SJC-10593

COMMONWEALTH vs. JAMES KEOWN.

Middlesex. February 10, 2017. - October 23, 2017.

Present: Gants, C.J., Lenk, Gaziano, Lowy, & Budd, JJ.

Homicide. Constitutional Law, Search and seizure, Probable cause. Search and Seizure, Computer, Warrant, Affidavit, Probable cause. Probable Cause. Evidence, Information stored on computer, Relevancy and materiality, Inflammatory evidence, Prior misconduct, Hearsay, State of mind, Motive. Practice, Criminal, Capital case, Motion to suppress, Argument by prosecutor, Instructions to jury. Dangerous Weapon.

Indictment found and returned in the Superior Court Department on November 3, 2005.

A pretrial motion to suppress evidence was heard by Sandra L. Hamlin, J., and the case was tried before her.

Claudia L. Bolgen for the defendant.

Jamie M. Charles, Assistant District Attorney, for the Commonwealth.

Eoghan Casey, pro se, amicus curiae, submitted a brief.

Gregory T. Nojeim, of the District of Columbia, & Andrew Crocker & Stephanie Lacambra, of California, & Donald S. Bronstein, Committee for Public Counsel Services, & Chauncey B. Wood, Matthew R. Segal, Jessie J. Rossman, Alexis L. Shapiro, & Margaret L. Sullivan, for Massachusetts Association of Criminal Defense Lawyers & others, amici curiae, submitted a brief.

LOWY, J. The jury convicted the defendant of murder in the first degree on a theory of deliberate premeditation for poisoning his wife, Julie Keown. On appeal, the defendant argues that (1) the trial judge erred in denying a motion to suppress certain computer evidence because the warrant used to obtain the evidence was defective; (2) the trial judge abused her discretion in declining to exclude evidence related to the defendant's computer username and Internet search results, the defendant's prior bad acts, and the victim's statements and electronic mail (e-mail) messages; (3) the prosecutor's closing argument was improper; and (4) the trial judge's instruction to the jury on the inference of malice lowered the Commonwealth's burden of proof. We affirm the defendant's conviction and decline to grant relief under G. L. c. 278, § 33E.[1]

Background. We summarize the facts that could have been found by the jury and reserve certain details for the discussion of the issues. On September 4, 2004, the defendant took his wife, the victim, to Newton-Wellesley Hospital (hospital), where she lapsed into a coma from which she would never recover. The

[1] We acknowledge the amicus brief of the Massachusetts Association of Criminal Defense Lawyers, the Committee for Public Counsel Services, the American Civil Liberties Union of Massachusetts, the Center for Democracy & Technology, and the Electronic Frontier Foundation; and the amicus brief of Professor Eoghan Casey.

victim died on September 8 after being removed from life support. The medical examiner concluded that the cause of death was both acute and chronic ethylene glycol (EG) poisoning. EG is a transparent liquid that is used in a variety of different solvents, including antifreeze.

The victim and the defendant were college sweethearts who had been married for seven and one-half years when they moved to Waltham from Missouri in January, 2004. The couple's move was prompted by the defendant falsely telling his wife and his employer that he had been accepted into Harvard Business School. Based on this misrepresentation, the employer, a consulting firm for nonprofit organizations, permitted him to move to Massachusetts and work remotely while he attended classes. The victim, a registered nurse, also reached an agreement with her employer, a health-related software design firm, to allow her to work remotely.

The victim first showed signs of illness in May, 2004. At the end of July -- after weeks of flu-like symptoms, diarrhea, nausea, and malaise -- she visited a doctor. The doctor prescribed a medication for gastroesophageal reflux disease, which did not alleviate her symptoms. In early August, the victim visited an urgent care facility, where she was diagnosed with gastritis and continued on the same medication.

The victim's condition continued to deteriorate, and on

August 20, 2004, she awoke with slurred speech, an inability to walk, and dizziness. She went to the hospital with the defendant. The doctors at the hospital observed that the victim displayed signs of neurological impairment as well as abnormal kidney function. The doctors did not diagnose EG poisoning at this time but concluded that poisoning of some sort was the likely explanation. During her stay, a doctor asked the victim if she felt safe at home, to which she responded, "Yes, absolutely." Shortly after the victim's discharge on August 23, her parents came for a three-day visit and the group of four drove up to Maine. During the drive, Julie told her mother that the doctors at the hospital had asked her repeatedly, "Are you sure your husband isn't giving you something?" The victim laughed when recounting this for her mother and said she thought the questions were "completely ridiculous." When asked by the victim about these questions on the drive, the defendant said he had been "really getting annoyed" that the doctors kept asking whether the victim had been "getting some kind of poison."

