SJC-10339

COMMONWEALTH vs. JOSEPH FACELLA.

Essex. May 5, 2017. - November 21, 2017.

Present: Gants, C.J., Lenk, Hines, Gaziano, & Cypher, JJ.[1]

Homicide. Evidence, Rebuttal, Prior misconduct, Hearsay, Expert opinion. Practice, Criminal, Instructions to jury, New trial, Assistance of counsel, Hearsay, Argument by counsel, Capital case. Constitutional Law, Assistance of counsel. Due Process of Law, Assistance of counsel.

Indictment found and returned in the Superior Court Department on May 15, 2002.

The case was tried before David A. Lowy, J.

Brian J. Kelly for the defendant.
Catherine Langevin Semel, Assistant District Attorney, for the Commonwealth.

CYPHER, J. A jury convicted the defendant, Joseph Facella, of murder in the first degree on a theory of extreme atrocity and cruelty for beating his girl friend, Annette Soares, to

[1] Justice Hines participated in the deliberation on this case prior to her retirement.

death in 2002.[2] At trial, his defense was that an antiviral drug he was taking at the time of the killing rendered him unable to appreciate the wrongfulness of his conduct or to conform his behavior to the requirements of the law. To rebut this defense, the Commonwealth presented evidence that the defendant, before ever taking the drug, had beaten and threatened to kill two other women with whom he was romantically involved between 1978 and 1989.

The defendant makes four arguments on appeal: (1) the trial judge erred by admitting evidence in the Commonwealth's case-in-chief of the defendant's previous incarceration; (2) the trial judge erred by giving untimely limiting instructions regarding prior bad act evidence admitted in the Commonwealth's case-in-chief;[3] (3) the trial judge erred by admitting evidence of the defendant's prior bad acts in the Commonwealth's rebuttal case; and (4) this court should exercise its power under G. L. c. 278, § 33E (§ 33E), to reduce the verdict or order a new trial. Following oral argument, the defendant also filed a

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[2] The trial occurred in December 2005. The defendant received the mandatory life sentence, and filed a timely notice of appeal. The appeal was entered in this court in December, 2008. After a series of procedural delays, we heard argument in May, 2017.

[3] The defendant also initially disputed the substance of a limiting instruction that appeared to tell the jury that it "should credit" certain testimony. However, at oral argument, the defendant conceded that a corrected version of the transcript rendered this argument moot.

motion for a new trial claiming ineffective assistance of counsel.

After careful consideration of the defendant's arguments on appeal and in his motion for a new trial, we affirm the judgment of conviction, deny the defendant's motion for a new trial, and decline to exercise our power under § 33E.

Background. We begin by discussing the facts presented in the Commonwealth's case-in-chief as the jury could have found them. We then discuss the defense case. We reserve other facts, including the evidence admitted in the Commonwealth's rebuttal case, for later discussion.

1. Commonwealth's case-in-chief. a. Emergency room. At around 9:30 P.M. on April 25, 2002, the defendant walked into the emergency room at the Merrimack Valley Hospital. He told the triage nurse that he had "somebody" who "wasn't breathing" in the back seat of his motor vehicle. Emergency room personnel immediately went outside and observed the victim lying face down and "wedged down tight" between the front and back seats of the vehicle. The victim was topless, had no pulse, and was "very badly bruised . . . [a]ll over her body."

Once the victim was removed from the car and brought inside the hospital, it became apparent that she had severe blunt force trauma to her face and head. The swelling was so extreme that the victim's head was swollen to "twice or three times the

normal size" and her facial features were impossible to discern. A medical team immediately began resuscitation efforts.

When hospital personnel asked the defendant what happened, he initially said that he had found the victim outside in that condition and that Billerica police were responsible. The defendant repeatedly interrupted the resuscitation efforts to ask whether the victim would be alright. A triage nurse testified that the defendant smelled of alcohol and appeared to be under the influence of alcohol, but not extremely so.

