-432 (2003) (finding of extreme atrocity or cruelty supported where victim was chased after being stabbed and was "still conscious for some considerable period of time" and "experienced severe pain from his extensive internal injuries"). The evidence clearly supported the jury's verdict.[2]

---

[2] The defendant also argues that we should reduce his conviction to murder in the second degree pursuant to G. L. c. 278, § 33E, because, although our ruling in Castillo, 485 Mass. at 863-864, was expressly made prospective, it clearly expresses disapproval of finding extreme atrocity or cruelty "based solely on the degree of the victim's conscious suffering." But as explained above, there is ample evidence to support a finding of other Cunneen factors that relate to the "egregiousness of the defendant's conduct." Id. at 864.

Had the defendant's trial been held after our decision in Castillo, the jury would have been instructed to consider the following three factors:

> "1. Whether the defendant was indifferent to or took pleasure in the suffering of the deceased; 2. Whether the defendant's method or means of killing the deceased was reasonably likely to substantially increase or prolong the conscious suffering of the victim; or 3. Whether the means used by the defendant were excessive and out of proportion to what would be needed to kill a person." (Footnotes omitted.)

b. Prior bad act evidence. The defendant also challenges the admission of evidence that he sold marijuana to Bethune and Rascoe. Trial counsel filed a motion in limine to exclude the evidence and objected to its introduction. Therefore, we review for prejudicial error. Commonwealth v. Tavares, 482 Mass. 694, 712 (2019). "We must first determine whether the judge committed an error of law or an abuse of discretion." Id. An abuse of discretion is "a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). If the evidence was admitted in error, we next determine whether its admission was prejudicial. Tavares, supra. Evidence is not prejudicial if it "did not influence the jury, or had but very slight effect" (citation omitted). Commonwealth v. Cruz, 445 Mass. 589, 591 (2005).

The Commonwealth cannot "introduce evidence that a defendant previously has misbehaved, indictably or not, for the purpose of showing his bad character or propensity to commit the crime charged." Commonwealth v. Copney, 468 Mass. 405, 412 (2014), quoting Commonwealth v. Helfant, 398 Mass. 214, 224-225

Id. at 869-870 (Appendix). The defendant's conduct would perhaps no longer meet the second factor, but still clearly meets the first and third.

(1986). See Mass. G. Evid. § 404(b)(1) (2021). However, such evidence can be admitted to "prove common scheme, pattern of operation, identity, intent, or motive" or "where evidence of the prior bad acts is inextricably intertwined with the description of events of the killing" (quotation, citation, and alteration omitted). Commonwealth v. Marrero, 427 Mass. 65, 67 (1998). See Mass. G. Evid. § 404(b)(2). However, in such cases "the evidence will not be admitted if its probative value is outweighed by the risk of unfair prejudice to the defendant." Commonwealth v. Crayton, 470 Mass. 228, 249 (2014).

The evidence that the defendant sold small amounts of marijuana was offered to prove one possible motive for the murder, which was that the defendant was a drug dealer concerned that the victim was encroaching on his territory. Queen testified that the victim approached the car to discuss drugs, and Bethune testified that the defendant asked, "Why is this guy out here?" or "Why are you guys out here?" Without the evidence on the defendant's own involvement in drug dealing, "the killing could have appeared to the jury as an essentially inexplicable act of violence." Commonwealth v. Bryant, 482 Mass. 731, 735-736 (2019), quoting Commonwealth v. Bradshaw, 385 Mass. 244, 269 (1982).

The risk of prejudice from this evidence neither outweighs its probative value nor could have had more than a slight effect

on the jury. Besides the fair and permissible use of the evidence to establish motive for this particular murder, there is no likelihood that the jury would have convicted him of murder based on his prior sales of small amounts of marijuana to the two witnesses.[3] Therefore, the trial judge did not abuse his discretion in admitting this evidence.