On the morning of September 4, 2004, the defendant spoke on the telephone with an on-duty doctor at the hospital about the victim's condition. The defendant told the doctor that the victim was confused, had difficulty walking, and had garbled speech. The doctor told the defendant that the victim should be brought back to the hospital immediately, but the defendant did

not take the victim to the hospital until after 9 P.M. that night. By the time the victim was seen by a physician she was unconscious. The victim died four days later.

During the victim's hospitalization, a doctor had asked the defendant whether the victim had been swallowing tablets or liquids and whether she was suicidal, which are routine questions in cases that involve toxicity. The defendant said that he had not found anything at home indicating that the victim had swallowed something and that she was not suicidal. When the doctor asked him why he had not immediately taken the victim to the emergency room following his morning telephone conversation with the doctor on September 4, the defendant said that the victim had refused. However, in the waiting room of the intensive care unit while the victim was still alive, the defendant told the victim's mother that the victim may have accidentally consumed a bottle of antifreeze while on a walk. The defendant also told this story on September 7 to a State police trooper, who had become involved after the victim's mother reported to the police that the victim was suffering from EG poisoning. The defendant further informed police that the victim was "talking about death" and had recently purchased chloroform on the Internet. In addition to these inconsistent explanations, the defendant, also on September 7, questioned a medical student assigned to the victim's case about the

"hospital's role . . . in determining cause of death" and, if ruled an accidental death, whether that would be "the end of the case." On that same day, the defendant allowed Waltham police officers to conduct a search of his residence. The search did not turn up any EG.

Not long after the victim's death, the defendant abandoned his home in Massachusetts, without informing his landlord, and moved back to Missouri at some point in late 2004. He left many personal effects and computer equipment behind but brought a Sony VAIO laptop computer (laptop computer) with him. The defendant remained in Missouri until he was arrested in November, 2005.

Following the arrest, the defendant's mother obtained the laptop computer and mailed it to the defendant's attorney in Massachusetts. A warrant was issued that authorized the examination of the contents of the laptop computer. The search, which was performed by a computer forensics investigator, yielded important evidence in the Commonwealth's case against the defendant. Prior to trial, the defendant moved to suppress evidence from the search of the laptop computer. The trial judge denied this motion.

At trial, the Commonwealth argued that the defendant had poisoned his wife to hide from her the fact that the couple was on the edge of financial ruin and to reap the benefits of her

life insurance policy. In support of this theory, the Commonwealth introduced evidence that the defendant had embezzled from his employer and forged his admissions letter to Harvard Business School. The employer discovered these frauds in July, 2004, and promptly fired the defendant. Financial records from the end of August, 2004, also introduced in evidence, tended to show that the couple's finances were nearly depleted. In addition, evidence of the victim's e-mail messages sent to friends and acquaintances shortly before her final admission to the hospital supported a conclusion that the victim was not aware that the defendant had been fired, that he had never attended Harvard Business School,[2] and that they had virtually no money left.

The Commonwealth also introduced the following: evidence that a number of searches had been conducted on the laptop computer while the victim was still alive for queries such as "antifreeze death human" and "poison recipe"; evidence that the taste of EG can be masked by putting it in Gatorade and the defendant had been insistent that the victim drink Gatorade in the days and weeks before her death; and testimony by the medical examiner that the victim's symptoms throughout the summer suggested that she had been given small doses of EG over

[2] The defendant took one class at Harvard University Extension School in the spring of 2004.

a length of time and then a lethal dose prior to her final admission to the hospital. The medical examiner further testified that the victim's manner of death was inconsistent with suicide.

The defendant's position at trial was that the victim's death was the result of either an accident or suicide. The defendant further argued that the victim was aware of the defendant's deceits, in order to rebut the Commonwealth's theory of motive, namely, that the defendant killed the victim so she would not discover his web of lies. The primary evidence offered of the victim's knowledge of the defendant's lies was that she told some people her husband was at Harvard University to finish his bachelor's degree, and others that he was at Harvard Business School. The jury found the defendant guilty of murder in the first degree on a theory of deliberate premeditation. The defendant's appeal from his conviction is before us pursuant to G. L. c. 278, § 33E.

Discussion. 1. The laptop computer warrant. Prior to trial, the defendant brought a motion to suppress evidence obtained from the search of the laptop computer as well as an additional hard drive.[3] That motion was denied and information found during a search of the laptop computer was used at trial.

[3] For ease of reference we refer to both devices collectively as the "laptop computer."

