SJC-12870

COMMONWEALTH vs. CHENG SUN.

Essex. March 11, 2022. - July 7, 2022.

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

Homicide. Joint Enterprise. Felony-Murder Rule. Evidence, Joint venturer, Intent, Present recollection refreshed, Credibility of witness. Intent. Witness, Refreshment of recollection, Credibility. Practice, Criminal, Opening statement, Conduct of prosecutor, Argument by prosecutor, Capital case.

Indictments found and returned in the Superior Court Department on December 28, 2011.

The cases were tried before David A. Lowy, J.

Joseph M. Kenneally for the defendant.
Kenneth E. Steinfield, Assistant District Attorney, for the Commonwealth.

CYPHER, J. In the early morning hours of September 27, 2011, the defendant, Cheng Sun, and two others, Sifa Lee (Lee) and Jun Di Lin (Lin), broke into a restaurant and attempted to rob the sixty-two year old owner, Shui "Tony" Woo, who was

sleeping in a back room. When the victim would not provide the robbers with access to the onsite safe, they beat, stabbed, and strangled him to death. On February 25, 2016, a jury convicted the defendant of murder in the first degree on theories of extreme atrocity or cruelty and felony-murder.[1] The defendant appeals on several grounds. He argues first that the Commonwealth's evidence was insufficient as a matter of law to sustain his conviction of murder in the first degree on a theory of extreme atrocity or cruelty. Next, the defendant argues that he was denied a fair trial due to prosecutorial misconduct during both the prosecutor's opening statement and her closing argument. He also contends that the improper admission in evidence of (1) the Commonwealth's plea agreement with Lin and (2) Lin's prior statements as refreshed recollections gave rise to a substantial likelihood of a miscarriage of justice. Finally, the defendant asks this court to exercise its discretionary authority pursuant to G. L. c. 278, § 33E, to reduce the verdict to either murder in the second degree or manslaughter. After a careful review of the record and

[1] The defendant also was convicted of the predicate felony of stealing by confining or putting in fear, G. L. c. 265, § 21; as well as armed assault of a person age sixty or older with intent to rob or murder, G. L. c. 265, § 18 (a). He was sentenced to life in prison without parole for the murder, and to concurrent terms of from forty to sixty years and from eighteen to twenty years on the remaining charges.

consideration of the defendant's arguments, we affirm the defendant's convictions and decline to exercise our authority under § 33E.

Prior proceedings. The defendant, Lee, and Lin were charged with (1) murder, G. L. c. 265, § 1; (2) stealing by confining or putting in fear, G. L. c. 265, § 21; and (3) armed assault of a person age sixty or over with intent to rob or murder, G. L. c. 265, § 18 (a). Lin reached a plea agreement with the Commonwealth. In exchange for his testimony, Lin pleaded guilty to a lesser charge of manslaughter.[2] A joint trial commenced against the defendant and Lee, but the case was severed over concerns surrounding the availability of interpreters. In a separate trial, Lee was convicted of all charges. Commonwealth v. Sifa Lee, 483 Mass. 531, 532 (2019). Those convictions later were affirmed. Id. Following nearly a month-long trial, a jury convicted the defendant of all charges. The defendant filed a timely notice of appeal.

Background. We recite the facts as the jury could have found them, reserving certain details for later discussion. Lin, a Boston-area taxicab driver, first met the defendant and Lee at Foxwoods Resort and Casino (Foxwoods) in early September 2011. They spoke about owners of a number of restaurants in the

[2] Lin also pleaded guilty to the remaining charges without alteration.

Chinatown neighborhood of Boston and exchanged cell phone numbers. Over the next few weeks, the defendant and Lee saw and spoke with Lin several times. The defendant and Lee told Lin they did not have any money, and Lin gave them free rides in his taxicab. Lin had a portable global positioning system (GPS) device, and his taxicab also was equipped with a separate device that captured time and date stamped information about the taxicab, including its location, speed, and direction.

In the very early hours of September 27, 2011, Lee telephoned Lin, asking Lin to pick up him and the defendant in Chinatown. Lin picked up the defendant and Lee in his "personal car," and then drove them to his taxicab, which was parked in the South Boston section of Boston. Either Lin or the defendant put a dark tool bag (bag) in the trunk of the taxicab.

As Lee directed, Lin then drove the group to Ipswich and parked in the parking lot of a business next to a restaurant.[3] After the three men got out of the car, Lin took the bag out of the trunk, and Lee removed metal clippers and walked away, returning several minutes later. Lee again walked away, this time with the defendant. During this excursion, the defendant and Lee cut the power cords to the restaurant's telephone line

[3] Lin had activated his global positioning system (GPS) device but did not use it because Lee had not provided him with their destination's exact address.

and electric meter. On their return, they were wearing gloves, Lee was wearing a ski mask and holding the clippers and a crowbar, and the defendant was wearing a hat or ski mask that did not cover his face and was holding a flashlight.

The defendant and Lee told Lin there was a large safe in the restaurant and asked for his assistance to steal money from it. Lin agreed. All three men, gloved, with Lin carrying the tool bag, and with the defendant carrying a knife, then entered the building through a skylight above the restaurant kitchen. Leaving Lin in the kitchen with the tool bag, the defendant and Lee went to another room. Lin heard a scream and a man speaking Cantonese. The defendant and Lee returned to the kitchen and told Lin that there was a man in the next room. Lin ran to the dining area, followed by Lee. Lee and Lin, now carrying the tool bag, then went to the room from where the scream had come, where Lin saw a large safe and the victim; the defendant was restraining the victim on a cot by holding a knife to the victim's neck.[4]

The victim had been "badly hit" and "looked like he was being tormented." While the defendant restrained the victim at knifepoint, Lee repeatedly beat him with the crowbar. Although the defendant, along with Lin, pleaded with Lee to stop hitting

[4] Lin testified that he never saw the defendant stab or strike the victim.

the victim and asked Lee whether he were "crazy" and "why [he was] doing this," the defendant nevertheless continued to restrain the victim at knifepoint. At the defendant's suggestion, Lee bound the victim's hands and feet while the defendant continued restraining the victim at knifepoint. Lee temporarily paused the beating during this time. The victim agreed to the defendant's demand that he open the safe, but the victim was unable to stand on his own and was held upright by Lin.

As the victim struggled to open the safe, Lee resumed beating the victim, first with the crowbar and then with a hammer. During this period of the beating, the defendant attempted to shield the victim's head from Lee's blows, but also "nudged" the victim's head to get him to open the safe and told him that if he did not open it, Lee would kill him. The victim eventually collapsed without opening the safe, and Lin and either the defendant or Lee took the victim to a hallway behind the safe and laid him on the floor. At Lee's insistence, the three men left the restaurant through the skylight in the roof and returned to the taxicab, bringing their tools with them. Before leaving, Lee repeatedly kicked and stomped on the victim,

who remained on the floor.[5] Each man had the victim's blood "everywhere" on him.

