SJC-13080

COMMONWEALTH vs. NICKOLAS LACROSSE.

Hampden. April 5, 2024. - August 21, 2024.

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

Homicide. Practice, Criminal, Assistance of counsel, Argument by prosecutor, Instructions to jury, Agreement between prosecutor and witness, Disclosure of evidence, Discovery, Sentence, Capital case. Constitutional Law, Assistance of counsel, Sentence. Evidence, Informer, Impeachment of credibility, Prior inconsistent statement, Argument by prosecutor, Disclosure of evidence, Videotape, Expert opinion. Witness, Police informer, Credibility, Expert. Jury and Jurors.

Indictment found and returned in the Superior Court Department on March 31, 2015.

The case was tried before Mark D. Mason, J., and a motion for a new trial, filed on August 24, 2022, was heard by him.

Elizabeth Caddick for the defendant.
John A. Wendel, Assistant District Attorney, for the Commonwealth.

KAFKER, J. A jury found the defendant, Nickolas Lacrosse, guilty of murder in the first degree on theories of deliberate

premeditation and extreme atrocity or cruelty for the stabbing of Kathryn Mauke (victim). The defendant and victim had dated on and off for several years, but the victim ended the relationship conclusively in December 2014, stating that she no longer wished to have contact with the defendant. On February 11, 2015, the defendant left his job early and got a ride home from his friend. The defendant then walked two miles from his home to the victim's home and stabbed the victim thirty-two times. At trial, the defendant primarily relied on a mental health defense to establish that he was not criminally responsible for the killing, which the jury rejected.

On direct appeal and appeal from a motion for a new trial, the defendant advances several arguments. First, he argues that he was denied a fair trial because the testimony of two purportedly unreliable incarcerated informants was admitted. Their testimony included statements from the defendant saying he intended to pretend to be "crazy." He advocates for a new rule requiring reliability hearings before incarcerated informants may be allowed to testify. Second, he contends his trial counsel provided ineffective assistance by failing to fully impeach the two incarcerated informants with various prior inconsistent statements they had made. Third, the defendant asserts that the prosecutor made several improper statements during her closing argument and that the cumulative prejudice of

these errors, along with the admission of the incarcerated informant testimony, warrants a new trial. Fourth, he argues that his sentence of life without parole is unconstitutional. Finally, he contends that his verdict should be reduced pursuant to G. L. c. 278, § 33E, because there was reasonable doubt about his criminal responsibility.

We conclude that the testimony of the two incarcerated informants was permissible and decline to create a new rule requiring reliability hearings for incarcerated informants. However, recognizing the distinct issues presented by incarcerated informant testimony, we require supplemental jury instructions to be provided prospectively in cases involving all incarcerated informants, including those who are testifying without a cooperation agreement. Further, we hold that his trial counsel adequately impeached the incarcerated informants' credibility and thus provided effective assistance in the instant case. We also conclude that all the prosecutor's statements were proper, although the inference that the defendant's mother's background in psychology helped the defendant develop a mental health defense was very close to the line. As there was no error, there was no cumulative prejudice requiring a new trial.

We do, however, conclude that the defendant's sentence of life without parole is unconstitutional in light of our holding

in Commonwealth v. Mattis, 493 Mass. 216 (2024). Finally, after reviewing the entire record, we decline to exercise our extraordinary power pursuant to G. L. c. 278, § 33E, because the jury's finding that the defendant was criminally responsible was supported by the evidence and the jury's credibility determinations of the expert witnesses.

Accordingly, we affirm the defendant's conviction of murder in the first degree. However, because the defendant's sentence of life without parole is unconstitutional, the defendant's sentence shall be modified to reflect his eligibility for parole after serving thirty years of his prison sentence.

1. Factual and procedural background. We recite the facts as the jury reasonably could have found them, reserving certain facts for our discussion of the legal issues.

a. The murder and subsequent investigation. At the time of the murder, the defendant was twenty years old and working in Ludlow. The victim was seventeen years old and was a high school senior in Springfield. The defendant and the victim first started dating when the defendant was fifteen and the victim was thirteen and dated "on and off" for about five years. In December of 2014, the victim broke up with the defendant, and in January 2015, she began dating someone else. While the defendant and the victim had broken up many times in the past, this most recent breakup was different because the victim cut

off communication with the defendant in a way she had not done during previous breakups. After the breakup, the defendant became depressed. He began drinking and smoking marijuana more than usual and appeared "[l]ethargic, kind of just slow, [and] sad." The defendant was aware of the victim's new boyfriend.

Early in the morning of February 11, 2015, the defendant messaged the victim via a social media account and the two began a lengthy message exchange. Throughout the exchange, the defendant expressed his distress and anger over the breakup, while the victim maintained that the relationship was over and that she did not want the defendant to be in her life anymore. The exchange ended shortly after the victim threatened to block the defendant's messages and stated that she was "happier without" the defendant. Later that morning, the victim told her younger sister that she was not feeling well and stayed home from school, while the sister left for school.

At around 10 A.M. that morning, the defendant sent a text message to his friend and coworker, Sean Edwards, asking for a ride home from work. The defendant claimed he needed to leave work early to deal with "family matters." Both the defendant and the victim lived in Springfield, with the defendant's house on Observer Street located approximately two miles from the victim's house on Prentice Street. Edwards dropped the defendant off at the defendant's home at approximately 10:35

A.M. and returned to work. Surveillance footage recorded by a security video camera located at a neighbor's house showed the defendant arriving at the victim's home at around 11:05 A.M. The defendant left the victim's home at around 11:45 A.M. but returned briefly at 11:48 A.M. before again leaving and heading home. At home, the defendant showered, shaved his beard, and put the clothes he had been wearing in a bag. The defendant then took the bag of clothes and put it in the trash barrel outside of Edwards's house, which was located across the street from the defendant's house.

A little before 3 P.M., the victim's sister arrived home from school and entered the house through the back door. After taking two steps into the house, she saw the victim lying in a pool of blood on the kitchen floor. She called out the victim's name twice, and after the victim did not respond, she ran out of the house and called her and the victim's father, who called 911. A subsequent medical examination showed that the victim had suffered thirty-two stab wounds throughout her body and that the cause of death was multiple sharp force injuries to her head, neck, torso, and extremities. A combination of blood loss and asphyxiation was the likely mechanism that contributed to her death.

During the investigation, detectives obtained surveillance footage from a neighbor who had video cameras facing directly to

the right of the victim's house. Police officers interviewed Edwards on the night of February 11, 2015, and showed him the surveillance footage. Edwards identified the individual entering and exiting the victim's house as the defendant. Edwards also informed the police that he had given the defendant a ride home from work that day and had gifted the defendant a knife approximately five years before the murder. The police searched both the defendant's home and the victim's home, as well as the route the defendant traveled, but did not find the knife Edwards referred to or any other knife.

That same night, plainclothes detectives arrived at the defendant's home and asked if he would accompany them to the Springfield police station for an interview. During the interview, the defendant lied about not being at the victim's home, lied about the clothes he wore that morning, and lied about having a beard that morning that he had shaved later in the day. At 6:30 P.M., the police administered Miranda warnings to the defendant, and at 6:34 P.M., informed him of his right to use the telephone. The defendant was placed under arrest shortly after 8:36 P.M. On February 12, 2015, one day after the murder, police officers found the bloodstained clothes that the defendant had worn during the murder inside the trash receptacle located in the back of Edwards's home. Testing revealed that

the clothes had a mixture of the defendant's and the victim's deoxyribonucleic acid on them.

b. The trial. i. Incarcerated informant testimony. At trial, the Commonwealth called as witnesses two inmates, Dominique Gomez and Melvin Santiago, who had both been housed in the same pod as the defendant at the Hampden County house of correction. Gomez was being held under sentence for violating probation, whereas Santiago was being held pretrial on pending charges for assault by means of a dangerous weapon, assault and battery on a family member, assault and battery on a pregnant person, intent to distribute heroin, illegal possession of a loaded firearm without a firearm identification card, possessing a firearm during a felony, and receiving stolen property. Santiago testified pursuant to a cooperation agreement with the district attorney for the Hampden district (DA), whereby the Commonwealth would take his cooperation in the defendant's case into consideration in resolving those pending charges. Santiago also had pending other charges for unarmed robbery that were not subject to the cooperation agreement. The trial judge instructed the jury during Santiago's testimony using a jury instruction for witnesses testifying pursuant to a cooperation agreement.[1] Gomez did not testify under a cooperation agreement

[1] The trial judge stated:

but had done so in the past. The defendant's trial counsel also requested a cooperating witness instruction with respect to Gomez, but the trial judge denied the motion because Gomez had not entered into any cooperation agreement.