The defendant renews his challenge to the search on three grounds: (1) the search warrant affidavit did not establish probable cause for the search; (2) the warrant failed to describe the items to be seized with sufficient particularity; and (3) the search was conducted in an unreasonable manner.[4] We conclude that the affidavit in this case established probable cause to search the laptop computer for evidence relating to the victim's death, the warrant described the items to be searched with sufficient particularity, and the search was conducted reasonably.

a. Probable cause. The general principles governing our consideration of a claim that probable cause to support a search warrant is lacking are well known. "Under the Fourth Amendment [to the United States Constitution] and art. 14 [of the Massachusetts Declaration of Rights], a search warrant may issue only on a showing of probable cause." Commonwealth v. Anthony, 451 Mass. 59, 68 (2008). "The probable cause necessary to support the issuance of a search warrant does not require definitive proof of criminal activity." Id. at 69. The probable cause inquiry is limited to the "four corners of the affidavit," Commonwealth v. O'Day, 440 Mass. 296, 297 (2003), quoting Commonwealth v. Villella, 39 Mass. App. Ct. 426, 428

[4] The defendant does not squarely raise an argument on reasonableness grounds on appeal, but we analyze the issue nonetheless.

(1995), but a magistrate may also consider "[a]ll reasonable inferences which may be drawn from the information in the affidavit." Commonwealth v. Dorelas, 473 Mass. 496, 501 (2016), quoting Commonwealth v. Donahue, 430 Mass. 710, 712 (2000). In addition, "[a]n affidavit must contain enough information for an issuing magistrate to determine 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." Commonwealth v. McDermott, 448 Mass. 750, 767, cert. denied, 552 U.S. 910 (2007), quoting Commonwealth v. Cinelli, 389 Mass. 197, 213, cert. denied, 464 U.S. 860 (1983). Search warrants should not be "subjected to hypercritical analysis," but rather should be "interpreted in a realistic and commonsense manner." Anthony, supra at 69, quoting Donahue, supra. "Importantly, '[w]e give considerable deference to a magistrate's determination of probable cause.'" Dorelas, supra, quoting McDermott, supra.

The defendant's probable cause argument focuses on a supposed insufficient nexus between the suspected criminal activity (murder) and the items sought (the laptop computer).[5]

[5] The defendant also argues that the judge used the wrong test to evaluate probable cause. The defendant is correct that, in addition to the traditional probable cause rubric, the judge employed the Aguilar-Spinelli test, which is typically used to determine probable cause when an unnamed informant is involved. See generally Spinelli v. United States, 393 U.S. 410 (1969);

We disagree.

Nexus between the crime and the items sought "may be found in 'the type of crime, the nature of the . . . items [sought], the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide [items of the sort sought].'" Anthony, 451 Mass. at 70, quoting Cinelli, 389 Mass. at 213.

Here, the affidavit drew sufficient nexus between the suspected criminal activity and the items sought by the warrant. First, the affidavit established the defendant's sophistication with computers by noting he had been employed as a Web designer. The affidavit also established that the defendant had forged contracts and documents from Harvard Business School, based on the affiant's conversation with the defendant's former boss. One could reasonably infer that he created these forgeries by using a computer. See Donahue, 430 Mass. at 712. Second, these forgeries relate specifically to the motive alleged in the affidavit: that the defendant had been lying to his wife about his accomplishments and their finances and killed her to prevent her from finding out about these deceits and to obtain her life insurance benefits. Third, the affidavit specified that the

---

Aguilar v. Texas, 378 U.S. 108 (1964). See also Commonwealth v. Upton, 394 Mass. 363, 374-375 (1985). That the judge added an additional -- albeit unnecessary -- layer of analysis to her nearly 120-page ruling on the defendant's motion to suppress does not undermine her resolution of the probable cause issue.

victim had died from EG poisoning, which the affiant noted, based on his nearly twenty years of investigatory experience, would likely have involved research that a computer savvy person like the defendant would have conducted online in 2004. Accordingly, the connection between the search of the computer and the suspected criminal activity was sufficient. Contrast Commonwealth v. White, 475 Mass. 583, 591-592 (2016) (no nexus between criminal activity of armed robbery and shooting suspect's cellular telephone where only connection made in affidavit was affiant's assertion, based on his experience, "that, given the type of crime under investigation, the device likely would contain evidence").

b. Particularity. Under the Fourth Amendment, warrants must "particularly describ[e] the place to be searched, and the persons or things to be seized." Article 14 requires warrants to be "accompanied with a special designation of the persons or objects of search, arrest, or seizure." This particularity requirement "both defines and limits the scope of the search and seizure, thereby protecting individuals from general searches, which was the vice of the pre-Revolution writs of assistance." Preventive Med. Assocs., Inc. v. Commonwealth, 465 Mass. 810, 830 (2013), quoting Commonwealth v. Balicki, 436 Mass. 1, 8 (2002). Searches of the "many files" on electronic devices, such as computers and smart cellular telephones, "must be done

with special care and satisfy a more narrow and demanding standard" than searches conducted in the physical world. Dorelas, 473 Mass. at 502.