The defendant had sustained an injury to the back of his hand, and both of his hands were bleeding. At Lee's instruction, Lin drove the group to Foxwoods. As they neared the casino, Lee called a man named Yusheng Tan (Tan) and asked Tan to meet them when they arrived, which Tan did. Tan got in the car with the group, and at Lee's instruction, Lin then drove to the Mohegan Sun Casino (Mohegan Sun). After they arrived at Mohegan Sun, and again at Lee's instruction, Tan retrieved Lee's and the defendant's clothing from a hotel room. The group then returned to Foxwoods and dropped off Tan. They then parked in a Foxwoods parking lot, where Lee and the defendant changed into the clothes Tan had brought for them. Lee then went into Foxwoods and bought new pants, shoes, and socks for Lin using a

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[5] From these attacks, the victim suffered blunt force wounds "over his entire body." He had more than twenty-five bone breaks caused by blunt force. He also had five lacerations on the top of his head, and contusions and abrasions all over his body, including "small bruises on his brain." The victim had two "stab wounds" on his lower back, "puncture wounds" on his left upper chest and left upper back, and incised wounds on his arms. The victim also had an abrasion on his neck, soft tissue hemorrhage of the neck muscle, bilateral fractures of the thyroid cartilage, and bleeding in the lining covering the whites of the eyes, all indicative of strangulation. Most, if not all, of the injuries were extremely painful. The victim's cause of death was multiple blunt and sharp force injuries and asphyxia due to strangulation. Anywhere from seconds to minutes elapsed between injury and death.

Foxwoods "rewards" card belonging to the defendant and using a personal identification number given to him by the defendant.

On Lee's return to the car, the three men took the bloody clothing they had been wearing and washed them at a nearby laundromat before throwing the clothing into a Dumpster and returning by car to Mohegan Sun. The defendant and Lee took the bag containing the hammer and crowbar inside the casino. Lee then returned to the car alone, and Lin drove Lee to Quincy, where he dropped off Lee before picking up a taxicab customer.

Meanwhile, a few hours earlier restaurant employees found the bound, badly beaten body of the victim in the restaurant, just outside the room where he kept a bed and safe. Police found a bloodied serrated knife on the floor near the victim's body and the safe. In the kitchen was a baseball hat containing deoxyribonucleic acid with a major profile matching Lee and a minor profile potentially contributed by Lin.

The day after the killing, September 28, 2011, after learning that the victim had died, Lin decided to flee to China, obtained a visa, and purchased plane tickets for this purpose. Lin later decided differently, and on September 29, he met with police at his attorney's office and "turned [himself] in." Lin made several statements, which he later admitted were false, in an attempt to minimize his role in the victim's death. Lin later was arrested at the Canadian border while attempting to

flee the country. On October 17, police arrested the defendant in New York City and Lee in New Jersey.

Discussion. 1. Sufficiency of the evidence. The jury convicted the defendant of murder in the first degree on theories of extreme atrocity or cruelty and felony-murder. The defendant argues that the evidence was insufficient to sustain his conviction on the theory of extreme atrocity or cruelty where the defendant did not participate in the fatal attack on the victim and did not act with the requisite malice. Instead, the defendant contends that the attack on the victim "was a senseless and spontaneous outburst of violence, perpetrated by a single individual [Lee], that prevented the men from achieving their alleged objective." The Commonwealth counters that this court need not consider the defendant's argument where the jury also convicted the defendant of murder in the first degree on the theory of felony-murder and the defendant does not challenge the sufficiency of the evidence on that theory. The Commonwealth further argues that the evidence was sufficient to permit the defendant's conviction as a joint venturer on each theory.

It is true that where the jury convict a defendant "on two theories of murder in the first degree, the verdict 'will remain undisturbed even if only one theory is sustained on appeal.'" Sifa Lee, 483 Mass. at 548 n.14, quoting Commonwealth v. Nolin,

448 Mass. 207, 220 (2007). And this court has, at times, declined to evaluate the sufficiency of the evidence as to one theory of murder where the jury convicted a defendant on two theories. See, e.g., Commonwealth v. Barbosa, 463 Mass. 116, 135 (2012). However, given this court's responsibility pursuant to G. L. c. 278, § 33E, to review "the whole case," we think the better practice here is to consider the defendant's sufficiency claim as to his conviction on the basis of extreme atrocity or cruelty even where the defendant does not contest the sufficiency of the evidence as to his conviction on the basis of felony-murder. See Commonwealth v. Mercado, 466 Mass. 141, 154-155 (2013) (although sufficiency not challenged, court concluded on § 33E review that evidence was insufficient to sustain conviction of murder in first degree on theory of felony-murder but sufficient to sustain conviction on theories of deliberate premeditation and extreme atrocity or cruelty, and sustained verdict on those bases). Additionally, a determination of the strength of the Commonwealth's case against the defendant is relevant to our determination as to whether any alleged errors created a substantial likelihood of a miscarriage of justice or otherwise prejudiced the defendant.[6] See, e.g., Commonwealth v.

[6] Additionally, although we affirm the judgments in this case, in a case where this court were to find reversible error, the Commonwealth would be precluded from pursuing at a new trial a theory for which this court concluded there was insufficient

Johnson, 429 Mass. 745, 755 (1999), S.C., 483 Mass. 1004 (2019) ("In light of the overwhelming evidence of the defendant's guilt, . . . we conclude that the admission of this evidence did not result in a substantial likelihood of a miscarriage of justice"). Thus, we will examine the sufficiency of the evidence as to both bases of the defendant's conviction of murder in the first degree.

"In determining whether the evidence was sufficient to sustain the conviction, we consider the evidence in the light most favorable to the Commonwealth, including issues of credibility" (citation omitted). Commonwealth v. Bonner, 489 Mass. 268, 275 (2022), citing Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979), and Commonwealth v. James, 424 Mass. 770, 785 (1997). "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'" (citation omitted). Commonwealth v. West, 487 Mass. 794, 800 (2021), quoting Commonwealth v. Casale, 381 Mass. 167, 173 (1980).

a. Felony-murder. The defendant rightly does not contest the sufficiency of the evidence as to his conviction on the basis of felony-murder. The evidence of such crime was

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evidence. See Commonwealth v. Plunkett, 422 Mass. 634, 636, 641 (1996).

overwhelming. "At the time of the defendant's trial,[7] a conviction of felony-murder required proof of three elements: first, that the defendant committed or attempted to commit a felony with a maximum sentence of life imprisonment [either as a principal or a joint venturer]; second, that the killing occurred during the commission or attempted commission of that felony; and third, that the felony was inherently dangerous, or that the defendant acted with conscious disregard of human life." Commonwealth v. Dowds, 483 Mass. 498, 504 (2019). See Commonwealth v. Gallett, 481 Mass. 662, 673 (2019).

Here, the defendant was convicted of stealing by confining or putting in fear, which carries a maximum sentence of life imprisonment. G. L. c. 265, § 21. The statute does not require that a defendant successfully steal, as that word is colloquially understood. Under the first part of the statute, the Commonwealth must prove beyond a reasonable doubt that the defendant, "[1] with intent to commit larceny or any felony, [2] confines, maims, injures or wounds, or attempts or threatens to

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[7] In 2017, this court prospectively abolished the common-law felony-murder doctrine. Commonwealth v. Brown, 477 Mass. 805, 807 (2017), cert. denied, 139 S. Ct. 54 (2018). In cases commenced after the date of that opinion, "felony-murder is limited to its statutory role under G. L. c. 265, § 1, as an aggravating element of murder," and a defendant may not be convicted of felony-murder absent proof of one of the three prongs of malice. Id. Because this case commenced prior to our decision in Brown, the common-law felony-murder doctrine applies.

kill, confine, maim, injure or wound, or puts any person in fear, [3] for the purpose of stealing from a building, bank, safe, vault or other depository of money, bonds or other valuables." Id.