2. Motion for a new trial. The defendant moved for a new trial, claiming ineffective assistance of counsel.[4] When reviewing a conviction of murder in the first degree, "we first determine whether there was an error in the course of the trial and, if there was, whether that error was likely to have influenced the jury's conclusion, such that it created a substantial likelihood of a miscarriage of justice" (quotations, citations, and alteration omitted). Commonwealth v. Dowds, 483 Mass. 498, 502 (2019). Also, "where the motion judge is not the trial judge, and no evidence is taken, we are able to assess the

---

[3] As the Commonwealth points out, this trial occurred only a couple months after Massachusetts voters approved a referendum legalizing recreational marijuana use.

[4] Appellate counsel relies on the fact that trial counsel has been suspended from the practice of law for misconduct unrelated to her representation of the defendant. This has limited, if any, relevance to our review of her effectiveness in this case. See Commonwealth v. McGuire, 421 Mass. 236, 238-239 (1995) ("Even where a suspension had been in effect, there is support for the conclusion that a defendant would not be entitled to a new trial unless he could show that his counsel committed some material error in representing him").

trial record and conduct a de novo review" rather than review for an abuse of discretion. Commonwealth v. Sanchez, 476 Mass. 725, 742 (2017).[5]

a. Failure to impeach with criminal records. The defendant first argues that his counsel was ineffective for failing to impeach Rascoe and Bethune with their criminal records.[6] As provided by G. L. c. 233, § 21, a witness's previous convictions "may be shown to affect his credibility," subject to certain conditions. See Commonwealth v. Daley, 439 Mass. 558, 563 (2003) ("[witness]'s earlier disregard for the law may suggest to the fact finder similar disregard for the courtroom oath" [citation omitted]). At the time of trial, Rascoe had been convicted of larceny over $250, larceny from a person, two separate charges of assault and battery, witness intimidation, possession of a class D substance, possession of a class B substance with intent to distribute, disorderly conduct, and assault and battery on a police officer. Of these

[5] As trial counsel has not cooperated with appellate counsel, we do not have the benefit of an affidavit from her explaining whether any claimed error stemmed from a "strategic or tactical decision." Commonwealth v. Watt, 484 Mass. 742, 762 (2020).

[6] Counsel did request the witnesses' criminal records, although there appears to be a factual dispute over whether she received them or not. As we conclude that counsel successfully impeached the witnesses without the criminal records, we need not resolve this issue.

convictions, the jury only learned of the last one because defense counsel impeached Rascoe by revealing that he was still on probation for it when the murder occurred and during trial.

Bethune was charged with assault and battery by means of a dangerous weapon for an incident that occurred after the murder and her grand jury testimony but before she testified at trial. Arrests or indictments cannot be used to attack a witness's credibility in the same way that convictions can. See G. L. c. 233, § 21. See also Commonwealth v. Haywood, 377 Mass. 755, 759 (1979) ("Arrest or indictment alone is insufficient for general impeachment purposes"). But pending charges can be used to show a witness's bias stemming from his or her expectation of favorable treatment for cooperation. Commonwealth v. Connor, 392 Mass. 838, 841 (1984).

At the outset, we note that in most cases, "failing to impeach a witness in a particular way does not constitute ineffective assistance." Commonwealth v. Watt, 484 Mass. 742, 763 (2020). This case is no exception to the general rule. Even conceding that defense counsel could or should have used this evidence, her failure to do so did not create a substantial likelihood of a miscarriage of justice, because Rascoe and Bethune were already thoroughly impeached. Id. at 764 ("In short, [witness's] shortcomings as a witness were thoroughly

exposed, especially with regard to his credibility and dishonesty").