Within one hour, the victim's pulse was restored, but she was breathing only with the assistance of a ventilator. However, testing showed that the victim had suffered serious brain injuries and had blood in her brain, so doctors decided to transfer her to a hospital in Boston for further treatment.

b. Police interviews. Before the victim was transferred to Boston, Haverhill police arrived and spoke with the defendant about what happened. He first told one detective that he had not seen the victim for at least three days beforehand, but that he thought she might have disappeared on a drinking binge. The defendant said the victim had driven herself home, and then "came staggering into" the condominium they shared at around 8:30 P.M. looking like she had been beaten up. He said he helped her to the couch, then realized later that she was not breathing, so he drove her to the hospital.

The defendant then told police that he had found the victim "wandering around the back yard in this condition." He said he helped her inside, laid her on the couch, and noticed a couple of hours later that she was not breathing. The defendant told police a third version of events, in which the victim arrived home "beat up" and "drunk," at which point they had a conversation in the living room before she passed out on the floor. Throughout the initial conversations with police, the defendant paced around the room, acted "very nervous," and frequently asked how the victim was and what was going to happen to him.

At the hospital, police noticed that the defendant's hands and knuckles were swollen. Police also noticed red marks on his knuckles, and dried blood on his ear, chest, shoulder, and arm. At that point, police advised the defendant of his Miranda rights, but he was not placed under arrest.

The defendant subsequently followed police to the Haverhill police station, where he was interviewed for approximately sixty to ninety minutes. The defendant agreed to speak with police, but refused to sign an advice of rights form. His statements during the interview were essentially cumulative of other versions of events he had already told police. The defendant denied having hit the victim.

After the interview, police and the defendant spoke with the Boston hospital and learned that the victim had been pronounced dead. The defendant was arrested.

c. Autopsy. The medical examiner testified to the numerous injuries that he observed during the autopsy. In particular, the victim's head injuries included: a four-inch contusion on the back of the head, bruising in the deep layers of the scalp, a hemorrhage underneath the scalp, a scrape or abrasion near the right eye, a contusion extending from the right eyelid onto the right side of the forehead, a two and one half inch contusion on the chin, a scrape on the lower lip, swelling and discoloration on the left side of the forehead, a contusion to the left ear, and multiple bruises inside the mouth and underneath the lips.

The victim also suffered several wounds to other parts of her body, including: hemorrhages in the neck, collar bone, jaw, trachea, and larynx areas; eight or more bruise sites on the back; contusions to the buttocks and thigh areas; and various bruising or contusions to the arms, hands, legs, and feet. Some of these were consistent with defensive injuries.

The medical examiner opined that the victim suffered multiple blunt force injuries to the head, and three or more separate impacts to the neck. He concluded that she died from

brain hemorrhaging, which caused brain swelling, resulting in respiratory or cardiac arrest.

d. Other physical evidence. Police observed injuries to the defendant as well. They noted a scratch or abrasion beneath his tailbone, red marks and bruises on his arms and hands, a cut on his finger, along with bruising and other marks on his legs. Police also observed reddish-brown staining on the defendant's ear, left shoulder, and buttocks which later tested positive for blood.

Additionally, police tested clothing, surfaces, and other items inside the condominium for the presence of blood. Some facial tissues recovered from the fireplace, a stained men's gray shirt, discovered in a hamper, and the defendant's sneakers all tested positive for blood. Among the surfaces that tested positive for blood were the kitchen floor, the kitchen sink, the carpet leading to and inside the living room, a second-floor wall, the master bedroom, and a second-floor office area. A State police criminalistics expert testified about spatter and transfer blood stains observed on the defendant's blue jeans, as well as on the gray shirt and a tan jacket recovered from the condominium.

e. The day before the beating. On April 24, 2002, the day before her death, the victim went to dinner at a Chinese restaurant with a friend and co-worker, Dawn Michelle Rippetoe.

The victim planned to spend the night at Rippetoe's house. Over the course of the evening, the women consumed several alcoholic drinks. The victim was also taking prescription medication for migraine headaches.

