SJC-13260

COMMONWEALTH vs. CARLOS COLINA.

Middlesex. April 1, 2024. - November 7, 2024.

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

Homicide. Evidence, Relevancy and materiality, Prior misconduct, State of mind, Intent, Motive, Argument by prosecutor. Constitutional Law, Probable cause. Search and Seizure, Probable cause, Warrant, Affidavit, Computer. Probable Cause. Intent. Practice, Criminal, Warrant, Instructions to jury, Argument by prosecutor, Motion to suppress, Capital case.

Indictments found and returned in the Superior Court Department on June 3, 2015.

A pretrial motion to suppress evidence was heard by Laurence D. Pierce, J., and the cases were tried before Elizabeth M. Fahey, J.

Elizabeth A. Billowitz (John H. Cunha, Jr., also present) for the defendant.

Emily Walsh, Assistant District Attorney (Nicole Allain, Assistant District Attorney, also present) for the Commonwealth.

GEORGES, J. Late in the evening on April 3, 2015, the defendant, Carlos Colina, killed Jonathan Camilien in the

defendant's Cambridge apartment by strangling him in a chokehold. After killing him, the defendant proceeded to dismember the victim's body, dispose of the victim's head and limbs in the apartment building's trash room, and carry a duffel bag containing the victim's torso out to a nearby walkway, where it was discovered the next morning. Surveillance video footage of the walkway quickly led investigators back to the defendant and his apartment, where they later discovered recordings of rap music, composed by the defendant, that contained lyrics describing strangulation, murder, and dismemberment.

In this direct appeal from his conviction of murder in the first degree,[1] the defendant principally argues that the admission of recordings and transcripts of the rap music lyrics in evidence was prejudicial error. The defendant further argues that the rap music evidence should have been excluded because it was seized pursuant to deficient search warrants. Additionally, the defendant contends that he was prejudiced by several other alleged errors, including the improper admission of his record of online purchase, the prosecutor's mischaracterization of the defendant's testimony during her closing argument, and the trial judge's failure to give the defendant's preferred jury

[1] The defendant was also convicted of improper disposal of human remains. He has waived any argument as to this conviction on appeal.

instruction on nondeadly force or a voluntary manslaughter instruction based on sudden combat or reasonable provocation.

We conclude neither the rap music evidence nor the record of online purchases was erroneously admitted in evidence. We further conclude that the trial judge's nondeadly force instructions were correct, and that any error in the judge's omission of an instruction on sudden combat or reasonable provocation was not prejudicial. While we agree that the prosecutor's remarks during closing argument were erroneous, the defendant was not prejudiced. Finally, after plenary review of the record, we discern no basis for relief under G. L. c. 278, § 33E. Therefore, we affirm the defendant's convictions.

1. Background. a. Facts. We summarize the facts the jury could have found, reserving some details for later discussion.

On the morning of April 4, 2015, security personnel from a Cambridge business contacted the police about a suspicious duffel bag observed in a walkway adjacent to the business's property. Police officers arrived at the scene shortly after 8 A.M. and discovered that the bag contained a human torso, appearing to belong to a male. Later that day, security personnel from the business led officers to a conference room, where they reviewed a surveillance video of the business's property recorded in the early morning hours of April 4. The

officers observed on the video, starting at the 4:15 A.M. time stamp, a person carrying a bag across a street towards the walkway, returning from the walkway to the same street without the bag, and entering an apartment building, all over the course of approximately five minutes.

Directing their investigative efforts to the apartment building depicted in the surveillance video, police obtained a time stamped record of key fobs used to enter the apartment building on that morning of April 4. From this record, police learned that a key fob assigned to the defendant was used to enter the lobby at 4:26 A.M. and that no other key fob was used to enter the apartment building for a "long period" around this time. The record also showed the number of the defendant's apartment, which was located on the third floor.

Later that same morning, police conducted a search of the halls, stairwells, and trash rooms of the apartment building. In a trash bin in the third-floor trash room, they discovered human remains -- including upper left and right limbs, lower left and right limbs, and a human head that appeared to be that of a male -- within white trash bags that had been stuffed into two blue draw-string bags branded with the name of a bodybuilding website. The trash bin also contained red-brown stains that later tested positive for the presence of blood. Officers also found clothes and other items in the trash bin,

including fragments of a driver's license and credit cards that had been cut into pieces. From these fragments, officers obtained the name of the victim, Jonathan Camilien, as well as his date of birth and photograph.

While on the third floor in the trash room, and prior to the trash bags being removed from the trash bin and opened, police officers heard the sound of a power tool or vacuum cleaner coming from the defendant's nearby apartment. When they approached the apartment's door, they could hear water being turned on and off and could smell a strong odor of bleach and cleaning products. The defendant then exited his apartment to the sight of the officers standing outside his front door. The officers observed that the defendant's clothes were wet and that he smelled of a bleach-based cleaning solution. The defendant agreed to accompany the officers to the police station. In the apartment building's lobby, officers observed a box addressed to the defendant from the same bodybuilding website that was branded on the blue draw-string bags found in the third-floor trash bin.

The defendant was arrested later that day at the police station. During the booking process, officers observed that the defendant had abrasions or marks on his forehead, neck, shoulder, back, arm, and hands.

After the defendant was taken into custody, officers obtained and executed a warrant to search his apartment. There, they discovered, among other things, a piece of green rope, a handsaw with red-brown stains on the blade that was removed from its handle, and cleaning supplies.[2] They also observed red-brown stains on the floor beneath a carpet, some of which tested positive for the presence of blood.

The next day, an autopsy was conducted on the victim's remains. The medical examiner observed signs of trauma at multiple points on the victim's head, including an abrasion on the left side, as well as a fracture to at least one of the cartilaginous rings around the trachea in the victim's neck and petechiae[3] present in the victim's eye lids. Although the medical examiner had difficulty determining the cause of death due to the "extensive trauma to the neck and the tissues surrounding the neck" and the nature and severity of the wounds, the potential causes of death included trauma and death by asphyxiation. After the autopsy, a forensic anthropologist

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[2] As the defendant testified at trial, he purchased cleaning supplies to clean up after dismembering the victim.

[3] Petechiae are "minute reddish or purplish spot[s] containing blood that appear[] in skin or mucous membrane as a result of localized hemorrhage." Merriam-Webster's Collegiate Dictionary 926 (11th ed. 2020).

examined the victim's bones and determined that the victim's body was cut apart using a manual saw.

b. The trial. The defendant was tried before a jury on charges of murder and improper disposal of human remains. As part of the Commonwealth's case, Cambridge police officers, State police troopers, security personnel from the business nearby the defendant's apartment, forensic scientists from the State police crime laboratory, the medical examiner, and the forensic anthropologist testified concerning the various investigative efforts detailed above. Additionally, an employee from a gym, where the defendant was a member, testified that, in the weeks before the murder, the defendant approached him and asked what cleaning product the employee used to clean the gym mats; the employee, who used a bleach-based cleaning solution with a chemical scent, told the defendant that he used a "chemical solution . . . to wipe off the blood or sweat or anything that we can't really see."

i. The defendant's testimony. Although defense counsel conceded in his opening statement that the defendant was guilty of improper disposal of human remains, the defendant testified in his own defense as to the charge of murder. According to the defendant, he and the victim met in about 2006 and had been friends since 2008. They shared an interest in rap music -- having recorded at least five rap songs together. The defendant

testified that on the night of the victim's death, he and the victim met at the defendant's apartment around 6 or 7 P.M. They went out a few times, including to purchase alcohol, and then returned to the defendant's apartment for an evening of drinking.