Rascoe's probationary status for assault and battery on a police officer was presented to the jury. Defense counsel also pointed out inconsistencies in his statements to the police and even in his trial testimony, "thereby casting doubt on the veracity of his over-all testimony." Commonwealth v. Valentin, 470 Mass. 186, 191 (2014). His involvement in the crime and his motive to deflect blame from himself was also probed by defense counsel. The jury were informed that he deleted text messages related to drugs from his cell phone before giving it to the police, and that, although he got out of the car supposedly to act as a "peace maker," he also reached into the victim's pocket to take his cell phone. See Commonwealth v. Daigle, 379 Mass. 541, 543-545 (1980) (defense counsel need not impeach witnesses with criminal records where "jury were aware at all times that the very reason why the accomplices were able to testify to the events of the crime in question was that they had participated in it"). Additionally, defense counsel emphasized that Rascoe was testifying pursuant to an immunity order, and the judge specifically instructed the jury on what an immunity order involved and the statutory requirement that they could not convict the defendant solely based on Rascoe's testimony, implying that it could be unreliable. See G. L. c. 233, § 20I

("No defendant in any criminal proceeding shall be convicted solely on the testimony of, or the evidence produced by, a person granted immunity under the provisions of [§ 20E]").

Bethune's testimony and credibility were also attacked and undermined. The fact that she first denied any knowledge of the stabbing, and then changed her testimony, was the subject of cross-examination by defense counsel. Bethune also admitted to deleting text messages before giving her cell phone to the police, and attempting to contact the defendant to tell him what the police knew before being arrested herself for failure to appear at the grand jury. Defense counsel explored her motive to give into police pressure, as she did not know who would take care of her son if she were arrested or sent to jail. She also admitted to drinking heavily and smoking marijuana on the evening of the murder, and she said that she did not remember going to the bar and that the events of the night were "foggy." Thus, her contradictions, concealments, vulnerabilities to police pressure, and drinking and smoking on the night in question were all before the jury.

Also, if the defendant had accused Bethune of being biased in light of a pending charge against her in another county, the judge could have allowed the Commonwealth to introduce prior consistent statements from "before the occurrence of the event indicating a bias." Commonwealth v. Caruso, 476 Mass. 275, 284-

285 (2017). See Mass. G. Evid. § 613(b)(2). Bethune's alleged assault occurred on November 7, 2016, and proceedings were initiated on January 9, 2017. By this point, she had already given testimony at the grand jury that was very similar to her testimony at trial, including that she had seen the defendant "punch" the victim three times, that she saw him wipe the bloody knife on his shirt, that the defendant said he "poked him up," and that he called her the next day to say that "the guy died." See Commonwealth v. Henson, 394 Mass. 584, 586-587 (1985); Haywood, 377 Mass. at 762-763. Therefore, the alleged bias evidence would have had very little significance to the jury, and would have only highlighted that Bethune made statements consistent with her trial testimony shortly after the murder occurred. Commonwealth v. Carmona, 428 Mass. 268, 271 (1998).

b. Opinion testimony. The defendant next challenges his trial counsel's failure to object when Bethune allegedly expressed an opinion that he was a "murderer." When the statement is read in context, however, it has a different, equivocal meaning.

While cross-examining Bethune, defense counsel attempted to elicit testimony that Bethune implicated the defendant at the grand jury in response to pressure by police. Specifically, defense counsel asked if the police tried to speak to her in jail or while they were transporting her to the hearing:

Q.: "On the way to Court, did they talk to you?"

A.: "About the fact that I was protecting a murderer. They didn't talk, they didn't want to have any conversation with me."

Q.: "So you did have another conversation with police?"

A.: "I wanted to talk to them, but they didn't want to have any conversation with me regarding this, they just wanted to bring me straight to the grand jury and told me to say what I had to say there."

Q.: "So they just basically wanted you to give them a statement about [the defendant], correct?"

A.: "In the car with the cops, they didn't ask me for anything I was in cuffs, they were transporting me, and they were just basically telling me that I need to be truthful and why am I protecting him."

Q.: "So they thought that you were protecting him at the time, is what they were saying to you and telling you to be truthful, correct? That's what the police were telling you?"

A.: "Yeah."