Gomez testified on direct examination that the defendant had admitted that he killed the victim, that he was "trying to play the crazy card," and that his mother had hidden the murder weapon. Gomez also described an incident in which the defendant, purportedly in response to Gomez failing to repay sixty dollars in canteen money that the defendant had loaned to

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> "Ladies and gentlemen, you are going to hear evidence, and you just heard some evidence, that Mr. Santiago entered into what we call a cooperation agreement with the district attorney's office, and that he will be testifying in this case pursuant to that cooperation agreement. In that regard I caution you as follows:
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> "First, you should examine Mr. Santiago's testimony which will be given in connection with a cooperation agreement in this case with extra care and caution. The determination of any witness, and in this particular case Mr. Santiago's truthfulness, is solely a question for you, the members of the jury, to decide, and any reference to truthfulness in a cooperation agreement does not mean that the Commonwealth has any way of knowing indeed whether or not Mr. Santiago is telling the truth.
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> "You may also ask yourselves the question of what promises, rewards, inducements or other benefits are flowing from Mr. Santiago's testimony as a consequence of this cooperation agreement, and if there are any, have those promises, inducements and rewards and benefits in any way affected his credibility."

Gomez, slid autopsy pictures under Gomez's cell door, saying "[t]his is what I do." After the incident, Santiago, who was standing nearby outside of Gomez's cell, approached Gomez and asked if the defendant had threatened him. Later, the defendant told Gomez that his then attorney[2] wanted to speak with him and instructed Gomez to lie and say that the papers that the defendant slid under his door were homework.

Santiago testified that the defendant had also confided in him about the murder, admitting that "he knew he did it, but he didn't deserve life" and stating that he was "going to play crazy." The defendant also recounted the day of the murder to Santiago, admitting that he had brought a knife that Edwards had given him to the victim's house and that his mother had that knife. Santiago also described witnessing the autopsy photograph incident, testifying that the defendant had gone over to Gomez's cell with the autopsy photographs and passed them underneath the cell as a threat if Gomez did not repay the loan. Santiago claimed that he took notes about the incident because he "didn't think it was right" and that he managed to slip one of the autopsy photographs into his pocket without the defendant noticing. Santiago then mailed the photograph to his mother for safekeeping. Santiago also testified that inmates did not have

[2] Trial counsel was a different attorney from the one who spoke with Gomez.

access to each other's cells, claiming that "[y]ou can't go in nobody else's cell period." Santiago also denied communicating about the case with Gomez.

The defendant's trial counsel impeached both Gomez and Santiago on multiple fronts. During Gomez's cross-examination, trial counsel drew attention to Gomez's extensive history of cooperating with the police and his many criminal convictions, getting Gomez to admit to being known in the community as a "snitch." Trial counsel also elicited an admission from Gomez that he had lied to the defendant's prior attorney when he told the attorney that the defendant had passed him homework under his cell door, rather than autopsy photographs. Trial counsel highlighted the fact that Gomez was convicted of breaking and entering but had the case "placed on file"[3] and received no prison time for a breaking and entering charge, and that he was not reincarcerated following a probation violation. Gomez further admitted that he had memory problems from being stabbed in the head as revenge for cooperating with the Commonwealth. Gomez also stated that, during trial, he was being housed and protected by the Commonwealth because of threats made against him due to his informant activities. Trial counsel additionally

[3] To place a case on file refers to the practice of suspending sentencing indefinitely on a conviction without dismissing the criminal case. See Commonwealth v. Simmons, 448 Mass. 687, 688 (2007).

questioned Gomez on whether he had access to the defendant's jail cell.

On cross-examination, Santiago admitted that, in an interview with the DA's office, he said that the defendant had told him that the defendant blacked out and did not remember killing the victim. Trial counsel emphasized Santiago's cooperation agreement and his prior convictions. Trial counsel also asked Santiago questions about his distance from the defendant's jail cell and whether the defendant always locked his door every time he left his jail cell.

Regarding the cooperation agreement, trial counsel repeatedly questioned Santiago as to whether his testimony at trial would be taken into consideration by the DA in resolving Santiago's pending charges. Additionally, trial counsel noted that Santiago faced additional charges not subject to the cooperation agreement and that he received seemingly lenient treatment on several charges, including receiving time served and getting released on probation for an armed robbery charge. Santiago further admitted that he did not immediately report the autopsy photograph incident and that he had testified to several statements and incidents that he did not record in his notes.

ii. The defendant's trial strategy. At trial, the defendant presented the defense that he was not criminally

responsible because he experienced dissociative amnesia[4] when he killed the victim. Two expert witnesses retained by the defendant evaluated the defendant and testified. Dr. Thomas Deters, a neuropsychologist, diagnosed the defendant with a number of mental disorders, including, most saliently, major depressive disorder and dissociative amnesia. Deters tied the multiple episodes of dissociative amnesia that the defendant reported to the defendant's depression and trauma. Deters opined that the defendant was experiencing dissociative amnesia when he killed the victim and thus was not criminally responsible. During cross-examination, Deters, whose diagnosis relied on the defendant's self-reporting, agreed that the defendant had lied during his interview with police. The prosecutor also drew attention to inconsistencies in statements the defendant gave to Deters and the other experts.

Dr. David Rosmarin, a forensic psychiatrist, also testified for the defense. Rosmarin opined that the defendant was experiencing "non-faked, non-malingered amnesia for the actual

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[4] Dr. Thomas Deters, an expert witness retained by the defendant, described dissociative amnesia as the inability to "form memories or experience emotions in an integrated way," which can occur in people who have experienced trauma or who have a history of depression or other mental illness. Dr. David Rosmarin, another expert retained by the defendant, explained that dissociative amnesia is "not normal forgetting" but rather the "loss of important or relevant biographical information that's not explained" by a neurological cause (e.g., a stroke, seizure, intoxication, etc.).

moments of the killing" and that based on this and other symptoms, "the state of dissociation more likely than not prevented him from meeting the legal standard for criminal responsibility." This diagnosis was based in part on the defendant's reports of previous episodes of dissociation and his experience of violence at home at the hands of his father. When asked why he did not think the defendant was malingering, Rosmarin testified that the defendant was "not psychiatrically sophisticated."

The prosecutor cross-examined Rosmarin, who, like Deters, had relied on the defendant's self-reporting, about the defendant's lies to police during his interrogation. The prosecutor also elicited testimony from Rosmarin that described the defendant's access to the Commonwealth's evidence, including police reports, which the defendant used to reconstruct the period of time that he could not remember. Specifically, Rosmarin stated that "his memory had been somewhat contaminated because he -- by the time he saw me, he had access to some of the Commonwealth's case." Finally, the Commonwealth confronted Rosmarin about the surveillance video footage of the defendant, twice asking Rosmarin if he saw the defendant carrying something in his hands after he briefly returned to the victim's house. Rosmarin twice denied seeing anything in the defendant's hands

on the footage. Both times, trial counsel objected to the question and the trial judge sustained the objections.[5]

The defendant took the stand to testify. When asked by trial counsel, he stated that he did not have a knife in his pocket when he walked to the victim's house and did not go there intending to kill the victim. However, the defendant admitted that he lied to his supervisor about the reason he left work early. He recounted several past instances in which he blacked out after becoming angry or upset. As to the murder itself, the defendant testified that the victim had let him into the house and given him five minutes to speak. The two began arguing, which escalated into raised voices and eventually yelling. At

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[5] Q.: "Did you notice from the last clip when he's leaving the house . . . that his arms are positioned up, and he appears to be holding something?"

Mr. Black: "Objection, Your honor, as to that characterization."