According to the defendant, while listening to music in his living room, the two friends began to argue over "the validity of [the] rappers and the content of the music." As the drunken argument became "kind of heated," the victim "got really aggressive" with the defendant and "slapped [the defendant], back handed . . . in the mouth very, very hard." The two men then engaged in a "strenuous wrestling match" during which the victim "attempted to put [the defendant] in a chokehold," but the defendant "managed to maneuver around it." According to the defendant, during the "exchange of blows," the victim "was reciting that he was going to kill [the defendant]" and "that it was over for [the defendant]."

The defendant claimed that he "fear[ed] for [his] life" and was "struggling for [his] life" during the "very strenuous fight," because he "thought [the victim] was really going to kill [him]." He further testified that the victim was "very strong, very physically fit and capable." The bout ended when the defendant put the victim in a chokehold, which the defendant held until the victim passed out because the defendant believed

that the victim would kill him if he released the chokehold. The defendant claimed that the entire fight lasted forty to fifty seconds in total. However, the medical examiner testified that asphyxiation is not instantaneous and takes minutes rather than seconds.

The defendant further testified that, after releasing the victim, he went to his desk chair, located in the same room where the fight occurred, to form an apology for when the victim "got up." The defendant asserted that, at that time, he believed the victim was "playing dead" and "being a jokester." Approximately forty to fifty minutes later, the defendant checked on the victim and realized he was dead. The defendant did not call the police because he thought they would not believe that the victim's death was accidental.

The defendant decided to remove the victim's body from his apartment. He first attempted to put the body in a duffel bag to carry out of his apartment but discovered the body did not fit. He then tied the victim's arms and legs together with a green rope, but the body still did not fit. After unsuccessful attempts to fit the victim's body in the bag, the defendant concluded that he needed to dismember the body to make it fit. The defendant moved the body to his bathtub where he proceeded to sever the legs, arms, and head, using the hand saw that police later discovered in his apartment. He placed the limbs

and head in bags and disposed of them "elsewhere in the building" along with the victim's clothes and identification cards, which he cut into pieces. The defendant then put the torso in a duffel bag and carried it from his apartment to the walkway where it was later discovered.

The prosecutor cross-examined the defendant on his physique and physical capabilities. At the time of the killing, the defendant weighed about 275 pounds. Further, as documented in a video he posted online, the defendant -- who acknowledged his own strength -- could lift 235 pounds above his head and a forty-five pound weight in one hand. The defendant further testified that he placed in weightlifting competitions at his local gym, including a competition during which he deadlifted 455 pounds.

ii. Rap music evidence. At trial, two rap songs written and recorded by the defendant were admitted in evidence. Before each song was played, the trial judge instructed the jury that they could only consider this evidence for the limited purpose of the defendant's state of mind, identity, intent, plan, or knowledge on the day of the murder and not for the purpose of showing anything about the defendant's character or propensity for misbehavior.

The first song, "Cavi's Demo," was discovered on a compact disc (CD) found in the defendant's bedroom closet during a

search of his apartment pursuant to a search warrant. According to testimony from the victim's brother, the defendant went by the nickname "Cavi." Over the defendant's objection, the Commonwealth introduced the audio recording and transcript of the first verse of "Cavi's Demo" in evidence. The lyrics described decapitation and dismemberment:

> "I decapitated and dismembered his arms and legs just to get a woody . . . Then started chuckling blood started dribbling down his arm and pant legs. I told my man 'cut that shit.' He said 'cut what? We just butchered this fat fuck.' . . . 'Saw the neck off from the head,' he said. 'It's no rocket science, I need to break this nigga's neck bone in two, pass the pliers.'"

The Commonwealth introduced this evidence through the direct examination of a State trooper who participated in the search that yielded the CD. During cross-examination, the trooper testified that he "interpreted [the song] as a confession" and believed the song "[f]oreshadow[ed]" the victim's murder. The defendant testified that he wrote "Cavi's Demo" about twelve to thirteen years prior to the murder. At the defendant's request, the entire audio recording and transcript of "Cavi's Demo," which featured the victim's voice, was admitted in evidence for context.

An audio recording of the second rap song, "The Virus," was discovered pursuant to a forensic search, pursuant to a search warrant, of the defendant's computer. The forensic examiner testified that the audio file was last edited in January 2012,

but had been copied onto the defendant's computer on March 21, 2015. Over the defendant's objection, the Commonwealth played the following portion of the audio recording of "The Virus," and admitted the corresponding transcript in evidence: "Yeah, my nigga Johnny. It was the fucking computer. And the Bermuda triangle, give me the truth. Like Kurt Angle, I strangle you in a chokehold. Behold the greatest. 'Bouta spit." The defendant testified that he knew of the wrestler Kurt Angle and was aware that he "was popular for chokeholds." The defendant further testified that a sheet of handwritten lyrics from "The Virus" dated March 25, 2011, which was already in evidence, was written by the victim, and that he (the defendant) wrote and recorded his own lyrics of that song around that date. After the Commonwealth admitted the above excerpt of "The Virus," the defendant played for the jury the entire audio recording of that song, which again featured the victim's voice, and the full transcript was admitted in evidence.

c. Procedural history. In June 2015, the defendant was indicted and arraigned on charges of murder in the first degree, in violation of G. L. c. 265, § 1, and improper disposal of human remains, in violation of G. L. c. 114, § 43N.

Prior to trial, in March 2016, the defendant filed a motion to suppress evidence, including the CD containing "Cavi's Demo," obtained during searches conducted pursuant to four search

warrants. His motion was denied after a nonevidentiary hearing. In April 2018, the Commonwealth filed motions in limine to admit, among other things, "audio recording[s] and . . . document[s]" found on the defendant's computer and in his apartment, including the audio recording of "Cavi's Demo." The next day, the defendant filed oppositions to the Commonwealth's motions, along with a separate motion in limine to exclude all rap music found on the defendant's computer, including "The Virus." The motion judge, who was also the trial judge, subsequently ruled that the Commonwealth could introduce the first verse of "Cavi's Demo" and specific lines from the beginning of "The Virus." The defendant also filed a motion in limine to exclude records of his purchases of various items from an online retailer as well as from a local hardware store. The motion judge ruled that the purchase history of some of the requested items, including the rope and saw, could be admitted.

In May 2018, a jury trial commenced before the trial judge. At the close of the evidence, the defendant requested jury instructions on voluntary manslaughter based on reasonable provocation, sudden combat, and excessive use of force in self-defense. The judge denied the requests for reasonable provocation and sudden combat instructions but provided a voluntary manslaughter instruction on excessive force in self-defense. On May 18, 2018, the jury returned guilty verdicts on

both indictments, with the conviction of murder in the first degree based on a theory of deliberate premeditation. The defendant was sentenced to life in prison without the possibility of parole on the murder conviction and six months in a house of correction, to be served concurrently with the murder sentence, on the improper disposal conviction. The defendant timely appealed.