In this context, her statement about "protecting a murderer" is ambiguous at best. She appears to be describing what the police were asking her, that is, why was she protecting a murderer? It does not appear to be a statement of fact by her that she was protecting a murderer. The question by the police would be of little to no import to the jury, as they knew that the police were investigating a murder and that she was present at the murder. Commonwealth v. Hamilton, 459 Mass. 422, 439 (2011). In fact, this would lend further support to the defendant's argument that the police prematurely concluded that

he was the murderer and then pressured Bethune into giving statements that supported that theory.

Even if Bethune were expressing her own opinion, it is unlikely to have made a difference to the jury, who had just heard her testify that she was an eyewitness to the murder and describe it in some detail. Commonwealth v. Perez, 460 Mass. 683, 694-695 (2011) (witness improperly opining that defendant committed murder did not warrant reversal where she had "provided extensive testimony regarding the defendant's inculpatory actions after the victim's murder, as well as the defendant's incriminating statements").

The defendant claims he was prejudiced by this comment because it allowed the prosecutor to "vouch" for Bethune's testimony during closing. Specifically, the prosecutor said:

> "She told you, I only told the complete truth about what I know when I was under oath before the Grand Jury and I decided that I was no longer going to cover up for someone who committed a murder. And I suggest to you, ladies and gentlemen, that that's what happened."

Impermissible vouching is "when an attorney expresses a personal belief in the credibility of a witness or indicates knowledge independent of the evidence before the jury verifying a witness's credibility" (quotation, citation, and alterations omitted). Commonwealth v. Morales, 440 Mass. 536, 549 (2003). Of course, 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." Commonwealth v. Penn, 472 Mass. 610, 627 (2015), cert. denied, 136 S. Ct. 1656 (2016).

The prosecutor's comments fall into the former category. They merely referred to Bethune's own explanation, which was already in evidence, for why her statements to the police changed. Nor could the jury have taken this comment as the prosecutor's personal opinion. Commonwealth v. Mitchell, 428 Mass. 852, 857 (1999) ("use of the phrases 'I think' and 'I suggest' to preface some remarks did not, viewed in their proper context, imply that the prosecutor had personal knowledge or was stating a personal belief"). Rather, it was an attempt to counter the defendant's argument, repeated during closing, that the jury should credit Bethune's earlier statements to the police before she was pressured into changing her testimony. See Commonwealth v. Sanders, 451 Mass. 290, 297 (2008) ("Because defense counsel had placed [the witness's] credibility at issue both during his cross-examination of her 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 [her]").

c. Religious bolstering. In a similar vein, the defendant argues that his counsel was ineffective for failing to object when Bethune claimed she "spoke to God" before deciding to

testify against him. "We have long and consistently disfavored allowing evidence of the religious beliefs of a witness either to enhance or [to] discredit the credibility of a witness." Commonwealth v. Dahl, 430 Mass. 813, 822 (2000). See Mass G. Evid. § 610.

Again, it is important to look at Bethune's comments in context. On cross-examination, defense counsel raised statements she had made to the police early in the investigation that were inconsistent with her trial testimony. Bethune responded by saying, "I didn't start telling the truth until I took the oath." After a few more questions, she continued, "I know that when I came from being locked up in jail so long, I decided that I spoke to God and I decided I was going to tell the truth. . . . Everything I said before that was a lie."

We cannot agree with the motion judge that Bethune's statement was merely the equivalent of saying she would "do the right thing" or that it was a reference to her grand jury oath. The specific statement that she spoke to God goes beyond that, and should have been struck given its potential prejudicial effect. Nonetheless, counsel's failure to object and move to strike did not create a substantial likelihood of a miscarriage of justice.[7]

[7] Although, as noted above, we have no evidence that any of the claimed errors stemmed from a strategic or tactical