The defendant conceded at trial that he "broke into [the] restaurant with the intent to steal." Lin testified that the defendant spoke about owners of a number of restaurants in the weeks leading up to the robbery; brought gloves, a hat, flashlight, and knife to the restaurant the night of the robbery; and told Lin that they were all going to go into the restaurant together because there was a "huge safe." Lin further testified that, once inside the restaurant, the defendant held the victim down on a cot at knifepoint while Lee brutally beat the victim with a crowbar; told the victim he would be killed if he did not open the safe; and, while still holding the knife, "nudge[d]" the victim's head to get him to open the safe. Lin testified that he never saw the defendant stab the victim. However, Lin also testified that only the defendant had a knife, and that there was at least one period of time when the defendant was with the victim while Lin was not present. The medical examiner testified that the victim had multiple "incised wounds" that could have been caused by "any instrument with a sharp edge," multiple "puncture wounds" that could have been caused by "anything with . . . a sharp . . .

point on it," and multiple "stab wounds" that were "suggestive of . . . an injury with a knife-like weapon" and were "consistent with a knife." Thus, a rational juror could have concluded that the defendant stabbed the victim.

This evidence overwhelmingly showed that the defendant, with the intent to commit larceny, confined and injured the victim for the purpose of stealing from the safe in the restaurant and, thus, that the defendant engaged in the predicate felony. This evidence -- particularly the evidence that the defendant stabbed the victim and enabled a brutal beating of the victim with a crowbar -- also overwhelmingly showed that the defendant acted with conscious disregard of human life. See Commonwealth v. Claudio, 418 Mass. 103, 108-109 (1994), overruled on other grounds by Commonwealth v. Britt, 465 Mass. 87 (2013) (felony-murder liability appropriate where "homicide occurs in the commission of an offense while armed, . . . because a defendant's willingness to use a weapon demonstrates a conscious disregard for human life").

Finally, the evidence likewise was overwhelming that the killing occurred during the commission of the predicate felony. "To support a conviction of felony-murder in the first degree, the killing need not have occurred during the course of the predicate felony itself, but only 'as part of one continuous transaction,' a standard which is met if the two 'took place at

substantially the same time and place.'" Commonwealth v. Witkowski, 487 Mass. 675, 680 (2021), quoting Commonwealth v. Morin, 478 Mass. 415, 422 (2017) (collecting cases). The victim was stabbed and beaten to death while the defendant, Lee, and Lin were attempting to gain access to the victim's safe, thus satisfying the requirement that the felony and homicide take place at substantially the same time and place.[8]

b. Extreme atrocity or cruelty. To convict a defendant as a joint venturer of murder in the first degree on a theory of extreme atrocity or cruelty, the Commonwealth must "prove beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, and that the defendant had or shared the required criminal intent" (quotation omitted). Commonwealth v. Watson, 487 Mass. 156, 162 (2021), quoting Britt, 465 Mass. at 100-101. Viewing the evidence in the light most favorable to the Commonwealth, we conclude that the

[8] As to the felony-murder conviction, it is no defense under the common-law felony-murder doctrine applicable at the time of trial that the defendant claims he lacked any intent to kill or injure the victim. "Once a defendant participates in the underlying felony, with the intent or shared intent to commit that felony, he or she becomes liable for a death that 'followed naturally and probably from the carrying out of the joint enterprise,'" and "it is no defen[s]e for the associates engaged with others in the commission of [the felony], that they did not intend to take life in its perpetration, or that they forbade their companions to kill" (citations omitted). Commonwealth v. Morin, 478 Mass. 415, 421 (2017). Nevertheless, as discussed infra, there was more than sufficient evidence here that the defendant possessed the third prong of malice.

evidence was sufficient to permit a rational juror to conclude, beyond a reasonable doubt, that the defendant participated in the killing of the victim, which was committed with extreme atrocity or cruelty, and that the defendant had the requisite intent to do an act that, in the circumstances known to him, a reasonable person would have known created a plain and strong likelihood that the victim would die.

i. Knowing participation. Where the actual killing was committed by another, the Commonwealth must prove that "the defendant was present at the scene of the murder, with the knowledge that another intend[ed] to commit a crime or with intent to commit the crime[,] and by agreement was willing and available to assist if necessary" (citation omitted). Commonwealth v. Williams, 475 Mass. 705, 712 (2016). Here, a rational juror could have concluded from the evidence that the defendant restrained the victim at knifepoint while Lee brutally beat the victim with a crowbar. Thus, the defendant not only witnessed Lee beating the victim to death. He enabled and assisted that beating knowing that the attack would almost certainly lead to the victim's death.[9] Viewing the evidence in

[9] A rational juror could have concluded that the defendant's statements to Lee during the beating -- calling Lee "crazy," asking Lee "why [he was] doing this," and pleading with Lee to stop -- conveyed that the defendant was aware that Lee, in beating the victim, was acting in a way that would cause the

the light most favorable to the Commonwealth, as we must, the evidence showed that the defendant stabbed the victim and that both the beating and stabbing caused the victim's death.

The defendant argues that he either did not participate in or withdrew from the killing where, when the beating commenced, he pleaded with Lee to stop and, later, shielded the victim's head from some of Lee's blows. This argument is unavailing. "In order to support a theory of withdrawal or abandonment of a joint venture, there must be at least an appreciable interval between the alleged termination and [the commission of the crime,] a detachment from the enterprise before the [crime] has become so probable that it cannot reasonably be stayed, and such notice or definite act of detachment that other principals in the attempted crime have opportunity also to abandon it." Commonwealth v. Rivera, 464 Mass. 56, 74, cert. denied, 570 U.S. 907 (2013), quoting Commonwealth v. Miranda, 458 Mass. 100, 118 (2010), cert. denied, 565 U.S. 1013 (2011). Here, there was no time between the alleged withdrawal and the commission of the crime, as the crime was already in the process of being committed when the defendant pleaded with Lee to stop and shielded the victim's head. Additionally, the defendant's expressions were far from sufficient to constitute withdrawal;

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victim's death. Despite this knowledge, the defendant continued to restrain the victim at knifepoint.

when considered with the act of the defendant continuing to restrain the victim at knifepoint and his statements suggesting to Lee that they bind the victim's hands and feet and threatening that the victim would be killed if he did not open the safe, the defendant's expressions instead confirmed the defendant's knowing participation in the killing of the victim. Thus, the evidence was sufficient for the jury to conclude that the defendant did not withdraw from the killing.

Finally, as discussed supra, the evidence was sufficient for the jury to conclude that the defendant stabbed the victim. Even if the defendant successfully withdrew from the beating, which we conclude he did not, the stabbing was sufficient on its own to prove participation in the killing where there was evidence that the victim died from blunt force, sharp force, and strangulation-related injuries.

ii. Intent. The requisite criminal intent is "malice aforethought." West, 487 Mass. at 800. "[M]alice [aforethought] is defined 'as an intent [1] to cause death, [2] to cause grievous bodily harm, or [3] 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." Watson, 487 Mass. at 164, quoting Commonwealth v. Sokphann Chhim, 447 Mass. 370, 377 (2006). A defendant need

not intend "to commit the murder in an extremely atrocious or cruel way." Watson, supra at 165.