2. Discussion. In a defendant's direct appeal from a conviction of murder in the first degree pursuant to G. L. c. 278, § 33E, we "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" (citation omitted). Commonwealth v. Tyler, 493 Mass. 752, 758 (2024).

a. Rap music evidence. The defendant contends that the trial judge's admission of the rap music evidence, when analyzed under the standards applicable to bad act evidence, was erroneous because the music lacked a sufficient nexus to the crimes and its probative value was outweighed by the risk of unfair prejudice.[4] We review the judge's admission of the rap

[4] The defendant also briefly argues that the State trooper's improper opinion testimony on the rap lyrics was prejudicial error. We disagree. Because the primary challenged portions of

music evidence for an abuse of discretion. See Commonwealth v. Correia, 492 Mass. 220, 227 (2023).

We analyze rap music evidence as bad act evidence when, as here, it "convey[s] ideas or acts that themselves could be considered bad acts and . . . reflect poorly on [the defendant's] character." Correia, 492 Mass. at 228-230. Bad act evidence "is not admissible to demonstrate the defendant's bad character or propensity to commit the crimes charged," id. at 228, but may be admissible for other purposes, such as "to prove motive, opportunity, intent, preparation, plan, [or] knowledge" (quotation omitted), Commonwealth v. Peno, 485 Mass. 378, 385 (2020). See Mass. G. Evid. § 404(b)(2) (2024). Even when offered for a permissible purpose, bad act evidence is not admissible if the "probative value is outweighed by the risk of

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the trooper's testimony were elicited by defense counsel on cross-examination, "the defendant's claim of prejudice is highly suspect." Commonwealth v. Otsuki, 411 Mass. 218, 236 (1991). See Commonwealth v. Moffat, 486 Mass. 193, 201 (2020) ("The testimony . . . occurred during defense counsel's cross-examination, and defense counsel neither moved to strike the answer nor moved to request a curative instruction"). Nonetheless, even assuming error with respect to this unpreserved issue, it did not create a substantial likelihood of a miscarriage of justice. The other evidence against the defendant was very strong, and "the witness potentially expressed an impermissible opinion only briefly." Commonwealth v. Robertson, 489 Mass. 226, 238, cert. denied, 143 S. Ct. 498 (2022).

unfair prejudice to the defendant, even if not substantially [so]" (citation omitted). Correia, supra at 228-229.

Here, the rap music evidence was not offered for improper propensity purposes; the Commonwealth did not introduce it to show that the defendant had a propensity for violence and thus was more likely to have committed the murder. Rather, where the defendant admitted to killing and dismembering the victim but claimed to have done so in self-defense, the Commonwealth offered this evidence to undermine his claim of self-defense and to provide an alternative explanation for the defendant's otherwise "inexplicable act of violence" (citation omitted). Commonwealth v. Veiovis, 477 Mass. 472, 485 (2017). Specifically, the Commonwealth sought to show that the defendant was fascinated with murder, strangulation, decapitation, and dismemberment, and that he acted on these interests when he killed the victim. Therefore, this evidence went to the defendant's state of mind and intent. See id. at 484 (images of human dissection on defendant's wall were "probative of the defendant's state of mind as a person fascinated by amputation and human dissection, and of an intent to seize the opportunity of these killings to engage in actual amputations and human dissection"). Thus, the rap music evidence was offered for a permissible noncharacter purpose.

Next, we consider whether the probative value of the rap music evidence was outweighed by the risk of unfair prejudice to the defendant. See Correia, 492 Mass. at 228. When determining the probative value of rap music, we evaluate the "nexus" of the lyrics to the "issues to be decided in the case." Id. at 231 (adopting nexus test applied by courts in other jurisdictions). See, e.g., Montague v. State, 471 Md. 657, 691-692 (2020); State v. Skinner, 218 N.J. 496, 500, 522 (2014). "This 'nexus' can be direct -- where rap music or lyrics recount key details of the events in a case," but may also be indirect -- "where a defendant expresses through music evidence of knowledge, a motive, or another relevant fact in dispute, even though the music is not a literal account of events that took place." Correia, supra. The details in the lyrics need not "compare perfectly to [the] actual [crime]" to have a sufficient nexus; rather "there [must be] a logical connection between that evidence and the crimes charged." State v. Koskovich, 168 N.J. 448, 485 (2001).

Here, the judge did not abuse her discretion in finding that the rap music evidence bore a sufficient nexus to the issues in this case and that this evidence was not unfairly prejudicial. The defendant's songs provide evidence of his state of mind and intent, which were contested at trial, as the defendant claimed to have killed the victim in self-defense.

See Correia, 492 Mass. at 231. Additionally, even if not a literal account of the events that would transpire, the lyrics aligned with key details of the killing. The defendant rapped about strangling a person "in a chokehold," as well as sawing a person's head off and "dismember[ing] his arms and legs" -- which is exactly what he did to the victim's body. Further, in "The Virus," the lyrics reference "Johnny," who the jury could have reasonably inferred to be the victim, Jonathan Camilien.[5]

When determining the admissibility of rap music evidence, we also consider whether the lyrics have a sufficient "temporal nexus" to the crime (citation omitted}. Correia, 492 Mass. at 231. Here, although the defendant testified that he wrote "Cavi's Demo" twelve to thirteen years prior to the victim's killing, this testimony did not have to be credited. Moreover, because the victim's voice can also be heard on the recording of "Cavi's Demo," the CD must have been created after the defendant met the victim, which, according to the defendant, occurred in 2006 -- nine years prior to the killing. In any event, "[t]emporal remoteness is not an exercise in line drawing." Peno, 485 Mass. at 386. Notably, the CD containing "Cavi's Demo" was discovered in the defendant's bedroom soon after the

[5] The victim's brother testified that the victim's nickname was "Jonny."

victim's death. See Koskovich, 168 N.J. at 485 (sufficient temporal nexus where violent song lyrics "were recovered from [the] defendant's bedroom shortly after the killings and thus were reasonably close in time to the offenses charged"). Thus, the defendant's testimony about when he wrote the lyrics did not preclude the trial judge from determining, in her discretion, that a sufficient temporal nexus existed between that rap song and the crimes charged. As for "The Virus," the forensic examiner testified that the audio file was copied onto the defendant's computer about two weeks before the victim's death, which likewise allowed the judge to find that a sufficient temporal nexus existed. See Correia, supra; Koskovich, supra.

We now turn to the risk of unfair prejudice. We have recognized that "[t]here is unique potential for prejudice when using 'the inflammatory contents of a person's form of artistic self-expression,'" including rap music (citation omitted). Correia, 492 Mass. at 230. However, any prejudicial effect may be reduced by providing proper limiting instructions to the jury. Id. at 231–232.