The defendant claims that the warrant for the laptop computer lacked particularity in general, and also was an impermissible general warrant because it contained a typographical error and lacked an articulated search protocol. We disagree.

The warrant adequately described the items to be searched with sufficient particularity. The scope of the search authorized by the warrant included electronic files on the laptop computer related to the health or death of the victim; other prominent poisoning cases; EG or other poisons; and the financial records, life insurance plans, and wills of the victim and the defendant. As discussed supra, the affidavit accompanying the warrant established probable cause to search for evidence on the laptop computer relating to the defendant's role in his wife's death. These categories of evidence were related to the means of committing the crime and the motive of the defendant, and provided sufficient guidance to the examiners so that they were not on a fishing expedition. See McDermott, 448 Mass. at 770.

The typographical error in the affidavit identified by the defendant does not change our conclusion about the affidavit's

adequate particularity. As written, the affidavit requested the authority to search the laptop computer for Internet-activity-related "computer files of the type described in Paragraph 2 of this affidavit." Paragraph 2 simply described the items to be searched (i.e., the laptop computer). It was obvious that this incongruous and nonsensical cross reference was the result of a typographical error, and any reasonable magistrate would have recognized that fact. "[M]inisterial errors do not nullify search warrants." Commonwealth v. Ocasio, 434 Mass. 1, 4 (2001), quoting Commonwealth v. Pellegrini, 405 Mass. 86, 88, cert. denied, 493 U.S. 975 (1989).[6]

Nor does the absence of search protocols mean the warrant lacked particularity for purposes of the Fourth Amendment and art. 14. This court has specifically declined to require search protocols in the past. McDermott, 448 Mass. at 776 ("Advance approval for the particular methods to be used in the forensic examination of the computers and disks is not necessary"). However, the proliferation of technology over the ten years since we decided McDermott and the eleven years since the search

[6] The obviousness that this was a typographical error was confirmed by the affiant's testimony that instead of referring to the paragraph describing the items to be searched, the cross reference should have been to paragraphs pertaining to the victim's health, EG, and financial records. The motion judge credited this testimony, and also credited the affiant's testimony that the search was actually conducted in accordance with the correct parameters.

warrant in this case was executed has heightened the concern regarding searches of electronic devices. See Riley v. California, 134 S. Ct. 2473, 2489-2490 (2014). We recognized this concern in Dorelas, 473 Mass. at 502 ("more narrow and demanding standard" required for searches of electronic devices). We have further expressed concern about the lack of formal guidelines in the Commonwealth for executing search warrants for digital evidence, Commonwealth v. Molina, 476 Mass. 388, 398-399 (2017), but noted that the Attorney General's existing digital evidence guide is helpful.[7] If the Commonwealth were to offer such guidelines in its warrant applications, it would certainly help address particularization and reasonableness concerns. Cf. Kerr, Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data, 48 Tex. Tech. L. Rev. 1, 18 (2015) ("The best way to minimize the unwarranted intrusions upon privacy for computer searches is to impose use restrictions on the nonresponsive data revealed in the course of the search"). While recognizing that the searches of electronic devices present major constitutional hazards, see Riley, supra, in the context of this case, where the search was conducted reasonably

[7] See Office of the Attorney General, Massachusetts Digital Evidence Guide (June 9, 2015), http://www.mass.gov/ago/docs/cybercrime/ma-digital-evidence-guide.pdf [https://perma.cc/WN9C-NJNY].

(see discussion infra), and took place more than a decade ago in an entirely different technological landscape, we do not conclude that the laptop computer warrant lacked particularity because it did not include ex ante search protocols. See Molina, supra at 397; McDermott, supra.

c. Reasonableness. Although not squarely raised in the defendant's brief, we conclude that the search was conducted reasonably. The manner of the execution of a search warrant must "satisfy the 'ultimate touchstone' of reasonableness." Molina, 476 Mass. at 397, citing Commonwealth v. Entwistle, 463 Mass. 205, 213 (2012), cert. denied, 568 U.S. 1129 (2013). Here, the examiners used a list of fifty search terms that was supplemented along the way by nineteen additional terms. While these search terms were not part of the warrant application, they are squarely related to the categories of evidence that were articulated in the affidavit.[8] Lastly, the examiner only looked closely at approximately 325 files of the nearly 400,000 found on the laptop computer. We are satisfied that the search was conducted in a reasonable manner.