The court: "Sustained."

. . .

Q.: "What did you notice about the last clip, Doctor?"

A.: "I didn't notice what he was doing with his hands."

Q.: "You didn't see that his hands were up like this (demonstrating)?"

Mr. Black: "Again, objection."

The court: "Sustained."

some point, the victim said something about the defendant's brother that was "upsetting" and "hurtful" and made the defendant angry. His last memory was standing very close to the victim while he and the victim screamed at each other, and he felt like his "blood was boiling." The defendant testified that his next memory was "standing on the corner of East Street with cars driving by me" and feeling the "cold air." Afterwards, the defendant "had a bad feeling" and returned to the victim's home and saw the victim's legs sticking out from behind the kitchen table. The defendant left the house and noticed that he had a kitchen knife in his pocket.[6] In response to trial counsel's questioning, the defendant admitted that he lied to the police about shaving and about being in the victim's neighborhood. The defendant also stated that he never sought professional psychiatric help.

On cross-examination, the defendant stated that he was very close with his mother and that his mother had a degree in psychology. The prosecutor also drew attention to the defendant's false statements during his initial interview with the police and to the inconsistency between the defendant's testimony and his statements to the Commonwealth's expert.

[6] The defendant denied that the knife he found in his pocket was the knife Edwards had given him.

The Commonwealth's rebuttal expert, Dr. Alison Fife, a psychiatrist who also examined the defendant, testified that in her opinion, the defendant was suffering from a grief reaction in the days leading up to the murder, rather than major depressive disorder. Moreover, Fife disagreed with Rosmarin and Deter's diagnosis of dissociative amnesia, finding that there was insufficient evidence of a precipitating traumatic event. Rather, any memory loss the defendant suffered was caused by stress brought on by the murder itself, rather than of dissociation that occurred during the murder. Fife also noted that despite the defendant's self-reported mental health symptoms and family problems, he never sought or received psychiatric treatment. Fife further testified that the defendant had told her or made her aware that he had access to the Commonwealth's evidence before he spoke to her.

iii. Closing argument. During her closing argument, the prosecutor emphasized that the defendant's story was suspicious in how closely it fit with the video evidence and stated that the defendant "had access to the Commonwealth's evidence before he had the chance to tell his version of the events." The prosecutor also criticized the defendant's experts, arguing that they "flat out ignored evidence that would contradict their opinions" and that "they were tailoring their testimony to give the opinions that they were hired to give." She singled out

Rosmarin's testimony, contending that, even after watching the surveillance video footage, he "wouldn't even admit that the defendant's hands were up and holding an object when the defendant left the house for a second time." The prosecutor also challenged Rosmarin's claim that the defendant was "psychologically naïve" by emphasizing that "the defendant's greatest confident [sic], his mother, had a degree in psychology."

On May 23, 2018, the defendant was found guilty of murder in the first degree by deliberate premeditation and with extreme atrocity or cruelty. The defendant timely filed a notice of appeal from his conviction on June 5, 2018.

c. Postconviction litigation. The defendant filed a motion for a new trial in August 2022. Among other claims, the defendant argued that Santiago and Gomez gave unreliable testimony that should not have been admitted and that defense counsel's cross-examination of the two incarcerated informants was ineffective because it did not focus on their inconsistent statements. At an evidentiary hearing on the motion for a new trial, the defendant called Dr. Jeffrey Neuschatz as an expert witness. Neuschatz presented a summary of his research suggesting that incarcerated informant testimony is unreliable for several reasons. He relied primarily on his experiments with mock jurors, his review of deoxyribonucleic acid (DNA)

exonerations, and the Report of the 1989-90 Los Angeles County Grand Jury (Los Angeles Grand Jury Report). Typical incarcerated informants, Neuschatz testified, are highly motivated to work with the police, and potentially fabricate information, because they are often facing a lengthy sentence and expect to receive some sort of benefit in exchange for their testimony, such as a lighter sentence. He further testified that it is difficult to ascertain whether an incarcerated informant is telling the truth and that informants' stories are often rife with inconsistencies. According to Neuschatz, this unreliability is worsened by the fact that jurors tend to believe the secondary confessions[7] reported by incarcerated informants for three reasons. First, jurors may assume that the prosecution would not call a witness unless it had vetted that witness and confirmed that the witness was telling the truth. Second, jurors are likely to attribute an incarcerated informant's decision to testify to the incarcerated informant's stated motivation -- which is often proclaimed to be his or her own sense of guilt or the desire to do good -- rather than to the benefits he or she may receive from the prosecution.

[7] A secondary confession is when an inmate claims to have heard another inmate confess to committing a crime. See Jenkins et al., A Snitching Enterprise: The Role of Evidence and Incentives on Providing False Secondary Confessions, 38 J. Police & Crim. Psychol. 141, 141 (2023).

Finally, incarcerated informant testimony often fits the facts presented in the case, which lends credibility to the testimony, even if the witness may be lying about how he or she obtained the information.

Based on mock jury experiments he and his students conducted, Neuschatz testified that cross-examination is rarely effective, except where the incarcerated informant is impeached with prior inconsistent statements or where defense counsel can show that the incarcerated informant had access to the information by means other than the confession of a defendant.

In July 2023, the motion judge, who also served as trial judge in the defendant's trial, denied the defendant's motion for a new trial. The defendant timely filed a notice of appeal from the denial of that motion. The defendant's appeal from the denial of his motion for a new trial was consolidated with his direct appeal.

2. Discussion. "Where we consider, as we do here, a defendant's direct appeal from a conviction of murder in the first degree together with an appeal from the denial of a motion for a new trial, we review the whole case under . . . § 33E." Commonwealth v. Goitia, 480 Mass. 763, 768 (2018). "We therefore review raised or preserved issues according to their constitutional or common-law standard and analyze any unraised, unpreserved, or unargued errors, and other errors we discover

after a comprehensive review of the entire record, for a substantial likelihood of a miscarriage of justice." Commonwealth v. Upton, 484 Mass. 155, 160 (2020).

a. Incarcerated informants. The defendant raises a series of interrelated claims regarding the prosecution's use of testimony from Santiago and Gomez.

Based on his expert's research regarding the unreliability of incarcerated informant testimony, the defendant contends, as he did in his motion for a new trial, that neither witness should have been allowed to testify without a Daubert-Lanigan-like hearing to determine their reliability. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 585-595 (1993); Commonwealth v. Lanigan, 419 Mass. 15, 25-26 (1994). The defendant also argues that defense counsel was ineffective because his cross-examination did not sufficiently focus on their prior inconsistent statements. We conclude that a Daubert-Lanigan type of reliability hearing is not appropriate for incarcerated informants. We further conclude that the cross-examination here was effective, and we decline to prescribe a particular form of cross-examination as argued by the defendant. We do, however, require a detailed instruction directed at all incarcerated informant testimony, drawing upon the model instruction employed by our sister State, Connecticut, for future cases. Such enhanced instruction, we conclude, will

better enable juries to evaluate the credibility of incarcerated informants.

i. The reliability of incarcerated informant testimony. We begin by acknowledging that the defendant raises legitimate concerns about the reliability of the testimony of incarcerated informants.[8] Indeed, the unreliability of incarcerated informant testimony has long been recognized as a problem. For example, the Los Angeles Grand Jury Report, relied on by the defense expert here, investigated the prevalence of incarcerated informants and the incentives they have to lie. The report found that "[t]he myriad benefits and favored treatment which are potentially available to [incarcerated] informants are compelling incentives for them to offer testimony and also a

[8] We also note that several States have adopted specific laws and procedures to address incarcerated informant testimony. See, e.g., Cal. Penal Code § 1111.5(a) (defendant may not be convicted based on uncorroborated testimony of in-custody informant; testimony of in-custody informant may not "be provided by the testimony of another in-custody informant unless the party calling the in-custody informant as a witness establishes by a preponderance of the evidence that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony"); 725 Ill. Comp. Stat. 5/115-21(d) (where prosecution seeks to introduce informant testimony, court must "conduct a hearing to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing"); Neb. Rev. Stat. § 29-4704(1)(a)-(e) (requiring prosecutor to disclose to defense extensive information about incarcerated informant's criminal history, specific statements allegedly made by defendant, etc. if prosecutor intends to use such testimony).

strong motivation to fabricate, when necessary, in order to provide such testimony." Los Angeles Grand Jury, supra at 10-11.