Here, the rap lyrics had the potential to prejudice the defendant because they contained violent imagery and offensive, racially charged language. See Skinner, 218 N.J. at 500. However, the trial judge was within her discretion in concluding that this risk did not outweigh the probative value of the

evidence. The lyrics here did not include generalized depictions of crime and violence, but rather discussed specific violent acts that directly correspond with the facts of the case. Cf. State v. Cheeseboro, 346 S.C. 526, 550 (2001), cert. denied, 535 U.S. 933 (2002) (lyrics, containing "general references glorifying violence" and lacking identifying details of crimes committed, had minimal probative value). Importantly, the judge provided proper limiting instructions, both before the audio recording of each song was played and during the final instructions to the jury, thereby further reducing the risk of unfair prejudice.[6] See Correia, 492 Mass. at 231. See also Commonwealth v. Crayton, 470 Mass. 228, 252 (2014) ("case[s] where we conclude that it was an abuse of discretion to admit

[6] Before each song was played, the judge instructed the jury that the rap music evidence was "admitted only for a limited purpose . . . [of] whether it tells you anything about [the defendant's] state of mind, identity, intent, plan, or knowledge" and "may not [be] consider[ed] . . . as showing anything about [the defendant's] character." Additionally, during the final instructions, the judge instructed the jury that the "portions of [the] two songs have been admitted only for a limited purpose . . . [of showing] anything about this defendant's state of mind, his identity, his intent, plan, or knowledge. You may not consider this evidence as showing anything regarding this defendant's character or in terms of it showing any propensity for misbehavior." While we find the instruction sufficient here, we continue to encourage judges to provide specific limiting instructions when possible. See Commonwealth v. Samia, 492 Mass. 135, 148 n.8 (2023) ("it falls upon the judge to 'articulate the precise manner in which the [bad act evidence] is relevant and material to the facts of the particular case'" [citation omitted]).

the 'bad act,' even with a limiting instruction," are "unusual"). Lastly, as evidenced by her ruling that only the lyrics with the closest factual nexus to the crimes charged would be admitted in evidence, the judge further limited the risk of unfair prejudice by conducting an individualized analysis of each lyric, as required. See Correia, supra at 230.

Thus, it was not an abuse of discretion for the trial judge to admit the rap lyric evidence. See Correia, 492 Mass. at 228-230.

b. Validity of search warrants. The defendant next challenges the denial of his pretrial motion to suppress. He asserts that the rap music evidence should have been suppressed because the search warrants used to obtain this evidence were unsupported by probable cause and lacked particularity. "The question whether there was probable cause to issue [each] search warrant is a question of law that we review de novo." Commonwealth v. Perkins, 478 Mass. 97, 102 (2017). See Commonwealth v. Lepage, 494 Mass. 67, 76 (2024) ("In reviewing the denial of a motion to suppress, we . . . assess the correctness of the judge's legal conclusions de novo" [citation omitted]).

The Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights require search warrants to be supported by probable cause, meaning the

affidavit submitted with the search warrant application must provide a "substantial basis to conclude that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues" (quotations and citation omitted). Commonwealth v. Alexis, 481 Mass. 91, 101-102 (2018). Stated differently, "the government must show not only that there is probable cause that the individual committed a crime but also that there is a 'nexus' between the alleged crime and the article to be searched or seized." Commonwealth v. Snow, 486 Mass. 582, 586 (2021).

The Fourth Amendment and art. 14 also "require that a search warrant describe with particularity the places to be searched and the items to be seized." Commonwealth v. Perry, 489 Mass. 436, 459 (2022). See Commonwealth. v. Valerio, 449 Mass. 562, 566 (2007). To comply with this requirement, "a warrant must describe the object[s] of the search with enough specificity that investigators can identify, with reasonable certainty, that which they are authorized to search, thus ensuring that they search only those items for which probable cause exists." Perry, supra. "The precise degree of particularity required necessarily var[ies] according to the circumstances and the type of items involved" (quotation and citation omitted). Id.

In this case, three separate search warrants are at issue.[7] The warrants were executed sequentially, and each successive warrant application relied at least in part on information derived from the fruits of the prior search. Accordingly, we consider the validity of each challenged warrant separately, following the chronological order in which they were issued.

i. First warrant. The first warrant authorized a search of the defendant's apartment for telephones, wallets, and computers, among other items, to help determine the victim's identity. Pursuant to this warrant, police seized the defendant's computer tower, which was then forensically searched pursuant to the third warrant.[8] The affidavit submitted in

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[7] We note that, with respect to another search warrant concerning the defendant's YouTube and Google Plus accounts, the defendant raises no arguments on appeal. Although this was the third search warrant to issue, we refer to the warrant that issued fourth in time as the third warrant.

[8] The police also seized the defendant's cell phone and later conducted a forensic search of the cell phone pursuant to the third warrant. The defendant contends that the search and seizure of his cell phone, like the other searches he challenges, were unconstitutional because the warrants were unsupported by probable cause and lacked particularity. However, the remedy for an unconstitutional search or seizure is exclusion of the evidence derived from that search or seizure; here, neither evidence obtained directly from the defendant's cell phone nor any other fruit from the search of his cell phone was admitted at trial. See Commonwealth v. Pearson, 486 Mass. 809, 812 (2021) ("[T]he exclusionary rule bars the use of evidence derived from an unconstitutional search or seizure" [citation omitted]). Even assuming, without deciding, that the search of the cell phone was unconstitutional, "no fruits --

support of the first warrant described the police's investigation from the point when the victim's dismembered torso was discovered until the defendant emerged from his apartment, before he was taken into custody.

We conclude that the facts described in this affidavit established probable cause for the search and that the warrant was sufficiently particular. See Perry, 489 Mass. at 459; Snow, 486 Mass. at 594. First, the affidavit established probable cause to believe that the defendant improperly disposed of the victim's remains.[9] Additionally, the items sought bore a substantial nexus to the suspected crimes because the identity of the victim was relevant to the police's investigation.[10] The

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tainted or otherwise -- were . . . admitted in evidence," and therefore any error would have been "harmless beyond a reasonable doubt." Lepage, 494 Mass. at 78.

[9] Among other facts, the affidavit detailed the following: video surveillance on the day the victim's remains were discovered showed an individual leaving the defendant's apartment building with a bag, walking to the location where police would later discover the duffel bag with the dismembered torso, returning to the apartment building without a bag, and entering the lobby at the exact time when the defendant's key fob was used to unlock the door. Human remains were found in the trash room on the floor where the defendant resided in the apartment building. Later that morning, coming from the defendant's apartment, officers heard a vacuum cleaner and running water and could smell a strong odor of chemicals, including bleach. When the defendant opened his door, the officers observed that he was wet and smelled of chemicals.

[10] Further, a person would reasonably expect that the items sought would be located in the defendant's apartment,

defendant, however, argues that the items sought had no nexus to the crimes because the victim's identity "already was known" to the police from the fragments of the identification cards found with the body parts in the apartment building's third-floor trash room. This argument fails because the police had not yet confirmed whether the human remains corresponded to the owner of the identification cards -- or whether the remains came from a single person. Furthermore, "there is nothing in the jurisprudence of . . . the Fourth Amendment that permits a [judge] to invalidate a warrant supported by probable cause based on the [judge's] belief that the police simply do not need to seek further evidence of a crime." Commonwealth v. Jones, 605 Pa. 188, 193, 202, cert. denied, 562 U.S. 832 (2010) (judge erred in concluding it was unnecessary for police to obtain further information concerning identity of victim).