In sum, the warrant authorizing the search of the laptop computer adequately established probable cause, was sufficiently particularized, and was executed reasonably.

[8] As an example, the search terms included murder, death benefit, antifreeze, and widower, along with a number of names of potential poisons.

2. Motions in limine. Prior to trial, the defendant filed several motions in limine arguing that certain evidence should be excluded from trial. On appeal, the defendant argues that the judge abused her discretion in denying the motions relating to the following evidence, which was admitted at trial: (a) the defendant's use of the computer username "Kaiser Soze"; (b) certain prior bad acts of the defendant; (c) the victim's statements and e-mail messages; and (d) incriminating searches performed on the laptop computer using the search engine Google (Google searches).

"Whether evidence is relevant and whether its probative value is substantially outweighed by its prejudicial effect are matters entrusted to the trial judge's broad discretion and are not disturbed absent palpable error." Commonwealth v. Sylvia, 456 Mass. 182, 192 (2010), quoting Commonwealth v. Simpson, 434 Mass. 570, 578-579 (2001).[9] An abuse of discretion occurs only where the judge makes "'a clear error of judgment in weighing' the factors relevant to the decision . . . , such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

a. "Kaiser Soze". At trial, the judge permitted the

[9] Prior bad act "evidence is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk." Commonwealth v. Crayton, 470 Mass. 228, 249 n.27 (2014).

Commonwealth to introduce evidence of the defendant's use of the username "Kaiser Soze" on the laptop computer to show the defendant's possession, custody, and control of the device. Kaiser Soze is a fictional character from the 1995 crime film, "The Usual Suspects," who is a criminal mastermind and supposedly murdered his wife and some of his children rather than allow them to be kidnapped. The Usual Suspects (Metro-Goldwyn-Mayer Studios Inc. 1995).

The defendant argues that the decision to allow evidence of this name was an abuse of the judge's discretion because the name was unduly prejudicial and there was other, less inflammatory evidence showing the defendant's use of the laptop computer.[10]

The judge did not abuse her discretion in allowing the "Kaiser Soze" evidence to be admitted at trial for the limited purpose of showing the defendant's possession, custody, and control of the laptop computer. Although there may have been

[10] The defendant also argues that the judge abused her discretion in admitting the "Kaiser Soze" evidence because she was not familiar with the motion picture and instead relied on her law clerks' and the prosecutor's descriptions of the character. The defendant does not argue, however, that the prosecutor's description of the character to the judge during the motion hearing was inaccurate in any way. Indeed, the defendant quotes this description in his brief to explain his theory of prejudice related to the use of the "Kaiser Soze" name. Not watching the motion picture, and instead relying on an undisputed description of the Kaiser Soze character, was not an abuse of discretion.

other ways to show the use and control of the computer, it was the defendant who chose to use the name of a fictional criminal mastermind as his username. Further, the evidence did not focus on who Kaiser Soze was, or what that name meant. Instead, the only "Kaiser Soze" evidence admitted was that the name was used as the name of a wireless network on the defendant's work computer when he returned to Missouri following the victim's death, and that the name was a username on the laptop computer, under which a number of incriminating Google searches were performed. In addition, the judge instructed the jury that the "Kaiser Soze" evidence was "admitted solely on the issue of the use and control of the computers." The judge also repeated a version of this instruction after telling the jury that those familiar with the character Kaiser Soze could not describe the character to those unfamiliar with the film in response to a question from the jury. "We presume that a jury understand and follow limiting instructions." See Donahue, 430 Mass. at 718.

b. Prior bad acts. At trial, the Commonwealth was allowed to present two instances of the defendant's prior misconduct to show his state of mind, motive, and intent, as well as give context to the victim's death. These two prior bad acts involved the fraud and embezzlement that resulted in his termination from his employment and his forgery of documents and misrepresentations regarding his alleged admission to Harvard

Business School.

"Evidence of prior bad acts is not admissible to show a defendant's bad character or propensity to commit the charged crime, but may be admissible if relevant for other purposes such as common scheme, pattern of operation, identity, intent, or motive." Commonwealth v. Oberle, 476 Mass. 539, 550 (2017), citing Commonwealth v. Carriere, 470 Mass. 1, 16 (2014). Such evidence may also be used if relevant to the defendant's state of mind. Commonwealth v. Gonzalez, 469 Mass. 410, 420 (2014). The judge must find that the probative value of the evidence outweighs any undue prejudice to the defendant. See Crayton, 470 Mass. at 249 n.27. "To be sufficiently probative the evidence must be connected with the facts of the case [and] not be too remote in time." Commonwealth v. Butler, 445 Mass. 568, 574 (2005), quoting Commonwealth v. Barrett, 418 Mass. 788, 794 (1994). Further, prior bad acts may be admissible if they are "inextricably intertwined with the description of events . . . of the killing." Commonwealth v. Marrero, 427 Mass. 65, 67 (1998), quoting Commonwealth v. Bradshaw, 385 Mass. 244, 269 (1982).