The defendant's argument that he lacked the requisite malice where he intended neither to kill nor to injure the victim is without merit where there was sufficient evidence for a rational juror to conclude that the defendant possessed the third prong of malice, an intent "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." Watson, 487 Mass. at 164. As discussed supra, the defendant restrained the victim at knifepoint while Lee repeatedly and brutally beat the victim with a crowbar, and viewing the evidence in the light most favorable to the Commonwealth, the defendant stabbed the victim. A rational juror could have concluded that, in these circumstances, a reasonable person would have known that the defendant's actions of stabbing the victim and restraining the victim during a brutal beating gave rise to a plain and strong likelihood of the victim's death. See Commonwealth v. Garcia, 470 Mass. 24, 32 (2014), citing Commonwealth v. Semedo, 422 Mass. 716, 720 (1996) (sufficient evidence of third prong of malice "where reasonable person would have known that victim could suffer death as beating progressed"); Sokphann Chhim, 447 Mass. at 379 (reasonable person would have recognized plain and strong

likelihood of victim's death from nature of severe beating with multiple stabbings by multiple attackers).

iii. The Cunneen factors. Finally, the evidence of extreme atrocity or cruelty here was overwhelming. As of the time of the defendant's trial, a killing is committed with extreme atrocity or cruelty where the Commonwealth shows at least one of the following: "indifference to or taking pleasure in the victim's suffering, consciousness and degree of suffering of the victim, extent of physical injuries, number of blows, manner and force with which delivered, instrument employed, and disproportion between the means needed to cause death and those employed."[10] West, 487 Mass. at 800 & n.7, quoting Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983). Here, the evidence showed that the victim was repeatedly beaten with a crowbar, a hammer, and Lee's foot; stabbed with a knife; and strangled. The victim had more than twenty-five bone breaks caused by blunt

[10] This court since has refined this standard in Commonwealth v. Castillo, 485 Mass. 852, 860-866 (2020). We concluded in that case that the victim's consciousness or degree of suffering may not support a finding of extreme atrocity or cruelty "where it stands alone as a factor, divorced from the egregiousness of the defendant's conduct." Id. at 864. Although the jury need not find that a defendant intended to commit an extremely atrocious or cruel murder, the jury are no longer permitted "to find extreme atrocity or cruelty based only on the degree of a victim's suffering, without considering whether the defendant's conduct was extreme in either its brutality or its cruelty." Id. at 864-865. The change is inconsequential here, where the evidence supported a finding that all Cunneen factors were present.

force; five lacerations on the top of his head; contusions, abrasions, and blunt force wounds all over his body; two stab wounds on his lower back; puncture wounds on his left upper chest and left upper back; incised wounds on his arms; an abrasion on his neck; soft tissue hemorrhage of the neck muscle; bilateral fractures of the thyroid cartilage; and bleeding in the lining covering the whites of the eyes. The medical examiner testified that the victim's death could have taken anywhere from seconds to minutes and that most, if not all, of the victim's injuries were painful. Lin's testimony tended to show that the victim survived at least long enough for two separate beatings to take place and for the defendant to speak briefly with the victim, urging him to open the safe, following the first beating.

This evidence tends to show the presence of all of the Cunneen factors -- that the victim was conscious and suffering; that at least Lee was indifferent to that suffering; that the victim had extensive physical injuries inflicted over a high number of blows administered with massive force using a crowbar, a hammer, and a knife; and that the force used was far greater than necessary to cause death.[11] That Lee was responsible for

[11] Under the current formulation, the factors are articulated as follows:

several of these factors does not alter our conclusion. "The defendant was responsible for [Lee's] actions because he [had] the requisite malice aforethought and he knowingly participated in the murder." Watson, 487 Mass. at 165. In these circumstances, where Lee's "actions warrant a finding of extreme atrocity or cruelty, the [defendant] is responsible for those actions." Id., quoting Sokphann Chhim, 447 Mass. at 379-380.

2. Opening statement and first witness. The defendant argues that he was denied a fair trial where the prosecutor improperly appealed to the jurors' sympathy by "eulogizing" the victim in her opening statement and by eliciting from the victim's son significant irrelevant testimony regarding the victim's background and character. The Commonwealth contends that the prosecutor's opening statement and direct examination

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> "[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 deceased[; and] . . . [3] whether the means used by the defendant were excessive and out of proportion to what would be needed to kill a person. In considering this final factor, juries may consider the extent of the injuries of the deceased; the number of blows delivered; the manner, degree and severity of the force used; and the nature of the weapon, instrument, or method used. A jury cannot make a finding of extreme atrocity or cruelty unless it is based on one of these three factors, although, as we have stated previously, the jury need not unanimously agree on which of the factors underlie their verdict." (Citations omitted.)

Castillo, 485 Mass. at 865-866.

of the victim's son constituted permissible humanizing of the proceedings. We agree that the prosecutor's statements and lines of questioning regarding the victim's character were improper, but we conclude that they did not create a substantial likelihood of a miscarriage of justice.

"[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."[12] Commonwealth v. Santiago, 425 Mass. 491, 495 (1997), S.C., 427 Mass. 298 and 428 Mass. 39, cert. denied, 525 U.S. 1003 (1998). However, we have previously cautioned that 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,'" Commonwealth v. Fernandes, 487 Mass. 770, 791 (2021), cert. denied, 142 S. Ct. 831 (2022), quoting Santiago, supra, and must avoid "slip[ping] into emotionally provocative argument," Commonwealth v. Alemany, 488 Mass. 499, 511 (2021), quoting Commonwealth v. Degro, 432 Mass. 319, 322 n.4 (2000).[13] In other words, where a prosecutor

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[12] We decline the defendant's invitation to prohibit absolutely the admission of humanizing evidence.

[13] For cases where we have previously reprimanded prosecutors for improper appeals to sympathy, see Alemany, 488 Mass. at 513 (reference to victim "never being able to 'walk down the aisle with her dad on her wedding day'" exceeded bounds of excusable hyperbole); Commonwealth v. Tavares, 471 Mass. 430,

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.'" Commonwealth v. Mejia, 463 Mass. 243, 253 (2012), quoting Santiago, supra at 494.

Because defense counsel did not object to the Commonwealth's opening statement or during the relevant portions of the examination of the first witness, we determine whether any error created a substantial likelihood of a miscarriage of justice. Commonwealth v. Taylor, 455 Mass. 372, 377 (2009). "For an error to have created a substantial likelihood of a miscarriage of justice, it must have been likely to have

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443 (2015) (unnecessary emphasis on loss suffered by victims' families is improper); Commonwealth v. Mejia, 463 Mass. 243, 253 (2012) (statement that victim "was a sister, she was a daughter, she was a niece, and she is none of these things anymore because of what he did to her" and that her body was discovered "literally in a state of humiliation" were "better left unsaid"); Commonwealth v. Guy, 454 Mass. 440, 445 (2009) (prosecutor should not have brought feelings of victim's husband and members of community to jury's attention); Commonwealth v. Rock, 429 Mass. 609, 615-616 (1999) (statement that victim could not testify because "he's dead" but spoke to jury during trial may have been "excessive"); Commonwealth v. Mitchell, 428 Mass. 852, 857 (1999) (prosecutor should not have stated victim "will be seventeen forever because he was killed," did not have jury, did not have trial, did not have any opportunity, and had "[n]o breaks"); Santiago, 425 Mass. at 495 (prosecutor improperly appealed to sympathy by repeated references to victim's personal characteristics).

influenced the jury's conclusion." Commonwealth v. Wilson, 486 Mass. 328, 333 (2020), quoting Commonwealth v. Upton, 484 Mass. 155, 160 (2020).

The prosecutor began her opening statement by discussing the victim's immigration story. She detailed how the victim moved to this country from China, got married, became a United States citizen, had two children, and worked long hours at multiple jobs to support his family. She described how the victim and his wife bought a restaurant and "made it a practice in homage to their heritage . . . to employ other Chinese immigrants, many of who[m] spoke no English." She explained that the victim was active in his community, sponsored little league teams, and "was a Mason, a group whose motto is '[b]etter men make a better world.'" She described how, on the night of the killing, "[a]s the final hours of Tony Woo's life ticked away," the victim's younger adult son, then in his late twenties, was getting ready for bed, the victim's wife was busy sewing at her at-home sewing business, and the victim's older son "lay next to his wife, asleep in their home in Braintree."