The first warrant was also sufficiently particular because it specifically described the place to be searched -- i.e., the defendant's apartment -- and the items to be seized -- i.e., telephones, wallets, and computers. See Perry, 489 Mass. at

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particularly given the allegations within the affidavit that tended to suggest the crimes had been committed there. Cf. Commonwealth v. McDermott, 448 Mass. 750, 768, cert. denied, 552 U.S. 910 (2007) ("even when a murder is committed away from a defendant's residence, sufficient probable cause exists to obtain a warrant to search the residence when there is evidence that it was 'reasonably likely' that the items specified in the affidavit could be found there" [citation omitted]).

459. The defendant asserts that this warrant lacked particularity because it did not contain a temporal limit and thus violated the rule in Snow, 486 Mass. at 594.

We held in Snow, 486 Mass. at 594, that a warrant to search a cell phone "presumptively must contain some temporal limit." When determining the proper temporal scope for a cell phone search, judges consider "'the type of crime, the nature of the [evidence] sought, and normal inferences' about how far back in time the evidence could be found." Id., quoting Commonwealth v. White, 475 Mass. 583, 589 (2016).

Even assuming our holding in Snow applies to all the electronic devices at issue, a temporal limit was not required because, while the warrant allowed police to search for and seize cell phones and computers, it did not authorize a search of the content of these items. See Snow, 486 Mass. at 594 ("officers are free to seize and hold cell phones" until they obtain broader warrant to search cell phone).

ii. Second warrant. The second warrant authorized a search of the defendant's apartment for, among other items, documents, in electronic or paper form, showing the defendant's purchase history and his "motive and/or state of mind prior to, during and after the killing." Pursuant to this warrant, officers seized the CD containing the rap song "Cavi's Demo" and a computer hard drive on which the audio recording of "The

Virus" was later discovered, after a forensic search was conducted pursuant to the third warrant.

In addition to reiterating the facts from the first warrant's affidavit, the supporting affidavit for the second warrant also described the results of the autopsy, the evidence obtained during the first search, and additional information the police had learned over the course of the investigation. For example, the police discovered in the defendant's apartment a twelve-inch carpentry saw that was likely used to dismember the victim's body. Also detailed in the affidavit was that investigators learned through the cooperation of an online retailer that the defendant purchased the saw from the retailer on September 5, 2012, and that, prior to the killing, the defendant had asked staff members at his gym how they cleaned blood from the floors. Additionally, the defendant reportedly told another gym member several weeks prior that he "had killed people before, chopped them into pieces[,] and buried them in [a] back yard." However, when police spoke with this gym member, he appeared nervous and anxious and "denied having an unusual conversation with [the defendant] but provided some degree of confirming detail."

As discussed above, the details of the investigation from the first affidavit established probable cause to believe that the defendant improperly disposed of the victim's remains;

further bolstered by the new averments in the second affidavit, probable cause was also established to believe that the defendant murdered the victim. See Perry, 489 Mass. 459; Snow, 486 Mass. at 594. There was also a sufficient nexus between the items sought and the suspected crimes,[11] given that the defendant, prior to the killing, asked gym staff about cleaning blood and potentially claimed that he had killed and chopped up people -- suggesting that the murder was premeditated. Additionally, that the defendant ordered, through an online retailer, the saw that was likely used to dismember the victim provided reason to believe that the defendant's order history would aid investigators by, for example, further establishing the defendant's method or means of committing the crimes.[12] See Commonwealth v. Ashman, 430 Mass. 736, 744 (2000) ("Evidence that a defendant possessed a weapon that could have been used to

[11] Again, a person would reasonably expect that the items sought would be located in the defendant's apartment.

[12] The defendant also challenges the seizure of a document with handwritten lyrics from "The Virus." From the record it is unclear whether this evidence was seized pursuant to the first warrant, which also authorized the search and seizure of "any notes . . . or documents that would show the relationship between the [defendant] and the victim," or the second warrant, as the items returned for both warrants include "[m]iscellaneous paperwork." Regardless, the supporting affidavit for each warrant established probable cause to seize this document, which ends with the victim's initials in large, artistically embellished letters.

commit a crime is relevant to prove that the defendant had the means of committing the crime").

The second warrant was also sufficiently particular. Like the first warrant, even assuming that the rule in Snow is applicable to the electronic devices here, the second warrant did not require a temporal limit because it did not authorize the search of the electronic items seized and no such search occurred pursuant to that warrant, at least with respect to the computer hard drive. See Snow, 486 Mass. at 591-592.[13]

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[13] The officers did listen to the CD containing "Cavi's Demo," as mentioned in the supporting affidavit for the third warrant. There is no indication in that affidavit of any dates establishing when the defendant copied a recording of "Cavi's Demo" onto the CD. Still, as discussed previously, the CD was found in the defendant's bedroom. See Koskovich, 168 N.J. at 485. Nonetheless, the defendant asserts that the police exceeded the scope of this warrant by listening to the CD, when the warrant did not provide specific authorization to do so. Even assuming separate authorization was required to listen to the CD after it was properly seized, suppression is unnecessary. Under the inevitable discovery exception, lawful discovery by the police of the "Cavi's Demo" audio recording "was certain as a practical matter" (citation omitted). Commonwealth v. Linton, 456 Mass. 534, 558 (2010). There can be "no doubt that the police agenda here included [listening to the CD] . . . [as] the only value [the CD] could possibly add to the investigation relied upon a legal further search of [its] contents." Commonwealth v. Fernandes, 485 Mass. 172, 186 (2020), cert. denied, 141 S. Ct. 1111 (2021).

Further, the facts described in the affidavit for the third search warrant -- excluding any reference to the content of the CD, which only comprised several sentences among ten pages of other detailed information -- would have established probable cause to listen to the CD. See Commonwealth v. McAfee, 63 Mass. App. Ct. 467, 478 (2005) ("even if the [unlawfully obtained]

iii. Third warrant. The third warrant authorized a forensic examination of the defendant's computer tower and three external hard drives seized pursuant to the first two warrants.[14] The warrant limited the search to files related to the defendant's mental state and relationship with the victim. As a result of the ensuing forensic search, the audio recording of "The Virus," which featured both the defendant's and the victim's voices, was discovered.

The supporting affidavit for the third warrant contained the same information as the first two affidavits and the following additional relevant facts. On the day that the victim's remains were discovered, police traveled to the victim's apartment and met the victim's brother, who lived with

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information . . . is excised from the search warrant application, the application still established probable cause for the proper issuance of the warrant"). Among these facts were the disclosures by the victim's brother that the defendant and the victim created rap music together and that the defendant's nickname was "Cavi." The affidavit also contained facts concerning the discovery by the police of a handwritten copy of rap lyrics (from "The Virus") in the defendant's bedroom. These facts provided a reasonable basis to conclude that rap music created by the defendant would likely be found on the CD -- which, as stated in the affidavit, was labeled "Cavi's Demo" -- and that such rap music could provide information about the defendant's state of mind or relationship with the victim.

[14] This warrant also authorized the search of the defendant's cell phone seized pursuant to the first warrant, but for the reasons discussed in note 8, supra, any error in denying the defendant's request to suppress the content of the cell phone would have been harmless.

the victim. The brother told police that the victim and the defendant had a tumultuous relationship, which began sometime in 2010 or 2011, and that they made rap music and played online games together.