The defendant argues that these acts should not have been admitted because "there was no nexus between the lies and the murder" and that they were too remote in time from the murder.

The Commonwealth's theory of the case was that there was a

clear connection between the lies and the murder. The Commonwealth theorized that the defendant killed his wife to reap the financial benefit of the victim's life insurance policy and to conceal their dire financial status. Under this theory, the lies that caused the defendant to lose his job -- and thus put him and the victim on the edge of financial ruin -- went directly to the defendant's motive, intent, and state of mind. The prior acts were also not too remote in time. Some of the lies occurred in 2002 and 2003, but they were directly connected to the reason the defendant was fired from his job weeks before the victim's death.

The judge did not abuse her discretion in determining that the danger of undue prejudice from these prior acts did not outweigh their probative value. Moreover, the judge specifically instructed the jury that they were not permitted to use these past events to decide that the defendant had a "criminal personality,"[11] and the jury are presumed to have

[11] The defendant argues that by referring specifically to "Harvard Business School" and the name of his employer in the final jury instruction, the judge impermissibly drew the jury's attention to the prior bad acts. The defendant objected to this following the instructions, and the judge stated that she felt the instruction "would not have been intelligible to [the jury]" without referring to the two institutions. The judge did not speak about specific conduct in her charge and instead referred to "certain conduct and acts of the defendant pertaining to the Harvard Business School [and his employer]." This instruction was proper. "A judge may state the evidence and discuss possible inferences to be drawn therefrom." Commonwealth v.

followed the judge's instruction. Donahue, 430 Mass. at 718.

c. Victim's statements and Internet browsing history. The defendant argues that the admission of certain statements of the victim contained in e-mail messages, as well as the admission of the victim's Internet browsing history shortly before her death, was improper. The defendant objected to the admission of this evidence at trial, so we review for prejudicial error. Commonwealth v. Cruz, 445 Mass. 589, 591 (2005).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement. See Mass. G. Evid. § 801(c)(2) (2017). If a statement is offered for any purpose other than for its truth, it is not hearsay. See P.C. Giannelli, Understanding Evidence 446 (4th ed. 2013). When determining whether a statement is offered for its truth, one must ask, "How is this statement relevant to the case?"

The evidence in question, which will be outlined below, was introduced for two purposes: (1) to show that the victim's state of mind was inconsistent with suicide; and (2) to evaluate the defendant's motive and state of mind. The judge instructed the jury that they were to use the victim's statements -- other than those given to health care providers -- for these limited purposes.

i. Victim's state of mind inconsistent with suicide. At

Perez, 390 Mass. 308, 319 (1983).

trial, the Commonwealth introduced evidence to show that the victim's state of mind was inconsistent with suicide. This evidence included the following: a spreadsheet found on the victim's laptop computer, last accessed on September 1, 2004, that listed questions relating to kidney disease and pregnancy options; the victim's Internet browsing history from September 4, which showed that she was researching her illness and also visiting Web sites related to her doll-making hobby; and e-mail messages from the victim to friends and acquaintances sent over the course of the week leading up to her final hospitalization on September 4 in which she used phrases that showed that she had (or attempted to have) a positive outlook on her failing health.[12] Because we conclude that these statements were properly admitted to show that the victim's state of mind was inconsistent with suicide, we do not reach the question of prejudice.

"A murder victim's state of mind becomes a material issue if the defendant opens the door by claiming that the death was a suicide . . . ." Commonwealth v. Magraw, 426 Mass. 589, 594 (1998). The defendant argued in both his opening and closing statements that the victim may have ingested EG in an attempt to commit suicide, and thus opened the door to the admission of the

[12] For example, the victim used the phrase "knock on wood" when she stated that the medication she was on was making her feel better.

victim's statements and Internet browsing history to show the victim's state of mind. See Commonwealth v. Silanskas, 433 Mass. 678, 697-698 (2001). The victim's e-mail messages and searches on the Internet were not offered to prove the truth of the matters contained in these statements. Rather, the statements were admissible to refute the defendant's theory that the victim committed suicide.