The prosecutor then called the victim's younger son to testify. Although the son properly testified to several relevant issues, such as the layout of the restaurant, the prosecutor devoted significant time at the start of the son's testimony to eliciting irrelevant evidence of the victim's

character. In addition to eliciting testimony consistent with the assertions made in her opening statement, the prosecutor elicited the following statements from the victim's son: (1) the victim did not decrease his hours as he got older until the victim's son began working at the restaurant, because "it was his baby, so he -- it was hard for him to do that"; (2) the victim always wore a collared shirt when working in the restaurant so he could be presentable, and would wear an apron over his clothing if he was cooking or bartending; (3) on the night of the murder, the victim's son "got the courage" to tell the victim he would be leaving the restaurant for a new job; (4) the victim was "ecstatic" at this news and made the victim's son a steak to celebrate; and (5) the victim made the best steak in the world, and the victim's son "can't even eat anybody else's steak now." The prosecutor also used the victim's son to introduce in evidence a photograph of the victim.

The defendant objected at a pretrial hearing on motions in limine to the proposed admission of the photograph of the victim. Thus, we determine whether the photograph's admission constituted error. Commonwealth v. Niemic, 483 Mass. 571, 580 n.14 (2019). If so, then we consider whether the error was prejudicial to the defendant. Id. "An error is not prejudicial only if the Commonwealth can show 'with fair assurance . . . that the judgment was not substantially swayed' by it."

Commonwealth v. Martin, 484 Mass. 634, 647 (2020), cert. denied, 141 S. Ct. 1519 (2021), quoting Commonwealth v. Rosado, 428 Mass. 76, 79 (1998). We conclude that the admission of the photograph of the victim was not error where it is well established that a predeath photograph of a victim properly may be admitted as humanizing evidence. See Commonwealth v. Martinez, 476 Mass. 186, 193 (2017); Degro, 432 Mass. at 323. The same cannot be said, however, of much of the prosecutor's opening statement and examination of the first witness, the victim's son.

Much of the prosecutor's opening and lines of questioning of the victim's son were improper. However, for the reasons discussed infra, we conclude that they did not create a substantial likelihood of a miscarriage of justice. First addressing the impropriety of the challenged statements, the start of the prosecutor's opening statement was entirely devoted to providing a history of the victim's life, with particular emphasis on his positive contributions to the community. The prosecutor then began her direct examination of the first witness, one of the victim's sons, by eliciting further sympathetic details about the victim's life. The contested statements and lines of questioning "were [not] limited in number and scope." Degro, 432 Mass. at 323. They went far

beyond the basic biographical details that we permit to humanize proceedings.

The Commonwealth argues that any statements as to the victim's character were not "emphasized" where they were not repeated in closing arguments. However, we conclude that the prosecutor emphasized the victim's good character where she began her opening statement with an extensive history of the victim's life, during which she provided multiple distinct examples of the victim's good character, and where she then elicited from the first witness evidence repeating and expanding on these examples. By the time the jury were provided with the first piece of relevant evidence in the case, the image of the victim's life and character had been more than solidified for them.

Although some of the more basic biographical statements, on their own, might have constituted permissible humanizing, taken together, the above-described statements and lines of questioning "had no relevance to the defendant's guilt and [were] an improper appeal to the passions or sympathies of the jury." Alemany, 488 Mass. at 513. We observe that the portions of the prosecutor's opening statement and examination of the first witness addressing the victim's life and character went beyond the bounds of proper humanizing of the proceedings, and we emphasize our strong disapproval of her tactics.

Having determined that there was error, "we consider, 'in the context of the arguments and the case as a whole,' whether the improper statement[s and examination] created a substantial likelihood of a miscarriage of justice." Id., quoting Commonwealth v. Kolenovic, 478 Mass. 189, 201 (2017). The judge provided instructions to the jury, both at the beginning and end of trial, that mitigated the error. At the beginning of trial, the judge told the jury multiple times that opening statements are not evidence and instructed them to decide the case "without bias, without prejudice, and without sympathy, according to the evidence." When charging the jury at the close of the case, the judge stated,

> "You, alone, determine what evidence to accept, how important the evidence is that you do accept, and what conclusions you should draw from the evidence. You must be completely fair and completely impartial. You can't be swayed by any biases or prejudices or personal likes or dislikes to either side, or because a charge is either popular or unpopular with the public. If there are conflicts in the testimony, it's your responsibility to resolve the conflicts and to determine where the truth lies. And you must do this based solely on a fair consideration of the evidence. You must be completely fair and impartial. So you can't be swayed by any personal likes or dislikes toward either side, or because the charges are popular or unpopular with the public."

Although it would have been preferable for the judge to remind the jury at the end of trial that opening statements are not evidence, we conclude that the judge's instructions were sufficient to mitigate the impact of the prosecutor's improper

statements such that they did not create a substantial likelihood of a miscarriage of justice. Commonwealth v. Francis, 450 Mass. 132, 140-141 (2007), S.C., 477 Mass. 582 (2017). See Mejia, 463 Mass. at 253; Commonwealth v. DelValle, 443 Mass. 782, 794 (2005). The judge's instructions were likewise sufficient to mitigate the impact of the prosecutor's improper line of questioning and resulting testimony from the victim's son. The judge instructed both at the beginning and close of trial that the jury should "try this case . . . without sympathy" and that they "must be completely fair and completely impartial" and "can[not] be swayed by any biases or prejudices or personal likes or dislikes to either side."

Further, the improper statements did not go to the heart of the defense strategy and were irrelevant to any disputed issue of fact. In light of the statements' irrelevance to the case and the judge's instructions, we also conclude that the jury reasonably would have been able to sort out the excessive statements made by the prosecutor. Finally, as discussed supra, the Commonwealth's case against the defendant was overwhelming as to felony-murder and extreme atrocity or cruelty. Thus, although portions of the prosecutor's opening statement and examination of the first witness were improper, when considered in the context of the whole case, the errors did not create a substantial likelihood of a miscarriage of justice.

3. Refreshed recollection testimony. The defendant argues that the prosecutor twice improperly submitted evidence of Lin's pretrial statements under the guise of refreshing Lin's recollection where Lin's testimony was inconsistent with his prior statements but his memory was not clearly exhausted. The Commonwealth asserts that, in both instances, the prosecutor showed that Lin's memory was clearly exhausted, satisfying the sole prerequisite to refreshing a witness's recollection. Because defense counsel did not object to either instance at trial, we determine whether any error gave rise to a substantial likelihood of a miscarriage of justice. Taylor, 455 Mass. at 377.

"An examiner may refresh the recollection of a witness during [his or] her testimony," and "[t]he only prerequisite to refreshing recollection is a showing that the witness's memory is clearly exhausted." Commonwealth v. O'Brien, 419 Mass. 470, 478 (1995). "A witness whose memory has been exhausted may have that memory refreshed in the presence of the jury by any means that permits the witness to testify from his or her own memory." Commonwealth v. Woodbine, 461 Mass. 720, 731 (2012), citing O'Brien, supra. A showing that a witness's memory is clearly exhausted generally occurs where a witness "is unable to recall the subject of that questioning," in which case "the witness must state that his or her memory is exhausted." Woodbine,

supra at 731-732. Although we do not require specific language as part of this showing, it must be clear that the witness is experiencing a failure of memory, rather than either providing a response the examiner did not expect or indicating he or she never had knowledge of the subject of examination. See Commonwealth v. Bookman, 386 Mass. 657, 662 n.8 (1982) (witness testimony that she could not recollect particular statements allegedly made in her presence by defendant sufficient to permit examiner to refresh her recollection); Bankers Trust Co. v. Publicker Indus., Inc., 641 F.2d 1361, 1363 (2d Cir. 1981) ("There is no required, ritualistic formula for finding exhaustion of memory"). See also Commonwealth v. McGee, 469 Mass. 1, 15 (2014), citing Commonwealth v. Jenkins, 458 Mass. 791, 796 n.4 (2011) (negative response not equivalent to failure of memory); Kaplan v. Gross, 223 Mass. 152, 156 (1916) (examiner may not refresh witness's recollection as to "matter about which he never had any knowledge"); National Labor Relations Bd. v. Federal Dairy Co., 297 F.2d 487, 488 n.3 (1st Cir. 1962), quoting United States v. Riccardi, 174 F.2d 883, 889 (3d Cir. 1949), cert. denied, 337 U.S. 941 (1949) (device of refreshing recollection may not be used improperly to suggest to witness testimony expected of him).