More recent research provided by Neuschatz and others indicates that incarcerated informant testimony has played a role in a number of wrongful convictions. See, e.g., Natapoff, Beyond Unreliable: How Snitches Contribute to Wrongful Convictions, 37 Golden Gate U.L. Rev. 107, 109 (2006) (summarizing research showing that significant percentage of wrongful capital and other convictions are influenced by incarcerated informant testimony). Indeed, research of DNA and non-DNA exonerations indicates that incarcerated informants are often involved in the conviction. See, e.g., Innocence Project, DNA Exonerations in the United States (1989-2020), https://innocenceproject.org/dna-exonerations-in-the-united-states [https://perma.cc/EXR5-4LV5] (seventeen percent of total DNA exonerations tracked nationwide from 1989 to 2020 involved incarcerated informants); Gross & Jackson, Snitch Watch, National Registry of Exonerations, University of Michigan Law School, https://www.law.umich.edu/special/exoneration/Pages/Features.Snitch.Watch.aspx (May 13, 2015) (eight percent -- 119 out of 1,567 -- of all exonerees included in National Registry of Exonerations were convicted in part by testimony from incarcerated informants, with vast majority of those

exonerations being murder cases); Gross et al., Exonerations in the United States 1989 through 2003, 95 J. Crim. L. & Criminology 523, 543-544 (2005) (in at least ninety-seven of 340 exonerations studied, "a civilian witness who did not claim to be directly involved in the crime committed perjury -- usually a jailhouse snitch or another witness who stood to gain from the false testimony").

Despite recognition of the potential problems associated with such testimony, "[incarcerated] [i]nformant testimony is a relatively new area of psycholegal research," and thus the precise influence of such testimony on juries remains an open question. See Fessinger et al., Informants v. Innocents: Informant Testimony and Its Contribution to Wrongful Convictions, 48 Cap. U. L. Rev. 149, 162 (2020). More analysis and tracking of actual incarcerated informant testimony, especially at the State level, is required. See Golding et al., The Influence of Jailhouse Informant Testimony on Jury Deliberation, 28 Psychol. Pub. Pol'y & L. 560, 560 (2022) ("How many jailhouse informants exist? There are no data on this question, as states generally do not keep statistics on it"). Much of the research, including the research of Neuschatz, has instead involved mock jurors, usually students, who are presented with testimony and then asked to render a decision. See, e.g., Wetmore, Neuschatz, & Gronlund, On the Power of

Secondary Confession Evidence, 20 Psychol. Crime & L. 339, 342-344 (2014) (describing study design in which undergraduate students were recruited to read trial summaries of fictional trial and render verdicts).[9]

Based on the expert testimony we have been presented, we are not persuaded, however, that a Daubert-Lanigan hearing, designed to evaluate the reliability of a scientific method, is the appropriate way to address the problem of the reliability of incarcerated informants. See Daubert, 509 U.S. at 597 (expert testimony must be based on "reliable foundation" and be "relevant to the task at hand"); Lanigan, 419 Mass. at 25-26. The Daubert-Lanigan analogy, we conclude, is inapt. Incarcerated informant testimony itself is not in any way scientific and thus subject to the special concerns regarding the difficulty of evaluation that the presentation of scientific evidence to a jury raises. Incarcerated informants are ordinary lay witnesses. Daubert-Lanigan hearings evaluate the reliability of the scientific method, not the credibility of the

[9] This research suggests that, at least for mock jurors, incarcerated informant testimony is highly persuasive. See Golding et al., The Influence of Jailhouse Informant Testimony on Jury Deliberation, supra at 561 (observing that studies have shown "a robust effect of jailhouse informant testimony compared with when such testimony is not presented -- that is, mock jurors give more guilty verdicts when a jailhouse informant testified compared with when there was no jailhouse informant testimony").

witness; "the judge must leave the determination of the credibility of the expert and the weight to be attributed to the expert's testimony to the trier of fact." Commonwealth v. Hinds, 487 Mass. 212, 225 (2021).

The defendant in effect asks that we change our long-standing rule that "[t]he issue of [incarcerated informant] credibility . . . is a question for the jury to decide" (quotation omitted). Commonwealth v. Cruz, 442 Mass. 299, 311 (2004), quoting Commonwealth v. Medeiros, 395 Mass. 336, 353 (1985). We conclude that juries have the capacity to evaluate such testimony, when presented with effective cross-examination and appropriate jury instructions, as they were here, for the reasons we explain infra.

However, going forward, we conclude that we can enhance the protections against the potential problems presented by incarcerated informant testimony by following the approach of our sister State Connecticut, which provides a more comprehensive and specific incarcerated informant jury instruction that applies to all incarcerated informants, regardless of whether they are testifying pursuant to a cooperation agreement. We lay out and discuss these enhanced instructions infra.

ii. Ineffective assistance of counsel. The defendant next argues that trial counsel was ineffective because he failed to

cross-examine Gomez and Santiago on a number of prior inconsistent statements and that without such cross-examination his defense was ineffective. He relies in particular on the scholarship of his own expert, Neuschatz, that emphasizes the importance of cross-examining incarcerated informants on prior inconsistent statements, as compared to other forms of cross-examination.[10] We conclude that trial counsel was not ineffective for failing to cross-examine Gomez and Santiago on these inconsistent statements. As stated supra, we will not prescribe a particular form of cross-examination. Defense counsel here conducted a vigorous cross-examination of both incarcerated informants, demonstrating their prior convictions, the lenient treatment they received, and their incentives for testifying. Their access to the discovery documents in the defendant's cell was also explored. Defense counsel further identified Gomez's memory problems due to a head injury that he had suffered as revenge for being a cooperating witness. In regard to Santiago, defense counsel cross-examined him regarding not only the cooperation agreement, but additional cases not subject to that agreement, and also the fact that, on the day of

[10] We note that this expert has also written that "research involving cross-examination in the context of incarcerated informant testimony is scarce." J.S. Neuschatz & J.M. Golding, Jailhouse Informants: Psychological and Legal Perspectives 137 (2022).

trial, Santiago was out on bail despite facing numerous, serious charges. Additionally, Santiago was cross-examined about delayed disclosures and inconsistencies in his statements. In sum, as trial counsel explained at the evidentiary hearing on the motion for a new trial, he remained convinced his cross-examination was effective. We agree.

The defendant highlights various statements from both men that he argues should have been challenged by trial counsel as inconsistent with prior statements. Many are minor and do not merit further discussion. Most relevant from our perspective is that Gomez did not say anything to investigators about the defendant stating he intended to "play the crazy card," but testified at trial that the defendant had made such a statement. Gomez also told the investigators that the defendant never told him what happened to the knife used in the murder, but "rumor is that supposedly his mom got rid of the knife." At trial, Gomez said that the defendant told him directly that the defendant's mother hid the murder weapon. Of the inconsistencies identified by the defendant, these relate at least to contested matters.

Where a defendant has been convicted of murder in the first degree, "we do not evaluate his ineffective assistance claim under the traditional standard set forth in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974)," but rather "apply the more favorable standard of G. L. c. 278, § 33E, and review his claim

to determine whether there was a substantial likelihood of a miscarriage of justice." Commonwealth v. Ayala, 481 Mass. 46, 62 (2018). We first ask whether trial counsel committed an error during the trial. Id. "If there was an error, we ask whether it was likely to have influenced the jury's conclusion." Id. Where the claimed ineffectiveness involved a strategic or tactical decision, the decision was an error only if it was "manifestly unreasonable." Id. This determination requires that we evaluate the "decision at the time it was made" (citation omitted). Id. "Only strategic and tactical decisions 'which lawyers of ordinary training and skill in criminal law would not consider competent are manifestly unreasonable.'" Id., quoting Commonwealth v. Holland, 476 Mass. 801, 812 (2017).