The victim's e-mail messages, spreadsheet, and Internet browsing history "tended to disprove a suicide," id. at 698, as they could be understood to indicate that the victim was seeking a diagnosis and treatment for her condition, and engaged in activity that brought her pleasure, rather than trying to die.[13] The judge did not abuse her discretion in admitting the victim's statements, not for their truth, but for the purpose of showing that her state of mind was inconsistent with suicide.

ii. Evaluating the defendant's motive and state of mind. On appeal, the defendant argues that three of the victim's statements contained in e-mail messages were improperly introduced to show the defendant's motive and state of mind. These statements are: a January 20, 2004, message from the victim to the defendant that indicates she was unaware of his

[13] The Commonwealth also presented direct evidence on the victim's state of mind in the form of testimony from two of her friends to the effect that the victim was happy and ready to battle her illness.

embezzlement from his employer; a September 3, 2004, message from the victim to an acquaintance where the victim describes the defendant as a "wonderful person" who was going to school and working full time; and a September 1, 2004, message from the victim to a friend that contained a statement of the victim that the defendant "keeps wanting me to drink Gatorade."[14]

Out-of-court statements may be introduced to understand the defendant's motive by showing another's state of mind, including friendliness and knowledge, if such issues are material. See Commonwealth v. Caldron, 383 Mass. 86, 91 (1981). A murder victim's state of mind may be material to the defendant's motive, "but only if the defendant knew of the victim's state of mind and, most importantly, 'would be likely to respond to it.'" Magraw, 426 Mass. at 594, quoting Commonwealth v. Qualls, 425 Mass. 163, 167 (1997).

Here, the judge stated in her final charge to the jury that one of the limited uses of the victim's statements was to "evaluat[e] the defendant's motive." We conclude, however, that if this was error, it was not prejudicial. The bulk of the

[14] This statement was cumulative of other evidence: the victim's mother recalled seeing a bottle of Gatorade in the victim and defendant's refrigerator and, more importantly, the victim's friend testified that during a telephone conversation with the victim in August, 2004, the defendant yelled to her in the background, "Tell Julie to drink her Gatorade," in an apparent attempt to get the friend to convince the victim to drink Gatorade. Further, the evidence of the defendant's guilt was overwhelming.

complained-of statements were admitted in evidence for another permissible purpose (i.e., to show that the victim's state of mind was inconsistent with suicide), and their innocuous nature makes it unlikely that they would (or could) have been used improperly by the jury. Contrast Magraw, 426 Mass. at 596-597 (error to allow testimony that murder victim, who was defendant's wife, said that she feared she would be found dead in manner that made her death appear to be accident).

d. Google searches on the laptop computer. The defendant argues, as he did in a motion in limine and at trial, that the judge improperly admitted evidence of a number of Google searches conducted on the laptop computer, because there was no concrete testimony about who conducted the searches and, thus, their probative value was substantially outweighed by the danger of unfair prejudice.

The complained-of searches occurred prior to the victim's death and involved searches on poisons in general and also one for "antifreeze death human." This latter search occurred on August 18, 2004. There was no evidence offered on who conducted these searches as they all occurred under the username "JKeown," which could stand for either Julie or James Keown, and was another username on the laptop computer, aside from "Kaiser Soze."

The judge did not abuse her discretion in admitting

evidence of the Google searches that occurred on the laptop computer prior to the victim's death. Evidence was presented that the victim only used laptop computers provided by her employer, and the defendant took the laptop computer with him when he returned to Missouri while leaving a number of other computers and possessions behind. Although there was no direct evidence that the defendant conducted the incriminating searches, a jury could reasonably infer that it was the defendant who conducted the searches. See Commonwealth v. Purdy, 459 Mass. 442, 451 (2011); Commonwealth v. Vera, 88 Mass. App. Ct. 313, 317 n.3 (2015). See also Mass. G. Evid. §§ 104(b), 901(b)(4). The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

3. Closing argument. The defendant argues that the Commonwealth's closing argument was improper because the argument (a) used the victim's statements for their truth and (b) incorrectly attributed one of the incriminating searches on the laptop computer to the "Kaiser Soze" username. The defendant raises these arguments for the first time on appeal, so we review these claims to determine whether there was a substantial likelihood of a miscarriage of justice. Commonwealth v. Nardi, 452 Mass. 379, 394 (2008).

a. Victim's statements. During closing argument, the prosecutor made a number of references to statements contained

in the victim's e-mail messages sent in the days before she slipped into a coma. The statements used by the prosecutor pertained to the victim's research of her medical condition, and her expressions of hope to friends and acquaintances. At trial, evidence of the victim's statements was admitted for a permissible purpose. See part 2.c, supra. See also Magraw, 426 Mass. at 594. The prosecutor was plainly not reciting these statements for their truth, but rather to show that the victim's state of mind was inconsistent with suicide -- the very purpose for which the statements were admitted. The prosecutor may argue for a conviction based on the evidence. Commonwealth v. Kozec, 399 Mass. 514, 516 (1987). There was no error.