After dinner, Rippetoe drove herself and the victim home in the victim's motor vehicle, but the vehicle ran out of gas a few hundred yards from Rippetoe's home. The women walked the rest of the way and arrived at Rippetoe's home around 11:15 P.M. The victim was "having a little difficulty walking" but Rippetoe said she was not "heavily intoxicated." Rippetoe then went to sleep. Shortly thereafter, the victim apparently left, but Rippetoe did not discover this fact until she woke up around 5:30 A.M. the next morning.[4]

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[4] Dawn Michelle Rippetoe also testified that she first met the defendant a few months before the victim was killed, when she stayed the night at the victim's condominium in January, 2002. After going out for dinner and drinks, Rippetoe and the victim returned to the condominium sometime after 11 P.M. and went to sleep.

Rippetoe was awoken the next morning by an argument between the victim and the defendant. She heard the defendant threaten the victim, telling her that if Rippetoe had not been present, he would have killed the victim. When Rippetoe interrupted, the defendant ran upstairs.

The defendant came back downstairs, introduced himself to Rippetoe, and said he had behaved the way he did because he was taking interferon to treat his hepatitis C. He told her that "he had done his research on interferon" and that he could have "gotten away with" killing the victim because "he could use [interferon] as an excuse for killing her."

At around 11:30 P.M. that evening, Billerica police were dispatched to the area of Farmers Lane in response to reports of a female wandering around in the woods, making noises. The woman, later identified as the victim, appeared intoxicated and was having trouble speaking and walking. Police placed her in protective custody. After transporting the victim back to the police station, she became belligerent and refused to answer booking questions.

f. The day of the beating. The victim was released from protective custody the next morning between 8 and 8:30 A.M. Shortly after, Billerica officers responded to a call from a local Ford dealership. The defendant had arrived at the dealership seeking assistance to change a flat tire, but an employee called police after smelling alcohol on the defendant's breath and observing him drink from a fifth of vodka. An officer who responded to the call observed that the defendant was unsteady on his feet and smelled of alcohol. After determining that the defendant was intoxicated, police placed him into protective custody. On the ride back to the police

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Rippetoe also testified to telephone conversations between the defendant and the victim that Rippetoe overheard while working with the victim between January and April, 2002. Rippetoe described the defendant as "[v]ery aggressive, yelling, swearing and threatening to hurt [the victim]." Rippetoe described seeing the victim, at several points during this time span, with bruises on her forearms and a black eye that she attempted to hide with sunglasses.

station, the defendant -- unprompted by the officer -- said, "How would you feel if your wife didn't come home last night?"

At around 10 A.M., the victim learned that the defendant was in protective custody. She requested that officers ask the defendant whether he would give her money and keys so she could get her car out of the impound. The defendant agreed to provide $120 and the car key, but not a house key.

At around 1 P.M., the victim returned to Rippetoe's home. The victim was crying, wearing mud-stained clothes, and appeared to be "in disarray." Rippetoe offered her a cup of tea and a change of clothes, at which point she observed several bruises on the victim's back and arms.

The defendant was released from protective custody at approximately 3:20 P.M. When he learned that the victim had not come to pick him up, he became upset. Police attempted to calm him down as he left the station, and they gave him directions back to the Ford dealership.

Before 4 P.M., while still at Rippetoe's home, the victim telephoned the station to ask if the defendant had been released from custody yet. Police confirmed that he had been released. Between 4:15 and 4:30 P.M, the defendant arrived back at the Ford dealership, paid the bill for the tire change, and left in his car.

The victim left Rippetoe's home at approximately 5:30 P.M. Sometime before she left, she called the defendant from her cellular telephone, while in Rippetoe's presence. Rippetoe could hear the defendant "screaming, swearing, and threatening" the victim. In particular, she heard the defendant say, "I'm going to f-ing kill you. You got me in trouble with the police. I told you if you got me in trouble with the police I would kill you." The victim appeared "hysterical" and "very upset" before she left.