Generally, the "failure to impeach a witness does not prejudice the defendant or constitute ineffective assistance." Commonwealth v. Bart B., 424 Mass. 911, 916 (1997). However, failure to impeach a witness can rise to the level of ineffective assistance and create a substantial likelihood of miscarriage of justice when it deprives a defendant of a substantial defense. Commonwealth v. Sena, 429 Mass. 590, 595-596 (1999), S.C., 441 Mass. 822 (2004). See Commonwealth v. Ly, 454 Mass. 223, 230-231 (2009) (failure of counsel to impeach complainant deprived defendant of substantial defense to indecent assault and battery charge, where sole issue at trial

was consent and complainant's credibility was central to that issue, and therefore constituted ineffective assistance of counsel). See also Commonwealth v. Lane, 462 Mass. 591, 596 (2012) ("[D]efense counsel's decision to not call an apparently credible and totally disinterested witness to act as counterweight to the Commonwealth's sole eyewitness, and put in dispute the entire theory of the case that the defendant was the shooter, was manifestly unreasonable and deprived the defendant of an otherwise available defense" [citation omitted]).

We hold that there was no ineffective assistance of counsel. First, it appears that trial counsel made a tactical decision regarding what he would emphasize in cross-examination and how much he would focus on prior inconsistencies. In his affidavit included in the defendant's motion for a new trial, trial counsel stated that he believed he adequately impeached the informants with their pretrial statements and did not think further impeachment was necessary. Similarly, at the evidentiary hearing on the defendant's motion for a new trial, trial counsel testified that he felt he had impeached both witnesses adequately, both men's testimony on cross-examination "came out badly," and thus any further impeachment would be like "beating a dead horse." See Commonwealth v. Kolenovic, 478 Mass. 189, 193 (2017), quoting Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("When counsel focuses on some issues to the exclusion

of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect").

Our own review confirms that trial counsel impeached both Gomez and Santiago extensively and effectively. Contrast Ly, 454 Mass. at 230-231 (counsel failed entirely to impeach complainant whose credibility was central to defendant's defense). Gomez was questioned at length about his criminal history and his collaboration with authorities in the past. Trial counsel also highlighted the fact that, when he testified, Gomez was housed and protected by the Commonwealth and that Gomez had received seemingly lenient treatment from prosecutors for a breaking and entering charge and a probation violation. For Santiago, trial counsel drew attention to his pending charges and the cooperation agreement. During his cross-examination of both men, trial counsel also asked questions about their access to the defendant's jail cell, implying that the men may have fabricated their testimony based on access to pretrial discovery materials. In his closing argument, trial counsel forcefully criticized the credibility of both men and emphasized the possibility that they could have fabricated their testimony using discovery materials in the defendant's jail cell.

Given the already extensive and effective impeachment done by trial counsel, we cannot say that his decision not to impeach

Gomez and Santiago on the specific statements highlighted by the defendant was "manifestly unreasonable." See Commonwealth v. Valentin, 470 Mass. 186, 190-191 (2014) (decision by trial counsel not to cross-examine witness on particular inconsistent statement not manifestly unreasonable where witness was extensively cross-examined on other inconsistent statements). We recognize that trial counsel's failure to point out that Gomez had not mentioned to investigators that the defendant had told him he intended to "play the crazy card" is questionable from a tactical perspective. Nevertheless, Santiago's testimony on the same point was not inconsistent, and focusing on Gomez's inconsistent statement may have just highlighted the damaging testimony. In any event, we cannot conclude it was manifestly unreasonable. See id. at 194 ("Given that this case involved multiple avenues of defense, more than one key witness, and general impeachment of all of the Commonwealth's witnesses based on inconsistent statements, defense counsel's strategic decision not to impeach [a witness's] particular statement was not 'manifestly unreasonable' such that her assistance was ineffective").

Second, even if trial counsel's decision was not strategic or tactical, there was no substantial likelihood of a miscarriage of justice. The fact that trial counsel failed to impeach Gomez and Santiago on certain prior inconsistent

statements does not render his representation ineffective. While "[a] defendant is entitled to reasonable cross-examination of a witness for the purpose of showing bias, . . . failure to use particular methods of impeachment at trial rarely rises to the level of ineffective assistance of counsel." Goitia, 480 Mass. at 770, quoting Commonwealth v. Hardy, 464 Mass. 660, 667, cert. denied, 571 U.S. 903 (2013). Here, as explained supra, trial counsel elicited significant testimony that suggested both Gomez and Santiago were unreliable witnesses. While the defendant argues that prior inconsistent statements are the most effective method of immunizing the jury from unreliable incarcerated informant testimony, relying heavily on his own expert witness's research to support this proposition, we cannot conclude that a more thorough cross-examination of these prior inconsistent statements would have "accomplished something material for the defense," Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977), or that the verdict would have been different, Commonwealth v. Shea, 401 Mass. 731, 744 (1988). As discussed supra, Gomez's inconsistent statement about "playing the crazy card" was buttressed by Santiago's consistent statement to that effect. Further, Gomez's change in testimony regarding whether the defendant's mother hid the knife is not critical, as there was no question that the defendant killed the

victim with a knife.[11] The failure to highlight these and other inconsistencies did not therefore cause a substantial likelihood of a miscarriage of justice. See Goitia, supra at 771-772.

While the defendant's ineffective assistance of counsel argument focuses mostly on the prior inconsistent statements, the defendant also argues that trial counsel was ineffective for failing to highlight the fact that Gomez and Santiago spoke to each other about their statements and meetings with authorities. Specifically, the defendant emphasizes the fact that Santiago testified at trial that he and Gomez had never discussed the case, but Gomez told investigators that Santiago had told him that someone would come to speak to him about the autopsy photograph incident and that the two men had talked after the defendant left.

For many of the same reasons discussed supra, we conclude that this was not ineffective. The fact that Gomez and Santiago had the opportunity to communicate with each other about the case was obvious, despite their inconsistent testimony to that effect. Their interaction regarding the autopsy photograph demonstrates that they had at least some limited discussion about the case. Gomez testified that after the defendant slid the photographs under his cell door, Santiago walked towards

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[11] Santiago also testified that the defendant's mother had the knife.

Gomez's cell and asked him, "Did that kid just threaten you?" Santiago testified that after the defendant slid the photographs to Gomez, Gomez handed Santiago the commissary slip showing the debts Gomez owed to the defendant and said, "Look, this is what he wants me to give him." Santiago in turn told Gomez not to give the defendant anything and that it was "not right." Santiago also testified that he and Gomez were housed in the same pod, albeit on different floors, that he observed Gomez and the defendant talking, and that he got close enough to Gomez's cell to be able to take the autopsy photograph from the defendant. Santiago also testified that Gomez's cell was on the same level as the recreation area and that Santiago thus was able to be outside of Gomez's cell during recreational time. During his cross-examination of Santiago, trial counsel repeatedly asked Santiago whether "[he] and Mr. Gomez communicated" and whether "Mr. Gomez talked to [him] about this case." While Santiago denied communicating with Gomez about the case and trial counsel did not impeach him with Gomez's pretrial statements to investigators, we again cannot say that doing so would have accomplished something material for the defense or changed the verdict. See Satterfield, 373 Mass. at 115; Shea, 401 Mass. at 744. As with the failure to highlight the specific prior inconsistent statements, trial counsel's failure to contradict Santiago's testimony with Gomez's pretrial statements

did not cause a substantial likelihood of a miscarriage of justice. See Goitia, 480 Mass. at 771-772.

iii. Enhanced jury instruction on incarcerated informant testimony. In the instant case, the judge gave the proper instructions according to existing law. In regard to Santiago, who was testifying pursuant to a cooperation agreement, the judge gave a Ciampa instruction. See Commonwealth v. Ciampa, 406 Mass. 257, 266 (1989). He also correctly declined to give a Ciampa instruction in regard to Gomez, who was not testifying pursuant to a cooperation agreement. See Cruz, 442 Mass. at 310 (noting that Ciampa created "guidelines to be used when a witness testifies pursuant to an agreement with the Commonwealth" [emphasis added]). Given the extensive cross-examination of Gomez, there was also no question that the jury understood the benefits that Gomez might have been expecting as well. His prior experiences as a cooperating witness were also front and center.