Although disfavored, such explicit references to religious motivation or bolstering have not been found to be grounds for reversal. See, e.g., Dahl, 430 Mass. at 822-824 (no prejudice from religious bolstering despite witness testifying that she was studying to become nun, wanted to do "a godly thing," and held rosary beads during her testimony); Commonwealth v. Murphy, 48 Mass. App. Ct. 143, 145-146 (1999) (error of allowing counsel to ask child witness if she attended catechism "entirely without consequence"). Bethune's reference to speaking "to God" was an explanation of why she decided to change her mind about testifying against the defendant, not an argument that people with certain religious beliefs are more or less trustworthy than others. Contrast Commonwealth v. Mahdi, 388 Mass. 679, 693 (1983) ("only apparent purpose of [questioning on defendant's religious beliefs on origins of races] was to inject racial hatred into the trial"); Commonwealth v. Buzzell, 16 Pick. 153, 156-157 (1834).

d. Testimony on Queen's fear of reprisal. Finally, the defendant claims that his counsel was ineffective for failing to repeatedly object when the prosecutor asked whether Queen changed his testimony out of fear, or to request a curative

---

decision, it would not be unreasonable for counsel to allow such statements to stand to avoid alienating religious jurors, given the low risk of prejudice.

instruction when the jury asked during deliberations if anyone had access to their personal information.

Queen was called by the Commonwealth, but he had to be arrested to be brought into court, and he was declared a hostile witness. At trial, Queen testified that he could not remember the appearance of the assailant or the person who took something from the victim's pocket, or from where the assailant approached the victim. Evidently, Queen had given a more specific and inculpatory statement to the police, specifically that after the victim walked away from the car, Queen saw the driver get out and approach him; that after the fight broke out, the victim was chased by a "short guy"; and that a "taller guy" had come over to take something out of the victim's pocket. Despite being shown the police report with his statement, Queen claimed he could no longer remember these details at trial. The prosecutor responded by asking him if he could "see that man seated in the courtroom with the glasses on and the braids?"

Trial counsel immediately objected, noting at sidebar that the prosecutor seemed to be referring to the defendant's brother, who was in the gallery. The prosecutor claimed that a victim-witness advocate had told her that Queen began claiming a poor memory when the brother entered the court room, to which defense counsel responded that the brother had been present every day of trial and that Queen claimed a lack of memory from

the start of his testimony. The judge noted that evidence of any intimidation by the brother was "thin" and sustained the objection.[8]

The prosecutor later asked Queen whether he recognized the defendant and asked why he kept looking at the defendant when answering questions. Defense counsel objected, but was overruled, and Queen answered that he was not looking at the

---

[8] Contrary to the defendant's argument, this was not prosecutorial misconduct. When cross-examining a witness, a prosecutor cannot ask a question "in bad faith or without foundation." Commonwealth v. Christian, 430 Mass. 552, 561 (2000), overruled on other grounds by Commonwealth v. Paulding, 438 Mass. 1 (2002), quoting Commonwealth v. White, 367 Mass. 280, 285 (1975). As explained infra, the Commonwealth was entitled to inquire into Queen's fear based on his changed testimony, and the prosecutor disclosed the basis for believing that this was due to the defendant's brother. See Commonwealth v. Johnson, 441 Mass. 1, 5 (2004). Although the judge appropriately concluded that the foundation was too "thin" to allow this particular line of questioning, that does not mean it was offered in bad faith.

The objection was sustained, and the prosecutor refrained from referring to the defendant's brother again on cross-examination or in closing argument. See id. at 6 (no reversal required where "there was one question to which the defendant objected [and the judge sustained that objection], followed by somewhat different questions"). Queen did not answer the question related to the defendant's brother, but denied being in fear of testifying. The jury had been given preliminary instructions that questions were not evidence, and the judge repeated similar instructions in the final charge. A concurrent instruction, or a later, explicit instruction was not required. Commonwealth v. Santiago, 458 Mass. 405, 412-413 (2010) (trial judge was not required to give curative instruction where he sustained objection to question about witness's fear and instructing jury explicitly on issue would "inappropriately emphasize the matter").

defendant. The prosecutor also asked Queen whether he left Massachusetts after witnessing the murder because he was afraid, and again defense counsel unsuccessfully objected. Queen answered that he was not afraid and that he had left because he was worried the police would think he was involved in the stabbing. Finally, the prosecutor asked why he had not come to court to testify and had to be arrested. There was no objection, and Queen answered that there was a warrant requiring him to appear at another court on the same day. On cross-examination, defense counsel got Queen to repeat his testimony that he was not afraid and the explanations for his seemingly evasive behavior. She also elicited an alternative explanation for his lack of memory -- that he had been drinking and smoking marijuana, and in fact had repeatedly told police that he was "not completely sure what happened." She also clarified some of his statements that the Commonwealth had seized on as inconsistent.