A neighbor whose condominium unit shares a wall with the unit in which the victim and the defendant lived, testified that, at around 5:30 P.M., she heard "some banging" from next door, which she said was unusual. The noise lasted around five or ten minutes; at first, the neighbor believed it may have been "banging pipes" related to a kitchen repair. She then heard two "definitely raised voices," one male and one female, but could not make out any specific words.

2. Defense case. The defendant's case was built around the claim that, at the time of the killing, he had been taking interferon to treat a hepatitis C infection. He presented testimony from two medical experts and three family members.

The first medical expert, a physician specializing in gastroenterology, described how interferon works to combat hepatitis C. He also described the known side-effects of

interferon, which include "mental and neurological side effects" such as depression, fatigue, lack of appetite, and -- most pertinent here -- irritability and aggression. The expert estimated that around one-third of interferon patients experience some degree of depression or mood alteration, while around five to ten per cent experience increased irritability.

The second medical expert, a psychiatrist and psychopharmacologist, described in more detail how interferon may disrupt normal serotonin functions in the brain, which in turn can result in mood changes, impulsivity, aggression, and difficulty modulating behavior. He estimated that somewhere between twenty-five and forty-five per cent of interferon patients may experience behavioral side effects from serotonin disruption, and that these effects may last for months after taking interferon. He opined that interferon may impair a person's capacity to, inter alia, weigh the pros and cons of his actions, refrain from committing certain acts, and form the intent to kill or injure.

Members of the defendant's family testified that he began taking interferon in the fall of 2001. They testified to various mood changes that they noticed following this treatment, including increased agitation, irritability, depression, and argumentativeness.

Although the focus of this testimony was the effect of interferon on the defendant in 2001 and 2002, there also was evidence in the form of medical records indicating the defendant had been treated with interferon for six months beginning around 1994 or 1995. The family members were not aware of this earlier treatment or were unsure whether they knew about it.

Discussion. 1. Evidence of defendant's prior incarceration. The defendant argues that the judge erred by admitting, in the Commonwealth's case-in-chief, evidence of his prior incarceration in the form of two letters that the defendant wrote to the victim while he was incarcerated. The first, from October, 1999, was essentially a love letter. In it, the defendant anticipated being "out for good," implored the victim to not "do anything to jeopardize my freedom once I am out," and encouraged her to save her money so they could travel. In the second, from June, 2000, the defendant accused the victim of being unfaithful to him and having "betrayed me in the most disgusting way possible" and having "destroyed me." He threatened that the victim "must pay to the same extreme as the wrong you've done to me." He also told the victim that she had "the arrogance of a pig" and warned her not to "blame what you did to yourself on the beating I gave you a year prior."

In general, evidence of a defendant's previous incarceration may be admitted if it is offered for a purpose

other than to show the defendant's criminal propensity or bad character, and if the probative value outweighs the risk of unfair prejudice. See Commonwealth v. Foxworth, 473 Mass. 149, 160 (2015). "[W]e afford trial judges great latitude and discretion" with respect to the probative-unfairly prejudicial analysis, and "we uphold a judge's decision in this area unless it is palpably wrong." Commonwealth v. Sicari, 434 Mass. 732, 752 (2001), cert. denied, 534 U.S. 1142 (2002).

The challenged letters were plainly relevant for the proffered purpose of "showing the nature of the entire relationship" between the defendant and the victim, and to support the Commonwealth's theory of motive or intent on the night of the killing. See Foxworth, 473 Mass. at 160-161 (evidence of prior prison sentence relevant to motive, and to show nature and history of relationship); Commonwealth v. Butler, 445 Mass. 568, 573-575 (2005) (discussing probative value of evidence that demonstrated hostile nature of relationship between defendant and victim). Moreover, we agree with the Commonwealth that the fact of the defendant's incarceration was inextricably intertwined with the contents of the letters. In other words, sanitizing the letters to remove any references to the defendant's incarceration would have rendered them virtually incomprehensible and thereby defeated their obvious probative value. Last, the judge forcefully

instructed the jury, immediately after the letters were read into the record, that they were not to consider the letters for any purpose other than to understand the defendant's motive or intent on the night in question, or to understand the relationship between the defendant and the victim. The judge did not err in concluding that the probative value of the letters outweighed the risk of unfair prejudice. See Foxworth, 473 Mass. at 160-161; Butler, 445 Mass. at 576.