Although we conclude that the combination of effective cross-examination and Ciampa instructions have adequately informed juries of the potential problems presented by incarcerated informant testimony, we are persuaded that a more comprehensive and specific instruction directed at all incarcerated informant testimony, regardless of whether the incarcerated informant is testifying pursuant to a cooperation

agreement, would be beneficial in future cases. For that reason, we require for prospective use a jury instruction directed at such testimony, drawing on the model instruction utilized in Connecticut. See Connecticut Judicial Branch, Criminal Jury Instructions § 2.5-3, Informant Testimony (rev. to May 24, 2023).

The revised instruction provides as follows:

> "A witness testified in this case as an incarcerated informant. An incarcerated informant is a witness who was incarcerated either at the time (he/she) offered to testify, or at the time (he/she) provided testimony, about a defendant's inculpatory statements or actions, regardless of where or when those inculpatory statements or actions took place.
>
> "Although the Commonwealth is permitted to present the testimony of an incarcerated informant, you should examine the testimony of such a witness who provides evidence against a defendant with greater care and caution than the testimony of an ordinary witness.
>
> "You should keep in mind that (he/she) may be looking or hoping for some favorable treatment in the sentence, supervision, or disposition of (his/her) own matters, and therefore (his/her) testimony may have been influenced by (his/her) expectation of or hope for favorable treatment in the sentence, supervision, or disposition of (his/her) own matters.
>
> "You should also keep in mind that in presenting the incarcerated informant as a witness, the Commonwealth does not know whether (he/she) is telling the truth. The witness's truthfulness is solely a question for you to decide.
>
> "The factors you may consider, among others, when evaluating the credibility of such a witness include:
>
> • the extent to which the witness's testimony is confirmed by other evidence;

> • the extent to which the testimony contains details known only by the perpetrator of the alleged offense;
>
> • the extent to which the details of the testimony could be obtained from a source other than the defendant, such as pretrial discovery in the possession of the defendant that may have been accessed by the witness or media coverage of the alleged offense;
>
> • the circumstances under which the witness initially provided information supporting such testimony to law enforcement or a prosecutorial official;
>
> • whether the witness has received a benefit, or expects to receive a benefit (including immunity from prosecution, leniency in prosecution, leniency in sentencing, or personal advantage) in exchange for testimony;
>
> • any other case in which the witness testified or offered statements and whether the witness received any promise, inducement, or benefit in exchange for that testimony or statement; and
>
> • whether the witness has ever changed (his/her) testimony.
>
> "You should carefully scrutinize the testimony of such a witness before you accept it. However, you are not required to disbelieve a witness simply because (he/she) is an incarcerated informant. Like all other questions of credibility, this is an issue for you to determine based on all the evidence presented to you."

This instruction, as explained supra, applies to all incarcerated informants and not just those testifying pursuant to a cooperation agreement, as the problems with incarcerated informant testimony are not limited to incarcerated informants testifying pursuant to cooperation agreements. See State v. Arroyo, 292 Conn. 558, 569 (2009), cert. denied, 559 U.S. 911

(2010) ("In light of [the] growing recognition of the inherent unreliability of [incarcerated] informant testimony, we are persuaded that the trial court should give a special credibility instruction to the jury whenever such testimony is given, regardless of whether the informant has received an express promise of a benefit"). The specific instructions we require here also focus the jury on factors the research has identified as requiring particular attention.

Indeed, we have further modified the Connecticut instruction to direct juries to consider how incarcerated informants may have accessed the information apart from a confession by the defendant, such as through access to the defendant's discovery materials or media accounts of the crime. See, e.g., Los Angeles Grand Jury Report, supra at 27-30 (describing how incarcerated informants gathered information from other sources, such as law enforcement, media reports, and defendants). We have also included the admonition that appears in our own Ciampa instruction for cooperating witnesses that the "government does not know whether the witness is telling the truth." Commonwealth v. Meuse, 423 Mass. 831, 832 (1996). See Ciampa, 406 Mass. at 263-264. Both of these modifications address issues identified in the research as matters of particular concern. See Allen, Lies Behind Bars: An Analysis of the Problematic Reliance on Jailhouse Informant Testimony in

the Criminal Justice System and A Texas-Sized Attempt to Address the Issue, 98 Wash. U. L. Rev. 257, 262 (2020) (incarcerated informants "learn to craft information that sounds accurate by stealing other inmates' legal papers, finding news reports, and colluding with others"); Fessinger et al., Informants v. Innocents, supra at 182-183 (jurors may "expect that the prosecutor is in a better position to determine whether the [incarcerated] informant is telling the truth than they are").

This instruction, unlike our Ciampa instruction, will apply to witnesses who are incarcerated either at the time they offer to testify or at the time they provide testimony, regardless of whether the witness has entered into a cooperation agreement. The Ciampa instruction will continue to remain applicable to informants who are not incarcerated but who are testifying pursuant to a cooperation agreement.

In sum, we conclude that juries have the capacity to evaluate the credibility of incarcerated informants provided the proper safeguards are in place. When presented with effective cross-examination and appropriate jury instructions, juries can evaluate such testimony. Defense counsel may also, of course, present expert witness testimony discussing the research regarding the unreliability of incarcerated informant testimony so long as the requirements of Daubert-Lanigan are satisfied for such testimony. See State v. Leniart, 333 Conn. 88, 144 (2019)

(expert testimony on "the general characteristics of the marketplace for criminal informant testimony and the academic research indicating that unreliable informant testimony contributes to many wrongful convictions" admissible so long as it satisfies other requirements for expert testimony). Cf. Commonwealth v. Gomes, 470 Mass. 352, 378 (2015), S.C., 478 Mass. 1025 (2018) (noting continued importance of expert testimony regarding unreliability of eyewitness identification even where jury instruction on eyewitness identification is given). We also conclude that the more specific instruction we require for prospective use will enhance the capacity of juries to evaluate the credibility of incarcerated informant testimony in future cases.

iv. Prosecutorial misconduct. The defendant also argues that Santiago received additional benefits from the Commonwealth that were not disclosed during the trial. We disagree.

Pursuant to Mass. R. Crim. P. 14 (a) (1) (A) (ix), as amended, 444 Mass. 1501 (2005), the Commonwealth must disclose to a defendant "all promises, rewards or inducements made to witnesses" that the Commonwealth intends to call at trial. "Understandings, agreements, promises, or any similar arrangements between the government and a significant government witness is exculpatory evidence that must be disclosed." Commonwealth v. Hill, 432 Mass. 704, 715-716 (2000).

The defendant is correct that, after trial, Santiago received favorable treatment on two pending matters that were not covered by his cooperation agreement; specifically, the DA's office filed a nolle prosequi for Santiago's violation of an abuse prevention order and dismissed the probation violation notice in another case. Nothing in the record, however, indicates an arrangement -- formal or informal -- involving those additional charges prior to or during trial. See Commonwealth v. Schand, 420 Mass. 783, 792-793 (1995) (no disclosable promise existed where record indicated that witness repeatedly sought promise of leniency from prosecutor on witness's pending charges but prosecutor provided no promise beyond general promise to be "fair" with witness). Based on this record, however, we cannot conclude that those benefits were conferred before or during trial. Contrast Commonwealth v. Rodriguez-Nieves, 487 Mass. 171, 177 (2021) (prosecutor failed to disclose inconsistent statements made by victim that were in his possession "at least as early as two days before [victim] testified").

Moreover, the jury were aware of Santiago's cooperation agreement regarding the other charges and, on cross-examination, trial counsel drew attention to Santiago's new charges and the pending violation of probation hearing that were not the subject of the cooperation agreement. The possibility of favorable

treatment on the new charges was thus evident even without a preexisting agreement. Therefore, there was no error and therefore no substantial likelihood of a miscarriage of justice warranting a new trial. See Schand, 420 Mass. at 792.

c. Prosecutor's closing argument. The defendant contends that the prosecutor, during her closing argument, argued facts not in evidence and made negative inferences suggesting that the defendant tailored his testimony based on his access to mandatory pretrial discovery and because he sat through the Commonwealth's case. Specifically, the defendant takes issue with five statements. First, the defendant claims that the prosecutor improperly implied that Rosmarin refused to admit what was visible in a surveillance video recording, despite a sustained objection from trial counsel. Second, he asserts that the prosecutor improperly argued facts not in evidence by arguing that the defendant's mother had a degree in psychology and implying that she thereby helped him fabricate a mental health defense. Third, the defendant claims the prosecutor also argued facts not in evidence by stating that a surveillance video recording showed the defendant carrying something in his hand. Fourth, he contends that the prosecutor's reference to the defendant's pretrial access to discovery was improper because it disparaged his right to such discovery. Fifth, he argues that the prosecutor improperly denigrated the defense

experts by claiming they ignored evidence and tailored their testimony because they were hired by the defendant.