In the first challenged instance here, the prosecutor asked Lin whether he saw the defendant with a knife before he, the

defendant, and Lee entered the restaurant. Lin stated, "Before we entered, I really didn't pay attention to him," and then that he was "[n]ot too sure" whether he had seen whether the defendant had any weapons during that period of time. The prosecutor then asked whether Lin had "a memory of whether [the defendant] did or did not have a weapon at that point in time," to which Lin replied, "Really, I don't recall. I don't recall if he had any weapons." At that point, the prosecutor refreshed Lin's recollection with a transcript of Lin's interview with police on September 29, 2011. Lin then testified that the defendant "was carrying a fruit knife" prior to entering the restaurant. Prior to having his memory refreshed, Lin never definitely answered the prosecutor's question, either affirmatively or negatively, and twice indicated that his memory on the questioned point was failing him -- first by stating he was "[n]ot too sure" and then by stating, "Really, I don't recall." Thus, the prosecutor properly refreshed Lin's memory in this instance.

In the second challenged instance, when the prosecutor questioned Lin about the defendant's actions while standing near the safe and about whether Lin saw what the defendant had done with the knife, Lin initially answered, "I didn't see it. I don't remember where it went." The prosecutor pressed further, asking, "Did you see [the defendant] with the knife over by the

safe?" The defendant responded, "Not any more." The prosecutor then refreshed Lin's recollection, after which Lin testified, "I do remember now. Just now I thought I didn't see the knife, but now, having read that, I'm able to remember yes, he had a knife in his hand." As the Commonwealth concedes, this exchange presents a closer question. Although Lin twice stated that he did not see the knife, he also, unprompted, stated, "I don't remember where it went." Although it would have been preferable for the prosecutor to further probe Lin's failure in memory before refreshing his recollection, we conclude that the exchange meets the bare minimum requirement of a showing that Lin's memory was exhausted. In any event, we fail to see how this exchange created a substantial likelihood of a miscarriage of justice where there was testimonial and physical evidence indicating that the defendant previously (1) held the victim down at knifepoint to enable Lee to beat the victim with a crowbar and (2) stabbed the victim. Whether or not the defendant had a knife in his hand after these actions, where it was not suggested that he made further use of the knife at that point, was unlikely to have influenced the jury's conclusion. Thus, we conclude that neither instance of refreshed recollection constituted reversible error.

4. Plea agreement. The defendant argues that the entry of the unredacted plea agreement in evidence was improper where the

jury were provided with evidence that Lin was required to tell the truth at trial and that, if the prosecutor felt he was not, the agreement could be revoked and Lin could then be charged with murder in the first degree. The defendant also contends that it was improper where the unredacted signatures of the prosecutor and Lin's attorney may have led the jury to believe they were attesting to Lin's credibility. The Commonwealth argues that there was no error where (1) defense counsel specifically requested that the plea agreement be admitted in evidence in its full, unredacted form; (2) the prosecutor made no mention of the disputed provisions in her closing; (3) there was overwhelming evidence of the defendant's guilt; and (4) the trial judge instructed the jury that they were the sole arbiters of whether Lin's testimony was truthful and that, further, the prosecutor was "not in a position to have any specialized knowledge or opinion about whether Mr. Lin's testimony [was] truthful." We agree that there was no error.

Where testimony is offered pursuant to a plea agreement, there is a risk that the jury may "believe that the government has special knowledge of the veracity of the witness's testimony." Commonwealth v. Marrero, 436 Mass. 488, 500 (2002). Thus, when plea agreements are submitted in evidence, it is preferable for the judge to redact both the signatures of the attorneys and provisions indicating the agreement is contingent

on the witness's truthfulness, "on request by a defendant" (emphasis added). Commonwealth v. Ciampa, 406 Mass. 257, 262 (1989). See Marrero, supra at 501. However, "in the absence of an objection, 'such redaction [is] not required.'" Commonwealth v. Webb, 468 Mass. 26, 34 (2014), quoting Marrero, supra.

The circumstances surrounding the admission of Lin's plea agreement share several similarities with the circumstances presented in Commonwealth v. Roman, 470 Mass. 85, 100 (2014), in which we found no error. There, as here, "not only was there no request for such redaction, but also trial counsel specifically indicated he did not want anything redacted." Id. Where one of defense counsel's primary tactics was to discredit Lin's testimony, the unredacted language "went to the heart of the defense."[14] Id. As in Roman, the judge in this case provided extensive instructions to the jurors cautioning them that they were the sole arbiters of the truthfulness of Lin's testimony, that the district attorney had no specialized knowledge of Lin's credibility, that the jury should consider whether the agreement was a possible incentive that would affect Lin's credibility, and that the jury should particularly scrutinize Lin's testimony

[14] Defense counsel began his closing argument as follows: "If you admit you had the knife, you're going to get life. And Jun Di Lin knew this. He knew this when he told this story to the government when he was attempting to negotiate a deal."

because he was an alleged accomplice. See id. at 99 (describing similar instructions to jury). There was no error here.

5. Closing argument. The defendant argues that several errors in the prosecutor's closing argument deprived him of a fair trial. The defendant argues that the prosecutor variously improperly appealed to the jury's sympathy, vouched for Lin's credibility, and misstated evidence or stated facts not in evidence, and that the cumulative effect of these errors gives rise to a substantial likelihood of a miscarriage of justice. The Commonwealth contends that the prosecutor's closing argument was entirely proper. The Commonwealth urges that, even if the prosecutor made errors in her closing argument, any errors were sufficiently mitigated by the judge's instructions to the jury. "We examine [all] the challenged statements 'in the context of the entire closing, the jury instructions, and the evidence introduced at trial.'" Commonwealth v. Wilkerson, 486 Mass. 159, 180 (2020), quoting Martinez, 476 Mass. at 198.

a. Appeal to sympathy. The defendant asserts that the prosecutor improperly appealed to the jury's sympathy for the victim by stating that Lin and Lee may "get less than they deserved," implying that, as a result, the jury should harshly punish the defendant to ensure some retribution for the victim. The Commonwealth argues that the prosecutor's statement that the jury should not concern themselves with the fact that Lin and

Lee, who may have been "equally culpable, may deserve worse than they may get," was proper rebuttal to defense counsel's assertion that Lin's testimony was fabricated in an attempt to get a lower sentence. Because defense counsel did not object to this statement at trial, we determine whether any statements were improper and, if so, whether they created a substantial likelihood of a miscarriage of justice. Taylor, 455 Mass. at 377.

As discussed supra, it is improper for a prosecutor to "play on . . . the jury's sympathy or emotions" or "comment on the consequences of a verdict." Commonwealth v. Kozec, 399 Mass. 514, 516-517 (1987). However, "[a] prosecutor is entitled to respond to an argument made by the defense at closing." Commonwealth v. Mason, 485 Mass. 520, 539 (2020), citing Commonwealth v. Smith, 404 Mass. 1, 7 (1989).