2. Limiting instruction. Paula L. Capaldo, a friend and business partner of the victim, testified about a telephone call she received in November, 1997, at around 1 A.M. During the call, the victim was "hysterical" and "crying," and said that the defendant had been repeatedly beating her and she did not think he was going to stop until he killed her. The victim "begg[ed]" Capaldo for help. When Capaldo said she would call the police, the victim said, "Please don't call the police. I'll be dead by then. Please come help me."

Capaldo then called the defendant's brother, and they both traveled to the victim's condominium. When they arrived at around 1:30 A.M., Capaldo screamed for the victim, who appeared on a balcony and said, "He's coming to get me," and jumped off. Meanwhile, the defendant came out of the front door, and his brother pinned him down, telling Capaldo to "take [the victim] out of here right now." Capaldo later observed that the

victim's face was swollen and bloodied and she was bleeding from the eyes, nose, chin, and mouth.

The defendant argues that the judge erroneously failed to give a "contemporaneous" limiting instruction regarding Capaldo's prior bad act testimony. Apparently, the defendant takes issue with the fact that the judge gave a limiting instruction immediately following Capaldo's direct examination rather than in the middle of it, immediately following the specific portions of her testimony related to the defendant's prior bad acts. The timing of the limiting instruction was not erroneous.

In general, "a judge has discretion as to the timing of instructions." Commonwealth v. Carter, 475 Mass. 512, 526 (2016), citing Mass. R. Crim. P. 24 (b), 378 Mass. 895 (1979). The defendant is correct that this court has looked favorably on contemporaneous limiting instructions. See, e.g., Commonwealth v. Walker, 442 Mass. 185, 202 (2004) (prejudice "sufficiently ameliorated" by limiting instructions "given immediately after the testimony and repeated during the final instructions"). But he cites no case, and we are aware of none, that would require a trial judge to give a limiting instruction in the middle of a witness's testimony. Moreover, this is exactly the timing that the defendant, through counsel, requested. At the close of Capaldo's direct examination, the judge told the jury in no

uncertain terms that the prior bad acts referenced in Capaldo's testimony could be used only for a limited purpose. There was no error in the timing of this limiting instruction.

3. Rebuttal evidence of prior bad acts. The defendant argues that the judge erred in admitting prior bad act evidence in the Commonwealth's rebuttal case. The defendant argues that this evidence was irrelevant to prove intent, lacked a temporal and substantive nexus to the crime, and overwhelmed the Commonwealth's case-in-chief.

In rebuttal the Commonwealth presented two witnesses. The first, a former girl friend of the defendant, testified to the emotional and physical abuse she suffered during the course of their relationship, which spanned approximately 1978 to 1983. She described how the defendant inflicted upon her over a dozen black eyes, numerous bruises, and several cigarette burns on her hands, shoulder, and chest. She testified that the defendant would strike her in the face whenever the songs by a former boy friend, who was a musician, came on the radio, and related one incident where the defendant beat her with a long metal bar because she had turned down the heat too low in their apartment. She said, "It didn't really seem to matter what would spark [the defendant's] temper." She also testified that the defendant once threatened to kill her and, on another occasion, to "mess

up your face [so] bad that no one will ever want to look at you again."