While prosecutors may argue "forcefully for the defendant's conviction," their "closing arguments must be limited to facts in evidence and the fair inferences that may be drawn from those facts." Commonwealth v. Rutherford, 476 Mass. 639, 643 (2017). However, the prosecutor is permitted in her closing to "attempt to 'fit all the pieces of evidence together' by suggesting 'what conclusions the jury should draw from the evidence.'" Id., quoting Commonwealth v. Burgess, 450 Mass. 422, 437 (2008). Moreover, inferences made by the prosecution "need not be necessary and inescapable, only reasonable and possible." Commonwealth v. Robinson, 493 Mass. 775, 788 (2024), quoting Commonwealth v. Goddard, 476 Mass. 443, 449 (2017).

An improper statement by a prosecutor must be evaluated based on "the context of the entire argument and the case as a whole." Commonwealth v. Santiago, 425 Mass. 491, 500 (1997), S.C., 427 Mass. 298 and 428 Mass. 39, cert. denied, 525 U.S. 1003 (1998). In making this determination, we examine "(1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in

the jury's conclusions." Commonwealth v. Kater, 432 Mass. 404, 422-423 (2000).

Trial counsel objected to the first two statements, and thus we review them to determine whether they constituted prejudicial error. Santiago, 425 Mass. at 500. Trial counsel did not object to the remaining statements, and we accordingly review them for a substantial likelihood of a miscarriage of justice. See Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014). We address each statement in turn.

i. Claim that Rosmarin ignored evidence. The defendant challenges the prosecutor's disparagement of Rosmarin for failing to acknowledge that the defendant was holding something when he left the victim's house for the second time in the surveillance video footage. In her closing argument, the prosecutor emphasized that "even when [Rosmarin] saw [the surveillance video footage] with his own eyes, this witness wouldn't even admit that the defendant's hands were up and holding an object." We hold that there was no error.

A prosecutor may ask the jury to examine critically the validity of an expert's opinion, and "[c]omments directed at the reliability of an expert's opinion do not exceed the bounds of permissible argument." Rutherford, 476 Mass. at 644, citing Commonwealth v. Miller, 457 Mass. 69, 79 (2010).

As discussed infra, the prosecutor was entitled to argue that Rosmarin ignored evidence and tailored his testimony. The defendant is correct that the trial judge sustained several objections to the prosecutor's line of questioning of Rosmarin about the surveillance footage. However, before the sustained objections, Rosmarin testified, "I did not see anything. I just didn't notice anything about his hands," in response to the prosecutor's question about what the defendant was doing with his hands when he left the house for the second time. Trial counsel did not object to this question or move to strike the answer, and thus the argument was based on admitted testimonial evidence. See Commonwealth v. Coren, 437 Mass. 723, 730 (2002). The jury were also shown the surveillance video footage and could draw its own conclusions about whether the basis for Rosmarin's opinion was contradicted by the video evidence. The prosecutor's argument on this point was therefore permissible.

ii. Inferences regarding improper assistance from the defendant's mother. The defendant also argues that the prosecutor improperly stated that the defendant's mother had a background in psychology and thereby implied that she used this knowledge to help the defendant tailor his testimony to avoid criminal responsibility. Although there was clear factual support in the record that the defendant's mother had a background in psychology, the implication that she used such

knowledge to help the defendant tailor his testimony is more problematic. We conclude that the prosecutor's statement here was permissible, albeit closer to the line.

We begin with what the prosecutor actually said, as opposed to what she implied. In closing, the prosecutor stated that while Rosmarin had testified that the "defendant couldn't make this [(i.e., his dissociative amnesia)] up because he's psychologically naïve . . . the defendant's greatest confident [sic], his mother, had a degree in psychology." The prosecutor thus implied, or at least could be interpreted by the jury to imply, that the defendant's mother did help him tailor the testimony. The support for the implication that she helped him develop the mental health defense was slim, but included the following: The prosecution's rebuttal expert, Fife, testified that she had learned during her examination of the defendant that his mother had a background in psychology. The defendant himself testified that he was very close with his mother and "believe[ed]" that she had a degree in psychology. And, finally, the incarcerated informant Gomez testified that the defendant said his mother helped him hide the knife he used to kill the victim, thus providing evidentiary support for other

improper assistance, although not the improper assistance at issue.[12]

Albeit a stretch, we conclude that these three statements support the implication, and the reasonableness of the inference the jury were being asked to draw from such implication. See Robinson, 493 Mass. at 788 (prosecutor's statements were reasonable inference "in the context of the entire argument and the evidence presented at trial"). Additionally, the judge instructed the jury, both before and after closing arguments, that closing arguments are not evidence. Therefore, even if the suggested inference the jury were being asked to draw was problematic, the judge's instructions were sufficient to guide the jury's evaluation of the inference. See Commonwealth v. Salazar, 481 Mass. 105, 118 (2018) (prosecutor's statement, while problematic, "was a brief, isolated statement in his closing argument and was not egregious enough to infect the whole of the trial" and was mitigated by judge's instruction that closing arguments are not evidence).

iii. Surveillance video footage. The defendant next contends that the prosecutor, by stating that the surveillance

[12] As discussed supra, Gomez did not provide this information when he first reported to investigators. Any such inconsistency, had it been presented, would have gone to only the weight not the admissibility of this testimony. Santiago also testified that the defendant's mother had the knife.

video footage showed the defendant carrying an item as he left the victim's home for the final time, invaded the province of the jury because it was for the jury to decide what the surveillance video footage showed. We discern no error.

In her closing statement, the prosecutor made a reference to the surveillance video footage showing the defendant enter and exit the victim's house, and then briefly return to the house, before leaving for a final time. She stated:

> "[I]t's clear from all the evidence before you, and especially in that . . . Prentice Street surveillance video that this defendant was going back to collect evidence he left behind. The defendant is seen leaving [the victim]'s house with his hands at his side and then sprinting back only to emerge carrying something in his hands on the way back down Prentice Street. You can see the video for yourself."

While the jury were required to ultimately decide what the surveillance video footage showed, the prosecutor was permitted to argue that the defendant was carrying something because this was an inference reasonably drawn from the evidence. Commonwealth v. Grier, 490 Mass. 455, 472 (2022). The surveillance video footage itself was admitted in evidence, and the jury thus had an opportunity to view it. Moreover, the prosecutor herself urged the jury to make the decision for themselves based on "all of the evidence before you"; she also stressed that "[y]ou can see the video for yourself." See Commonwealth v. Roy, 464 Mass. 818, 831 (2013), quoting

Commonwealth v. Ferreira, 381 Mass. 306, 316 (1980) ("Counsel may . . . attempt to assist the jury in their task of analyzing, evaluating, and applying evidence. Such assistance includes suggestions by counsel as to what conclusions the jury should draw from the evidence"). Thus, the prosecutor's statements here were proper.

iv. Reference to the defendant's access to pretrial discovery. The defendant argues that the prosecutor erred in accusing him of tailoring his testimony based on his access to the pretrial discovery when she stated:

> "According to this defendant, it's only the cold air down on the corner [that brings him out of his dissociative state], when he's out of view of the video camera. Doesn't that story just fit perfectly with the video evidence? The surveillance video police told this defendant they had the night of the murder. Remember, Dr. Fife told you that this defendant had access to the Commonwealth's evidence before he had the chance to tell his version of the events."

We conclude there was no error.