The victim's brother also informed police that the defendant suffered from schizophrenia and took medication for this condition. After the defendant stopped taking his medication for one week sometime in 2014, he believed that the devil was after him. According to the brother, on March 29, 2015, less than one week before the victim's death, the defendant told the victim that they could not be friends anymore because the defendant was hearing voices that "Johnny was bad." The defendant also told the victim that the defendant "need[ed] [his] meds" and that "if he goes off them[,] he goes crazy."

With the victim's brother's consent, police searched the victim's bedroom. During the search, the brother guessed the password on the victim's computer and opened an application called "STEAM," which police learned was a gaming website used by the victim to communicate with the defendant. The brother identified the victim's STEAM username as "JMC." On the screen, officers could see that an image of the defendant was associated with the username "9th Gate Spymaster." The brother then opened the "chat window" that displayed the last online conversation between "JMC" and "9th Gate Spymaster" on March 27, 2015.

Police subsequently conducted an Internet search; discovered that the defendant, in addition to having an account on STEAM, had accounts on several different social media websites, including Facebook, Google Plus, and YouTube; and obtained the defendant's usernames for those accounts.

To establish probable cause to search the contents of a computer-like device, "police first must obtain information that establishes the existence of some 'particularized evidence' related to the crime" that they believe is likely to be found on the device in question (citation omitted). White, 475 Mass. at 589. See Riley v. California, 573 U.S. 373, 393-394 (2014). "[T]here must be 'specific, not speculative,' evidence linking the device in question to the criminal conduct" (citation omitted). Commonwealth v. Henley, 488 Mass. 95, 116 (2021).

As with the first and second affidavits, the facts in the third affidavit were sufficient to establish probable cause to believe that the defendant committed the crimes. See Perry, 489 Mass. at 459; Snow, 486 Mass. at 594. The additional information in the third affidavit also established that particularized evidence related to the crimes -- that being communications and electronic files concerning the defendant's mental state and relationship with the victim, which were relevant to the question of premeditation -- was "likely to be

found on the device[s] in question" -- i.e., the defendant's computer and hard drives. White, 475 Mass. at 589.

Among that information in the affidavit, police learned through the victim's brother that the defendant and the victim would make rap music, chat online,[15] and play online video games together. Although "information that an individual communicated with another person, who may have been linked to a crime, without more, is insufficient to establish probable cause," Commonwealth v. Morin, 478 Mass. 415, 426 (2017), such information must be considered within the context of the affidavit as a whole, rather than in isolation, see Snow, 486 Mass. at 588. Here, while the communications and hobbies shared between the defendant and the victim are innocuous enough in isolation, the affidavit provided sufficient additional information.

In particular, the affidavit described strong evidence, as relayed above, that the defendant murdered the victim without an "apparent instigating event." Henley, 488 Mass. at 118. Additionally, supplemental averments in the third affidavit on the tumultuous nature of the defendant's relationship with the victim and the defendant's statement that "Johnny was bad," made

[15] Police also discovered that the defendant had numerous other social media accounts, which -- like "STEAM" -- could have been used to communicate with the victim.

less than one week before the killing, provided further evidence that the murder was premeditated.

When considering the foregoing details together, there was probable cause to believe that a search of the defendant's computer or external hard drives would yield relevant online communications between the defendant and the victim, or other relevant files concerning their relationship or the defendant's mental state, to assist police in determining a motive for the killing or establishing the defendant's intent. Thus, there was a sufficient nexus between the suspected crimes and the specific items sought.

The defendant asserts that this warrant was likewise overbroad because it did not include a temporal limit. Again assuming that our holding in Snow applies to the search of the electronic devices at issue here -- i.e., computers and hard drives -- the evidence that the defendant seeks to suppress -- the audio recording of the "The Virus" -- would have fallen within the scope of a reasonable temporal limit. See Snow, 486 Mass. at 594 (remedy for overbroad warrant "is partial suppression only of the evidence that fell outside what would have been a reasonable scope"). As noted previously, an audio file of "The Virus" was saved on the defendant's computer about two weeks before the killing and less than one week before the latest online communication between the defendant and the

victim, negating the defendant's temporal limit claim. See Henley, 488 Mass. at 121-122 (where record showed "long-standing relationship between the defendants and the victim," reasonable temporal limit for cell phone search "would extend beyond just the day of the murder or even the days leading up to the murder"); Commonwealth v. Holley, 478 Mass. 508, 525, 527-528 (2017) (scope of seventeen days for search of cell phone may have been too broad, but defendant was not prejudiced because only messages from four days before shooting were admitted).

c. Record of online purchases. The defendant further contends that the trial judge erred in admitting in evidence, without providing a limiting instruction, a record of purchases he made through an online retailer about three to four years prior to the killing. Of note, the record lists the defendant's purchases of the carpentry saw used to dismember the victim's body, a rope with which the defendant attempted to bind the body, and a set of pliers. The record shows that the defendant purchased the rope on June 29, 2012, and purchased both the carpentry saw and the pliers on September 1, 2011. The defendant contends that the record of online purchases should have been analyzed as prior bad act evidence and excluded because it lacked probative value and was highly prejudicial.

As discussed previously, when prior bad act evidence is offered for a permissible, nonpropensity purpose, it "is

admissible only if its probative value is not outweighed by its prejudicial effect." Commonwealth v. West, 487 Mass. 794, 805 (2021). Such evidence is sufficiently probative when there is "a 'logical relationship' between the prior bad act and the crime charged" (citation omitted), id., and it is "not . . . too remote in time" (citation omitted), Peno, 485 Mass. at 386. When reviewing a ruling on prior bad act evidence, we consider "whether the trial judge carefully weighed the probative value and prejudicial effect of the evidence introduced at trial[,] . . . whether the judge mitigated the prejudicial effect through proper limiting instructions[, and] . . . whether the challenged evidence was cumulative of other admissible evidence, thereby reducing the risk of any additional prejudicial effect." West, supra at 807.

Assuming, without deciding, that the defendant's record of online purchases qualified as prior bad act evidence, we conclude that -- even considering the more "rigorous" admissibility test for prior bad act evidence -- it was not an abuse of discretion for the trial judge to allow the admission of that record without providing a limiting instruction. See Correia, 492 Mass. at 228-230. First, the record of the defendant's online purchases was probative of the defendant's state of mind and intent -- the central issues at trial. With respect to the saw and rope, that the defendant rapped about

dismembering a person, purchased items that could be used to bind and dismember a person, and then actually used these very items to bind and dismember the victim after the defendant had killed him tended to support the Commonwealth's theory that the defendant had a long-standing fantasy about dismemberment, acquired the appropriate tools, and then killed the victim to carry out this fantasy. See Commonwealth v. Guy, 454 Mass. 440, 444 (2009) ("Evidence of the defendant's fascination with murder and serial killings was relevant to the issue of intent and motive"). See also McConnaughey v. United States, 804 A.2d 334, 339 (D.C. 2002) ("[a]n accused person's prior possession of the physical means of committing the crime is some evidence of the probability of his guilt").