Here, defense counsel began his closing argument by implying that Lin's testimony was fabricated in an attempt to secure a lower sentence for himself. Defense counsel stated, "If you admit you had the knife, you're going to get life. And Jun Di Lin knew this. He knew this when he told this story to the government when he was attempting to negotiate a deal." Defense counsel later stated, "[A]s time goes on, [Lin] figures out, I'm going to be in an awful lot of trouble. . . . And then he decides, I'm going to get a lawyer, and I'm going to go under

the table to see if I can cut my deal first." Defense counsel went on to detail for the jury that Lin was facing a sentence of life without parole for murder in the first degree, and that, in negotiating a plea agreement,

> "[Lin] has to tell a story that's good enough so that he can negotiate his deal. And he went in there, and he got himself a deal. . . . His sentencing is pending based upon his testimony in this case, and based upon his testimony in Lee's case. If things go well, he will receive a sentence with a bottom number of fifteen years when he hits parole, and that number could be less, depending on behavior while you're incarcerated. It's a pretty good deal."

Defense counsel also argued throughout that the attack on the victim was carried out not by the defendant, but by Lee and Lin.

The prosecutor was entitled to respond both to the argument that Lee and Lin were the only ones to carry out the murder and to the argument that Lin received a lower sentence than he deserved as a result of his negotiations with the Commonwealth. The prosecutor began by asserting, "[I]t will be clear to you that all three men are guilty. But you are here, sworn, to decide a verdict on one man, Cheng Sun." She then continued by arguing that, although others "who are equally guilty may have been more vicious, more violent, may have been equally culpable, may deserve worse than they may get, [that] should not distract [the jury] from judging the evidence about Cheng Sun. [Bec]ause he's the one here that is on trial." These statements were proper rebuttal to defense counsel's focus on Lee and Lin as the

perpetrators of the murder and to defense counsel's assertion that Lin received a greatly reduced sentence as a result of clever negotiating, and they were thus "within the right of retaliatory reply."[15] Commonwealth v. Goitia, 480 Mass. 763, 775 (2018). See Kozec, 399 Mass. at 519 (although prosecutor may not "fight fire with fire" and exceed proper limits of argument, defense counsel's argument may justify particular rebuttal).

b. Vouching. The defendant argues that the prosecutor twice improperly vouched for Lin's credibility. The Commonwealth contends that the prosecutor properly argued from the evidence why Lin should be believed. Because defense counsel objected to what he perceived to be improper vouching for Lin, sought a curative instruction, and asked that the prosecutor's statement to the effect that "certain things have a ring of truth to them" be struck, "we consider whether the prosecutor's comments were improper and, if they were, whether the error was prejudicial." Goitia, 480 Mass. at 775. There was no error.

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[15] Additionally, the judge instructed the jury that they "may not consider any sentencing consequences in any way in [their] deliberations, since that has nothing to do with [their] role as the judges of the facts of the case," thus mitigating any potential improper inference to be made from the prosecutor's statements. Santiago, 425 Mass. at 495 ("trial judge's instructions are generally adequate to cure errors in the arguments").

It is improper for an attorney to vouch for a witness's credibility. Commonwealth v. Koumaris, 440 Mass. 405, 414 (2003). "However, it is permissible to comment and draw inferences regarding the evidence at trial," Id., and "where the credibility of a witness is an issue, counsel may argue from the evidence why a witness should be believed" (citation omitted), Wilkerson, 486 Mass. at 179. "Improper vouching occurs where an attorney 'expresses a personal belief in the credibility of a witness, or indicates that he or she has knowledge independent of the evidence before the jury.'" Mejia, 463 Mass. at 254, quoting Commonwealth v. Ortega, 441 Mass. 170, 181 (2004).

In the first challenged statement, the prosecutor asserted, "[D]espite what's been argued to you [by defense counsel, Lin's] testimony is reliable, and accurate, and I suggest you should believe it to a moral certainty." As a preliminary matter, defense counsel put Lin's credibility at issue during both his cross-examination of him and his closing argument, suggesting that Lin fabricated his story to secure a favorable plea deal. As a result, "the prosecutor legitimately could defend the credibility" of Lin. Koumaris, 440 Mass. at 414. Additionally, we do not consider this statement alone, but in the context of the entire closing argument. Wilkerson, 486 Mass. at 180.

Immediately following the challenged statement, the prosecutor provided the reasons that the jury should believe

Lin's testimony, saying, "Consider all of the evidence that he gave." She then extensively detailed how Lin's testimony was corroborated by independent evidence, including by cell tower information; GPS tracking data; video surveillance and photographs; a computer report; footprints, a hat, a knife, and a cord found at the scene; lack of fingerprint evidence found at the scene; tool marks at the scene; blood transfer at the scene; the injuries to the victim's body; the testimony of another witness, Tan; and receipts and transaction records.

This summary of the evidence corroborating Lin's testimony was immediately followed by the prosecutor's second challenged statement, as follows:

> "Layer upon layer upon layer of objective, irrefutable evidence corroborates Jun Di Lin, and that's why you can rely on it to a moral certainty. But there's more. Sometimes things just have what's called a 'ring of truth' to them. Just a common sense saying. I'm sure everyone in this courtroom has used that phrase, heard that phrase, know what it means. It means that something just sort of seems right. It makes sense."

She later explained this statement by stating, "The sense I'm referring to is that when you ask a series of questions about how his testimony matches the evidence that you heard, it does, in fact, make sense."

Placed in their proper context, it is clear that neither of the challenged statements constitutes improper vouching. The prosecutor neither expressed a personal belief as to Lin's

credibility nor indicated she had knowledge independent of the evidence before the jury. Instead, the prosecutor argued the evidence and a fair inference regarding Lin's credibility that could be drawn from the evidence in light of defense counsel's earlier attack on Lin's credibility. Koumaris, 440 Mass. at 414. See Goitia, 480 Mass. at 775 (evidence presented to jury required them to decide between conflicting versions of events, and prosecutor properly could argue which version of evidence was more credible). Additionally, it is clear in context that the prosecutor's statement referencing a "ring of truth" was nothing more than a suggestion that the jury should use their common sense in evaluating Lin's testimony in context with the corroborating evidence. This was not improper.[16] See Ortega, 441 Mass. at 181 & n.18 (prosecutor suggested that if jury used their common sense, they would believe officers' testimony); Santiago, 425 Mass. at 498 (no error to tell jurors to use common sense where "[j]urors should use common sense to assist in reaching their verdict").

c. Misstatements of the evidence. The defendant contends that the prosecutor made three misstatements of evidence or

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[16] Contrary to the defendant's argument, we also find no error with the prosecutor's assertion that the jury could believe Lin's testimony "to a moral certainty." See Commonwealth v. Kebreau, 454 Mass. 287, 304 (2009) (prosecutor's statement that "[t]hose people[']s corroboration are your moral certainty" not improper vouching).

statements of facts not in evidence. Defense counsel did not object to these statements at trial. Thus, we determine whether any statements were improper and, if so, whether they created a substantial likelihood of a miscarriage of justice. Taylor, 455 Mass. at 377. Although "counsel may argue the evidence and the fair inferences which can be drawn from the evidence," Commonwealth v. Hoffer, 375 Mass. 369, 378 (1978), "a prosecutor should not . . . misstate the evidence or refer to facts not in evidence," Kozec, 399 Mass. at 516. "Arguments that are unsupported by the evidence and thus are speculative and conjectural are, of course, improper." Id. at 522, citing Commonwealth v. Connor, 392 Mass. 838, 853 (1984), and others. "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." Santiago, 425 Mass. at 499-500.