Under the circumstances, it is difficult to see what more trial counsel could have done, or what difference further objections would have made. Appellate counsel faults her failure to ask for a sidebar, after the judge overruled her objection, to argue that there was no foundation for the prosecutor to ask Queen why he was looking at the defendant. However, the trial judge, who was observing the examination, was

in the best position to determine whether there was any basis for the question. In any event, Queen denied looking at the defendant or being afraid of anyone. For the other questions related to Queen's alleged fear, the trial judge did not abuse his discretion in overruling counsel's objections. Commonwealth v. Fitzgerald, 376 Mass. 402, 412 (1978) (repudiation of previous statements to law enforcement "required some attempt at explanation," and prosecutor did not need to accept witness's denial of fear). Trial counsel's approach of reemphasizing his denials in cross-examination and providing other explanations for his lack of memory was not ineffective.

Finally, the defendant alleges that his counsel was ineffective in her response to a question the jury sent during deliberations asking who had access to their personal information. The trial judge, after consulting the prosecutor and defense counsel, answered the question by telling the jury that their personal information would be destroyed and that their confidential questionnaires could only be released after a hearing with good cause shown. He also repeated his instruction that they must decide the case without "fear or favor" to either side. We discern no error in the judge's response nor anything more that defense counsel should have done.

3. Section 33E review. Having reviewed the record, we conclude that there is no reason to reduce the defendant's

conviction to murder in the second degree under G. L. c. 278, § 33E.

The defendant points to cases in which we have reduced a verdict of murder in the first degree where the killing arose from a "senseless brawl" in which alcohol was involved.[9] Although we have suggested that one "factor" that may be considered is "whether the homicide occurred in the course of a 'senseless brawl'" (citation omitted), Commonwealth v. Colleran, 452 Mass. 417, 431 (2008), it certainly does not entitle the defendant to a reduction in his sentence, where, as here, the evidence clearly established that the murder was committed with extreme atrocity or cruelty based on the number of stab wounds and the defendant's comments following the stabbing, see Commonwealth v. Libby, 405 Mass. 231, 236-237 (1989), S.C., 411 Mass. 177 (1991) ("This case involves a senseless brawl, fueled by alcohol and other drugs. The defendant and the victim were strangers. Had there been but one stab wound, we might well

[9] There was evidence in the record that the defendant was drinking before the murder, but not heavily enough to impair his walking or driving. The jury were specifically instructed on intoxication, including that they could consider it on the theory of extreme atrocity or cruelty. Bethune testified that the defendant said he was too drunk to drive home when they were leaving Rascoe's house in Malden to return to her apartment. However, it seems he did so without incident. This was also hours after the murder, when the sun was coming up according to Bethune, after the defendant had continued to drink at Rascoe's house.

have regarded this case as one of a class not typically involving murder in the first degree. Here, however, there were nine separate acts of stabbing . . ." [citations omitted]). Furthermore, the brawl here "was initiated, continued, escalated, and afterward celebrated by the defendant." Rodriquez, 461 Mass. at 111-112. See Commonwealth v. Deconinck, 480 Mass. 254, 273 (2018) (relief under § 33E was inappropriate where, inter alia, defendant and victim had been separated a number of times in drunken fight over allegedly stolen prescription medications); Anderson, 445 Mass. at 202, 215-216 (denying relief pursuant to § 33E in case where defendant bragged about murder).

Our review of the evidence reveals no reason to reduce the verdict under G. L. c. 278, § 33E. We affirm the defendant's conviction and the order denying his motion for a new trial.

So ordered.