The defendant's purchase of the pliers also had probative value, even if less so when compared to the other items. While we have generally cautioned against admission of "a weapon [that] definitively could not have been used in the commission of the crime," the probative value of the pliers was enhanced by its connection to the saw. Veiovis, 477 Mass. at 486. In the song "Cavi's Demo," the defendant specifically rapped about using pliers to break a neck bone in half and "[s]aw[ing] the neck off" of someone. Although there was no evidence that the defendant used pliers to kill or dismember the victim, they were purchased on the same day as the saw that the defendant used to

dismember the victim. Thus, the parallel between the lyrics in "Cavi's Demo" and the defendant's purchase of the pliers and the saw together tends to make more probable that the defendant had the state of mind to carry out the acts about which he rapped, and in fact prepared to do so.

Additionally, these purchases from about three to four years before the crimes were not too remote in time to have a sufficient nexus to the case, particularly given that two of the items purchased were used by the defendant at the time of the crimes. See United States v. Mujahid, 433 Fed. Appx. 559, 562 (9th Cir. 2011) (jailhouse recordings from about five years before charged offense were not too remote where defendant, in recordings, admitted ownership of same type of firearm for which he was indicted of possessing). Again, "[t]emporal remoteness is not an exercise in line drawing." Peno, 485 Mass. at 386. See, e.g., Commonwealth v. Sharpe, 454 Mass. 135, 144 (2009) (prior bad act evidence occurring at least seven years before crime charged was not too remote). We are not convinced by the defendant's argument concerning the risk of unfair prejudice flowing from this evidence. "Evidence is unfairly prejudicial only if it has an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one" (quotation and citation omitted). Commonwealth v. Foreman, 101 Mass. App. Ct. 398, 403 (2022). The defendant essentially

asserts that he was prejudiced because this evidence could have supported the Commonwealth's theory about bringing his long-standing fantasies to life. However, even to the extent that this evidence had some tendency to prejudice the defendant, we discern no abuse of discretion in the trial judge's determination that it was not unduly prejudicial. See Commonwealth v. Rosa, 468 Mass. 231, 241 (2014) ("the question is not whether admission of the [bad act evidence] was prejudicial; it is rather whether it was unduly prejudicial" [emphasis added]). Rather than having an undue tendency to promote an emotional or otherwise improper basis for the jury's decision, the record of purchases, along with the rap lyric evidence, provided a logical basis from which the jury could conclude that the defendant did not merely stumble upon the means to dismember the victim after killing him, but that the defendant potentially made these purchases in anticipation of living out his fantasy. See Peno, supra at 389. See also Commonwealth v. MacCormack, 491 Mass. 848, 864 (2023) ("Without the challenged evidence, at a minimum, the jury would have lacked context about the defendant's state of mind"). Additionally, the record indicates that the judge "carefully weighed the probative value and prejudicial effect," as she excluded two additional items originally listed on the record of purchases -- a shovel and sledgehammer -- thus limiting the

evidence to only those items used in the murder or referred to in the defendant's rap songs. West, 487 Mass. at 807.

Further, where the record listed purchases of, in the defendant's words, "common household tools," it did not present the same inherent risk of unfair prejudice as other bad act evidence, such as evidence of prior domestic abuse or use of profane or racially charged language. See, e.g., Rosa, 468 Mass. at 241-242 (evidence of defendant's use of profane language and racial epithet); Butler, 445 Mass. at 570, 575-576 (evidence of defendant's prior instances of domestic violence). Unlike these other categories of bad act evidence, neither the record of purchases nor the items listed within were illegal or socially repugnant and thus, in isolation, were unlikely to "reflect poorly on [the defendant's] character" and enflame the jury. Correia, 492 Mass. at 230. Instead, the record of purchases tended to show that the defendant murdered the victim only when considered in the context of the specific facts surrounding the victim's killing. As discussed above, this tendency properly arose from the logical inferences that the jury could draw from this evidence -- i.e., that the defendant had the means to carry out the crimes and may have contemplated doing so prior to the killing -- rather than from an improper basis such as emotion. Moreover, the act of purchasing various items and tools is not so similar to the crimes for which these

tools were ultimately used as to increase the risk of propensity reasoning. Thus, the record of purchases posed, at best, little risk of unfair prejudice to the defendant.

Lastly, considering the other relevant factors, discussed above, we conclude that the absence of a limiting instruction here did not amount to an abuse of discretion on the trial judge's part. "[T]here is no requirement that the judge give limiting instructions sua sponte," and the defendant did not request one. Commonwealth v. Cruzado, 480 Mass. 275, 279 (2018). The record indicates that the judge "carefully weighed the probative value and prejudicial effect" as to each purchased item and excluded the defendant's purchase of the shovel and sledgehammer. West, 487 Mass. at 807. Further, for the reasons explained above, the record of purchases that was admitted was sufficiently probative and carried little risk of unfair prejudice. Additionally, much of "the challenged evidence was cumulative of other admissible evidence, thereby reducing the risk of any additional prejudicial effect," as the other admitted evidence showed that the saw and rope were used to dismember and dispose of the victim's body. Id.

d. Prosecutor's closing argument. The defendant contends that the prosecutor misrepresented the defendant's testimony during closing argument and that, because he was prejudiced by this misattribution, reversal is warranted. Specifically, in

summarizing the defendant's testimony about the argument that preceded the physical fight between the victim and the defendant, the prosecutor stated that "[the defendant's] words were, 'Jonathan [the victim] persisted in his opinion.'" (emphasis added). In actuality, the defendant testified that he, not the victim, "persisted in [his] opinion." While we agree the prosecutor misstated the defendant's testimony,[16] we conclude that the defendant was not prejudiced by this error.

Where, as here, the defendant objected at trial, we review for prejudicial error. See Commonwealth v. Tu Trinh, 458 Mass. 776, 785 (2011).[17] We consider "whether the error was limited to collateral issues or went to the heart of the case," "what

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[16] The Commonwealth asked the defendant on cross-examination, "[H]ow did that discussion [before the killing] turn into an argument?" The defendant replied, "It just did, it became argumentative when [the victim] strongly disagreed, and I persisted in my opinion" (emphasis added).

[17] At the end of the prosecutor's closing argument, the defendant objected to the prosecutor's statement that the defendant was "angry" because the victim persisted in his opinion. Although the objection was not articulated at trial in the exact manner as the defendant now frames the issue on appeal, we find that the objection was sufficient to preserve the error for appellate review because it drew the judge's attention to the relevant portion of the prosecutor's closing argument and was made on the ground that the prosecutor had misstated the defendant's testimony. See Commonwealth v. McDonagh, 480 Mass. 131, 138 (2018) ("Perfection is not the standard by which we measure the adequacy of an objection"); Tu Trinh, 458 Mass. at 789 (to preserve objection to prosecutor's closing argument, defendant must "seasonably object[]").

specific or general instructions the judge gave the jury which may have mitigated the mistake," and "whether the error, in the circumstances, possibly made a difference in the jury's conclusions" (citation omitted). Id. at 789.