First, the defendant argues that the prosecutor mistakenly stated that Lin knew that dispatch could track his taxicab at times, and thus he would not have used his taxicab the night of the killing had he known that the defendant and Lee were planning to commit a crime. The Commonwealth asserts that Lin testified that the taxicab company would be "aware if [he] picked up [a] customer" and "would be able to track [his] movements as to where [he] drove that customer" and the

prosecutor said only that Lin knew the company could track the taxicab "at times."[17] Lin testified that he knew that "the [taxicab] company could track [his] route if [he] turned the meter on" and also that the company could know where the taxicab was if he was logged in as the driver. He also testified that he did not know whether the company could track his taxicab when the meter was off. Thus, the evidence tended to show that Lin was aware the company could track the taxicab when the meter was on, but not whether it could track the taxicab when the meter was off. In other words, he was aware that, "at times," i.e., when the meter was on, the company could track the taxicab. Although the inference that Lin was aware the company could track the taxicab's movements at times did "not . . . flow[] inevitably from the evidence," the prosecutor's statement "asked the jury to draw an inference that was 'reasonable and possible.'" Commonwealth v. Mazariego, 474 Mass. 42, 58 (2016), quoting Commonwealth v. Marquetty, 416 Mass. 445, 452 (1993).

[17] The prosecutor stated, in relevant part: "Why is [Lin] there -- if he knew that this robbery was going to take place, not even the murder, that they gratuitously engage in, that he knew that a robbery was going to take place, why does he get rid of his personal car, pick up his cab, that has a Garmin, that has GPS in it? He knows dispatch can track it at times. It's custom painted in multiple colors. And it's got his individual hackney license, 513, painted and emblazoned on its front, on its back, and on the side of the cab."

The defendant argues that the prosecutor also misstated the evidence when she purportedly asserted that the defendant "took no steps to protect [the victim] from Lee's attack." The Commonwealth asserts that the prosecutor properly argued that, where the defendant took some steps to protect the victim from Lee's attack, his actions were motivated by his desire to gain access to the safe, not to safeguard the victim's health. The prosecutor did not misstate the evidence.

Prior to making the challenged statement, the prosecutor correctly stated that the evidence showed injuries to the defendant's hands that were consistent with his trying to stop Lee from beating the victim. She also stated that the defendant pleaded with Lee to stop. She then went on to argue what inferences could be drawn from those actions in light of all the evidence. Defense counsel had argued that the defendant's actions showed withdrawal from the criminal enterprise. In response, the prosecutor countered that, considering the evidence that the defendant acted as he did amidst his ongoing efforts to get the victim to open the safe, the defendant's actions were not motivated by an intent to withdraw or altruistically protect the victim, but were "a calculated move to ensure that [the victim] is able to get the money that he's gone there to steal. That's what that is." Thus, placed in the context of the closing argument as a whole, the prosecutor's

statement was within the bounds of proper argument. Mazariego, 474 Mass. at 57 (prosecutor permitted to make arguments to assist jury in analyzing evidence and to suggest conclusions they should draw from evidence).

Finally, the defendant asserts that the prosecutor improperly stated that, before Lin entered the restaurant, the defendant and Lee told him that someone was inside. The Commonwealth responds that the prosecutor merely identified occasions when Lin was not in a position to see what the defendant and Lee were doing when she stated, "[The defendant and Lee] go into the restaurant and somehow have learned, and state their knowledge, that there's a man inside. Jun Di Lin wasn't with them," and the defendant knew the victim was inside where he armed himself with a weapon before entering the restaurant. This statement was improper.

Lin testified that, prior to entering the restaurant, the defendant and Lee told him that no one was inside, and that assertion informed his decision to agree to go into the restaurant with them. On further questioning, Lin confirmed that he "had no information that there was someone else inside the restaurant before [he] went in the restaurant." Lin had previously testified that the defendant and Lee only informed him that someone was inside after they had already entered the restaurant and after Lin had heard a scream coming from another

room. There is no evidentiary support for the argument that, prior to entering the restaurant, the defendant and Lee "state[d] their knowledge" that a man was inside. Although not challenged below or on appeal, we likewise conclude that there was no support for the prosecutor's statement, "[S]omehow [the defendant and Lee] know there's a man inside. And I believe you can reasonably infer from that they had to have been in the restaurant to know that."[18]

Although improper, the misstatements were limited to the collateral issue of whether Lin, Lee, or the defendant knew there was a person in the restaurant before they went inside.[19] Additionally, the judge instructed the jury three times -- at the beginning of trial, before closing arguments, and during the charge to the jury -- that closing arguments are not evidence.

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[18] It would have been preferable for the prosecutor to refrain from using the language, "I believe." In context, however, it is clear that she was arguing what inference was reasonable from what she incorrectly thought was the evidence, rather than improperly "express[ing] a personal belief in the credibility of a witness, or indicat[ing] that . . . she ha[d] knowledge independent of the evidence before the jury" (citation omitted). Mejia, 463 Mass. at 254.

[19] Where the defendant was convicted on theories of felony-murder and extreme atrocity or cruelty but not deliberate premeditation, prior knowledge that someone was in the restaurant was not relevant to either theory pursuant to which the defendant was convicted. See supra for a discussion of the elements the Commonwealth had to prove to convict the defendant of murder in the first degree on a theory of felony-murder or extreme atrocity or cruelty.

"[W]e must and do recognize that closing argument is identified as argument, the jury understand[] that, instructions from the judge inform the jury that closing argument is not evidence, and instructions may mitigate any [potentially improper impact from] the final argument." Kozec, 399 Mass. at 517. "A certain measure of jury sophistication in sorting out excessive claims on both sides fairly may be assumed." Id. In the context of an otherwise proper closing argument, where the misstatements went only to a collateral issue, and where the jury were repeatedly instructed that closing arguments are not evidence, we do not see how the misstatements made a difference in the jury's conclusion or created a substantial likelihood of a miscarriage of justice.

6. Review under G. L. c. 278, § 33E. The defendant asks this court to exercise its discretionary authority under G. L. c. 278, § 33E, to reduce the verdict to either murder in the second degree or manslaughter. The defendant contends that sustaining a verdict of murder in the first degree would constitute a miscarriage of justice where the defendant did not participate in the killing of the victim and never intended to injure or kill the victim. Additionally, the defendant asks us to reduce the verdict where he could not have been convicted of murder in the first degree on a theory of felony-murder had his trial commenced after this court's decision in Commonwealth v.

Brown, 477 Mass. 805, 825, 832-833 (2017) (Gants, C.J., concurring), cert. denied, 139 S. Ct. 54 (2018), which abolished the common-law felony-murder doctrine. In effect, the defendant asks this court to apply Brown's holding retroactively to this case.

First, this court made clear in Brown that its abolition of the common-law felony-murder rule was "prospective, applying only to cases where trial begins after" the date of the opinion. Brown, 477 Mass. at 834 (Gants, C.J., concurring). Thus, we will not entertain the defendant's request to apply Brown's holding retroactively to this case. Further, to do so would be inconsequential where, in addition to being convicted of murder in the first degree on the theory of felony-murder, the defendant was also convicted on the theory of extreme atrocity or cruelty -- a theory that remains legally valid today, G. L. c. 265, § 1, and where there was sufficient evidence of malice,[20] as required for a felony-murder conviction today. Finally, as discussed supra, the defendant participated in the killing. After a thorough review of the record, we discern no reason to exercise our authority under § 33E to reduce the verdict.

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[20] As discussed supra, the Commonwealth presented sufficient evidence that the defendant possessed the third prong of malice, an intent "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." Watson, 487 Mass. at 164.

Judgments affirmed.