A defendant is entitled to hear the Commonwealth's evidence and to confront the witnesses against him. Commonwealth v. Person, 400 Mass. 136, 139 (1987). Accordingly, it is improper for a prosecutor to assert without factual support that "because the defendant sat through all the Commonwealth's evidence he was able to fabricate a cover story tailored to answer every detail of the evidence against him." Id. However, a prosecutor may "impugn the defendant's credibility and argue that his story is

a fabrication." Commonwealth v. Gaudette, 441 Mass. 762, 767 (2004), quoting Commonwealth v. Beauchamp, 424 Mass. 682, 691 (1997). Where "there is a basis in the evidence introduced at trial, [the prosecutor may] attack the credibility of a defendant on the ground that his testimony has been shaped or changed in response to listening to the testimony of other witnesses." Gaudette, supra.

Here, there was evidence elicited at trial that fairly supported the argument that the defendant shaped and changed his testimony in response to the evidence accumulating against him. Gaudette, 441 Mass. at 768. Most importantly, the Commonwealth elicited testimony showing that the defendant had given inconsistent statements to experts, and his police interview demonstrated a tendency to modify his story when confronted with evidence that proved its falsity. See id. (inconsistencies between statements defendant made to police and defendant's trial testimony sufficient evidence to argue that defendant tailored testimony). Also, Fife and Rosmarin testified that the defendant had access to the Commonwealth's discovery in the case. See Commonwealth v. Sherick, 401 Mass. 302, 304 (1987) (evidence that defendant changed pretrial position to conform with trial testimony supported inference that defendant fabricated his trial testimony). Given this evidence, the

prosecutor was permitted to attack the defendant's credibility and argue he tailored his testimony.

v. Expert witnesses tailoring testimony. Finally, the defendant contends that the prosecutor's argument that Deters and Rosmarin were biased and "flat out ignored evidence that would contradict their opinions" and "were tailoring their testimony to give the opinions they were retained to give" was improper. We conclude that the prosecutor's arguments about the defendant's expert witnesses were permissible.

The prosecution's arguments did not cross any improper lines here. A prosecutor may argue that an expert is biased because he or she was retained by the defendant, so long as terms like "hired gun" or "bought" testimony are avoided. Commonwealth v. Bishop, 461 Mass. 586, 598 (2012). Commonwealth v. O'Brien, 377 Mass. 772, 778 (1979). The Commonwealth may also argue, as it did here, that the experts were ignoring evidence that would undercut their opinions. See Rutherford, 476 Mass. at 643-644; Bishop, supra; O'Brien, supra at 777-778. As explained supra, there was contradictory evidence in the instant case, including the defendant's lies to investigators and the actions he took immediately after the murder. Thus, we conclude that there was no error in these statements.

vi. Cumulative prejudice. The defendant argues that the cumulative effects of the prosecutor's statements discussed

supra and the admission of "unreliable" incarcerated informant testimony created a substantial likelihood of a miscarriage of justice even if no single error alone did so. We hold that there was no such cumulative prejudice.

As discussed supra, we examine closing argument errors cumulatively. Commonwealth v. Kozec, 399 Mass. 514, 523 (1987) ("[T]he entire record, including the balance of the prosecutor's argument, becomes relevant in determining whether the error was prejudicial to the point of requiring a reversal of the conviction"). Further, in certain circumstances, nonprejudicial errors may combine to cause prejudice meriting a new trial when the entire context is examined. See Commonwealth v. Rosario, 477 Mass. 69, 78-79 (2017) ("unique confluence of events," i.e., "irregularities in the defendant's interrogation leading to his confession [including defendant's neurologic condition] combined with . . . new fire science," warranted new trial).

There was no such "unique confluence of events" that created cumulative prejudice at the defendant's trial because, as we discussed supra, there was no error in the admission of Santiago's and Gomez's testimony and none of the prosecutor's statements was improper. Thus, as there were no errors at all, there was no combined set of nonprejudicial errors that amount to cumulative prejudice warranting a new trial. See Santiago, 425 Mass. at 500.

d. Life sentence. Both the defendant and Commonwealth agree that the defendant's sentence of life without the possibility of parole is unconstitutional under the Eighth Amendment to the United States Constitution and arts. 12 and 26 of the Massachusetts Declaration of Rights because the defendant was under the age of twenty-one when he committed murder in the first degree.

In Mattis, 493 Mass. at 217, 235, we concluded that it is unconstitutional to sentence individuals who were eighteen through twenty years of age when they committed the crime to life without the possibility of parole. The defendant was twenty years old at the time of the murder, and thus, his sentence of life imprisonment without the possibility of parole is unconstitutional. Id. The defendant committed his offense after July 25, 2014, and is accordingly entitled to parole eligibility after serving thirty years in prison. Id. at 237 (providing parole eligibility after thirty years in case of murder in first degree with extreme atrocity or cruelty).

e. § 33E review. The defendant argues that we should exercise our power under G. L. c. 278, § 33E, to enter a verdict more consonant with justice for several reasons. First, the defendant argues that the video evidence -- specifically the fact that the defendant was in the victim's house for forty minutes -- corroborates his version of events while being

"inconsistent with the Commonwealth's theory" that the defendant went to the house with the specific intent to murder the victim. Second, the defendant asserts that Fife's testimony was not entitled to any weight because she failed to diagnose the defendant with major depressive disorder despite conceding that he met all the diagnostic criteria for the illness, and that the defendant's experts' testimony should be credited instead.

Under G. L. c. 278, § 33E, we "consider a defendant's entire case, taking into account a broad range of factors, when determining whether a conviction of murder in the first degree was a miscarriage of justice that warrants a reduction in the degree of guilt" (citation omitted). Commonwealth v. Concepcion, 487 Mass. 77, 94, cert. denied, 142 S. Ct. 408 (2021). However, our "duty is not to sit as a second jury but, rather, to consider whether the verdict returned is consonant with justice" (citation omitted). Id. We generally do not upset the jury's finding of criminal responsibility. Commonwealth v. Dowds, 483 Mass. 498, 512 (2019). Further, "[m]ental illness alone is generally insufficient to support a verdict reduction under G. L. c. 278, § 33E." Concepcion, supra at 95.

We have carefully reviewed the entire record, pursuant to our duty under G. L. c. 278, § 33E, and find no reason to set aside the verdict or reduce the degree of guilt. There was

extensive evidence supporting the jury's finding that the defendant acted with deliberate premeditation and extreme atrocity or cruelty. See Commonwealth v. Billingslea, 484 Mass. 606, 618 (2020). Even if the video surveillance footage is consistent with the defendant's testimony that he and the victim spoke for some time before the conversation escalated into a fight, this alone does not establish that he lacked the requisite criminal intent for deliberate premeditation. See Commonwealth v. Whitaker, 460 Mass. 409, 419 (2011) ("No particular length of time of reflection is required to find deliberate premeditation; a decision to kill may be formed in a few seconds"). Similarly, the jury were presented with extensive evidence supporting a finding of extreme atrocity or cruelty, given the nature and number of the victim's injuries. See Commonwealth v. Linton, 456 Mass. 534, 546-547 (2010) (defendant's strangulation of victim with enough force to cause bleeding in victim's eyes and evidence of ninety seconds of "constant or near-constant pressure" on victim's airway before she stopped breathing supported jury's finding of extreme atrocity or cruelty).

We also decline to discredit Fife and adopt the opinions of Deters and Rosmarin. We do not "sit as a second jury," and thus we will not disturb the jury's credibility findings. Hinds, 487 Mass. at 225. Likewise, we see no reason to override the jury's

determination that the defendant was criminally responsible, regardless of whether the defendant was suffering from a mental illness at the time of the murder. See Commonwealth v. Keita, 429 Mass. 843, 845 (1999) ("We have never taken away from a trier of fact the determination whether a defendant was criminally responsible when the evidence raised the issue").

3. Conclusion. We affirm the defendant's conviction of murder in the first degree on the theories of deliberate premeditation and extreme atrocity or cruelty. We also affirm the denial of the defendant's motion for a new trial. The defendant shall be eligible for parole after thirty years, and his sentence shall so reflect such eligibility. Accordingly, we remand this matter to the Superior Court to take such further action as is necessary and appropriate, consistent with this opinion.

So ordered.