Here, the error did not go to the "heart of the case." Tu Trinh, 458 Mass. at 785. The defendant argues that the prosecutor tied her misstatement to the Commonwealth's theory of premeditation by stating, shortly after the misstatement, that the defendant "was thinking about what he wanted the outcome to be, he was planning his response. That is premeditation." Despite this fleeting comment from the prosecutor, whether the defendant or victim persisted in his opinion during the alleged argument was not material to the Commonwealth's theory of premeditation; rather, the Commonwealth's theory was based on evidence that the defendant fantasized and composed rap songs about murder and dismemberment, purchased the tools to carry out these acts, and then seized the opportunity to live out his fantasy.

Additionally, we are confident that this misstatement did not have an impact on the jury's conclusions. See Tu Trinh, 458 Mass. at 789. The prosecutor's misattribution was a "brief, isolated statement that was not egregious enough to infect the whole of the trial" (quotations and citation omitted). Commonwealth v. Fernandes, 487 Mass. 770, 792 (2021), cert.

denied, 142 S. Ct. 831 (2022). Further, although the prosecutor technically misquoted the defendant, that the victim also persisted in his opinion could reasonably be inferred from the defendant's other testimony where he described the victim's steadfast contrary opinion.[18] See Commonwealth v. Robinson, 493 Mass. 775, 788 (2024) ("A prosecutor's closing argument may . . . analyze the evidence and suggest what reasonable inferences the jury should draw from that evidence, . . . [which] need not be necessary and inescapable, only reasonable and possible" [quotations and citations omitted]).

Finally, the trial judge provided adequate instructions to mitigate any possible prejudicial effect. When charging the jury prior to deliberations, the judge instructed the jury that, to the extent their memory conflicted with the attorneys' statements, their memory controls. Although it was not specific to the prosecutor's misstatement, "we presume the jury to have understood and followed" this instruction. Tu Trinh, 458 Mass. at 789.

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[18] During cross-examination, the prosecutor asked the defendant, "Do you remember what you said right before [the victim] hit you?" The defendant replied, in part, "I . . . said something along the lines of [having] dis[d]ain for [the victim's] opinion and he disagreed with me wholeheartedly and then he hit me." That the victim "wholeheartedly" disagreed may be fairly read to mean that the victim also persisted in his opinion.

e. Manslaughter instructions. The defendant contends that the jury should have been instructed on voluntary manslaughter based on reasonable provocation and sudden combat. Since the defendant requested these instructions and objected at trial when they were not provided, we review for prejudicial error. See Commonwealth v. Miranda, 492 Mass. 301, 306 (2023).

We conclude that, assuming error, the defendant was not prejudiced, as "we are sure that the [assumed] error did not influence the jury, or had but very slight effect" (citation omitted). Commonwealth v. Richards, 485 Mass. 896, 919 (2020). Indeed, there was scant evidence of reasonable provocation in this case. See id. at 920 (no prejudice from failure to instruct on reasonable provocation where "it [was] extremely unlikely that any reasonable juror would have a reasonable doubt as to whether the victim stabbed the defendant . . . [and] extremely unlikely that the juror would conclude that the defendant did not use excessive force in self-defense but acted instead with reasonable provocation"). First, it is unlikely that any reasonable juror would have believed the defendant's claim that the entire fight lasted forty to fifty seconds, when, as the medical examiner testified, asphyxiation takes minutes rather than seconds. See Commonwealth v. Steeves, 490 Mass. 270, 292 (2022) ("manual strangulation requires sustained force over a prolonged period of time to accomplish death, during

which an objectively reasonable person would likely have 'cooled off'"); Commonwealth v. Felix, 476 Mass. 750, 759 (2017) ("the time required to strangle the victim . . . supported a finding of deliberate premeditation inconsistent with sudden provocation"). The length of time is crucial because, for reasonable provocation to apply, "the killing must occur before there is sufficient time for the defendant to cool off" (citation omitted). Commonwealth v. Smith, 460 Mass. 318, 325 (2011).

Second, it is also unlikely that any reasonable juror would have concluded that "a reasonable person would have become sufficiently provoked, and that the defendant was in fact provoked by the victim's conduct" (quotation and citation omitted). Commonwealth v. Bianchi, 435 Mass. 316, 329 (2001). Even assuming that the jury would have credited the defendant's testimony that the victim was the one to deliver the first blow, the defendant was significantly larger than the victim, as clearly observable in video footage from the night of the killing, and also had substantial weightlifting capabilities, while the victim was described as "slim." See id. (that victim punched defendant's face "add[ed] little to [the defendant's] claim of provocation" where defendant "was a weightlifter who outweighed the victim by more than 170 pounds"). See also Felix, 476 Mass. at 757 ("where the defendant outweighs and is

physically far more powerful than the victim," physical contact between defendant and victim, even if initiated by victim, may not be enough for manslaughter instruction based on provocation). Further, the defendant also appeared to sustain, at most, minor injuries from the victim's alleged attack. See Commonwealth v. Garabedian, 399 Mass. 304, 314 (1987) (insufficient provocation where victim scratched defendant's face and drew blood).

Finally, the defendant's calculated actions immediately following the victim's death do not suggest that the killing was the product of heat of passion. See Commonwealth v. Sirois, 437 Mass. 845, 855 (2002) (no reasonable provocation where "immediately after [the] shooting . . . , the defendant walked back out to the car and drove off to the fair with his children, . . . not displaying even the slightest degree of 'passion, anger, fear, fright, or nervous excitement'" [citation omitted]). Since the evidence of reasonable provocation was so scant, we conclude that the defendant was not prejudiced by this presumed error.[19]

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[19] Because sudden combat is a form of reasonable provocation, see Commonwealth v. Yat Fung Ng, 489 Mass. 242, 266 (2022), cert. denied, 491 Mass. 247 (2023), we likewise conclude that, even assuming that the facts warranted such an instruction, the defendant was not prejudiced by the trial judge's failure to instruct the jury on sudden combat, see Richards, 485 Mass. at 920.

f. Nondeadly force instruction. The defendant asserts that the trial judge's nondeadly force instruction was deficient because it did not include the following language from Commonwealth v. Noble, 429 Mass. 44, 46 (1999), which the defendant had requested at trial: "Nondeadly force, such as the force of one's fists, hands, and arms, is considered to be nondeadly even if a death results." Here, the judge instructed the jury using the model jury instructions for deadly and nondeadly force, stating: "Deadly force is force intended to or likely to cause death or serious bodily harm. Nondeadly force by contrast, is force that is not intended to or likely to cause death or serious bodily harm." See Model Jury Instructions on Homicide 35 (2018).

The judge was "not required to give [the] jury instruction[] in the exact manner requested by the defendant provided that the requested instruction [was] adequately covered." Miranda, 492 Mass. at 310. The judge's instruction, which adhered to the model instructions, was adequate. See id. Moreover, the defendant's requested instruction quoted dicta from Noble, 429 Mass. at 46, which, when taken out of context, implies that the force of one's "fists, hands, and arms" is per se nondeadly. This is an incorrect statement of the law; as we held in Noble, "[i]t was for the jury to determine whether the

headlock used by the defendant was deadly or nondeadly force." Id. There was no error.

g. Review under G. L. c. 278, § 33E. Having reviewed the entire record, we discern no reason to exercise our extraordinary authority under G. L. c. 278, § 33E.

3. Conclusion. Accordingly, we affirm the judgments.

So ordered.