b. Reference to "Kaiser Soze" username. During his closing, the prosecutor referred to the "Kaiser Soze" username on the laptop computer five times over the course of two transcript pages. These references incorrectly attributed a search for "ethylene glycol death human" that occurred on August 18 to the "Kaiser Soze" username. Prosecutors may not "misstate the evidence or refer to facts not in evidence." Kozec, 399 Mass. at 516. "However, '[r]emarks made during closing arguments are considered in the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury.'" Commonwealth v. Walters, 472 Mass. 680, 703 (2015), quoting Commonwealth v. Gonzalez, 465 Mass. 672, 680 (2013).

There were two errors regarding this reference. First, the search was actually for "antifreeze death human." The jury, however, had been educated that EG was commonly found in antifreeze. This minor misstatement did not cause a substantial likelihood of a miscarriage of justice. See Commonwealth v. DaSilva, 471 Mass. 71, 83 (2015) (error in misstating timing by one minute did not result in substantial likelihood of miscarriage of justice).

Second, there was no evidence under which username this search occurred. The prosecutor's statement attributing the search to the "Kaiser Soze" username was improper. The prosecutor's statement, however, was directing the jury to draw the fair inference that the search was conducted by the defendant. See Commonwealth v. Francis, 450 Mass. 132, 142 (2007). The statement did not attempt to use the "Kaiser Soze" username for an impermissible purpose. The jury were instructed by the judge several times regarding the permitted use of the "Kaiser Soze" username, and were further instructed "both before and after closing arguments that the arguments of counsel are not evidence, and that, if either party referred to facts not in evidence during closing, the jury should disregard them." Walters, 472 Mass. at 703. The jury are presumed to have followed the judge's instructions. See Donahue, 430 Mass. at 718. The prosecutor's misstatement was not so great that it

created a substantial likelihood of a miscarriage of justice. See Walters, supra.

4. Jury instruction. The defendant argues that the judge's instruction to the jury, permitting them to infer an intent to kill based on the use of poison, impermissibly lowered the Commonwealth's burden of proof in violation of his due process rights. The defendant objected to the jury instruction at trial, so we review for prejudicial error. Cruz, 445 Mass. at 591.

Specifically, the defendant claims that the jury should not have been permitted to infer an intent to kill from the use of EG because it is not "dangerous per se." Contrasting the use of EG with the use of a weapon that is dangerous per se (e.g., a firearm), the defendant claims that the judge's instruction allowed the jury to infer an intent to kill even though the use of EG against another more readily equates to an "intent to harm." We disagree.

We have held that certain weapons, such as firearms and daggers, are dangerous per se for purposes of G. L. c. 265, § 15A (assault and battery by means of dangerous weapon). See Commonwealth v. Appleby, 380 Mass. 296, 303 (1980). Weapons are dangerous per se when they are "designed for the offense or defense of persons." Id. Other items that are not dangerous weapons per se may, however, qualify as dangerous weapons as

used. See id. at 304, and cases cited; Commonwealth v. Farrell, 322 Mass. 606, 615 (1948). See Commonwealth v. Lord, 55 Mass. App. Ct. 265, 269 n.7 (2002) ("The degree of bodily harm that a weapon must be capable of inflicting is the same, whether the weapon is inherently dangerous or dangerous as used. The primary difference between weapons in these two categories is in their design and purpose"). Whether an item is dangerous as used is a question for the jury. See Appleby, supra at 305; Farrell, supra.

The "jury are permitted to infer malice from the use of a dangerous weapon," Commonwealth v. Guy, 441 Mass. 96, 107 (2004), "even in connection with first prong ('intent to kill') malice." Commonwealth v. Perez, 444 Mass. 143, 153 (2005), citing Guy, supra. This is so even when the jury are instructed that a dangerous weapon is an item that is capable of causing serious injury (in addition to death) because it is a reasonable inference that one who attacks another with an item that is capable of causing serious injury intends to kill that person. See Perez, supra (malice may be inferred from use of dangerous weapon). See also Commonwealth v. Albert, 391 Mass. 853, 860-861 (1984) ("Certainly, the jury were entitled to infer malice from the intentional use of a deadly weapon, so long as the judge's instructions did not compel them to do so"). Here, the judge's instruction properly instructed the jury on the use of

dangerous weapons. There was no error.

Conclusion. We have reviewed the entire record on both the law and the facts pursuant to our obligation under G. L. c. 278, § 33E. We conclude that the defendant is not entitled to relief, as the interests of justice do not require the entry of a verdict of a lesser degree of guilt or a new trial.

Judgment affirmed.