The second rebuttal witness was a former assistant district attorney who handled the plea colloquy in a prosecution of the defendant in 1990. The witness authenticated a memorandum that he had prepared for the plea hearing, which the plea judge then read in open court, with the defendant objecting to or correcting certain facts with which he did not agree. A redacted version of the memorandum was read into the record. It described an incident in 1989 in which the defendant threatened to kill his former girl friend. The defendant kicked her while wearing cowboy boots, dragged her by her hair, whipped her with a bullwhip, burned her with a cigarette, and "beat her repeatedly until she was covered with blood."

As discussed above, evidence of prior bad acts "is not admissible to show a defendant's bad character or propensity to commit the charged crime." Commonwealth v. Dwyer, 448 Mass. 122, 128 (2006). However, it may be introduced, if relevant, for another purpose -- for example, to show "a common scheme, pattern of operation, absence of accident or mistake, identity, intent, or motive." See Commonwealth v. Gollman, 436 Mass. 111, 113-114 (2002), quoting Commonwealth v. Helfant, 398 Mass. 214, 224 (1986). If offered for such a purpose, the trial judge must exercise his or her discretion to determine whether the

potential undue prejudice from the evidence outweighs its probative value. See Gollman, supra at 114. The judge's "decision to admit such evidence will be upheld absent clear error." Commonwealth v. Oberle, 476 Mass. 539, 550 (2017), quoting Commonwealth v. Robidoux, 450 Mass. 144, 158–159 (2007).

It is important first to clarify the purpose for which the Commonwealth's rebuttal evidence was admitted. It was not, as various iterations of the defendant's argument suggest, admitted for propensity purposes, or to show a pattern of operation, or to show motive or intent in the usual sense. Instead, it was offered for the narrow purpose of rebutting the defendant's theory that interferon diminished his capacity in a legally significant way. See Butler, 445 Mass. at 575 (although not admissible to show pattern or course of conduct, to prove identity of defendant, or to prove intent, evidence was probative to demonstrate hostile nature of relationship between defendant and victim). As the trial judge here succinctly stated, "If the defendant's saying, 'I killed her because of [i]nterferon,' and [the rebuttal evidence shows that] he almost killed somebody else in a horrible incident when he wasn't on interferon, then it rebuts the defense."[5] Because the rebuttal

[5] We do not dispute the defendant's contention that certain comments in the record suggest that this theory of admissibility was intermixed with other propensity-like arguments in favor of admitting the rebuttal evidence. However, when read in their

evidence tended to disprove the defendant's theory of interferon's effects on him, it was relevant and admissible for that purpose. See Mass. G. Evid. § 401 (2017). See also Commonwealth v. Philbrook, 475 Mass. 20, 26–27 (2016) (defendant's mental state in days before shooting relevant to whether conduct was intentional, and not result of compulsive or illogical thoughts brought on by brain disease exacerbated by medications); Commonwealth v. Anestal, 463 Mass. 655, 665 (2012) (prior bad act evidence may be admissible to rebut defendant's contentions made in course of trial [quotations and citation omitted]).

It is within the context of this limited purpose that we must evaluate the defendant's arguments about the temporal and substantive nexus between the rebuttal evidence and the charged crime. With respect to the temporal nexus, the conduct described in the Commonwealth's rebuttal case occurred between approximately thirteen to twenty-four years prior to the charged crime. The defendant is correct that, typically, prior bad act evidence must share a relatively close temporal proximity to the charged crime. See, e.g., Butler, 445 Mass. at 573, 575 (approving admission of prior bad acts that occurred three years before charged crime, to show hostile nature of relationship

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entirety and in context, it is apparent that the evidence was admitted on a proper theory of admissibility.

between defendant and victim); Commonwealth v. Scott, 408 Mass. 811, 819 & n.8 (1990) (same, when prior bad acts occurred two and five days before victim was killed). On the other hand, even a very close temporal nexus does not necessarily render evidence of prior bad acts admissible. See, e.g., Commonwealth v. Anderson, 439 Mass. 1007, 1008 (2003) (passage of five months may render prior bad act "too remote to warrant admission"); Helfant, 398 Mass. at 228 n.13 ("time span of fifteen minutes may be too much").

In short, "[t]here is no bright-line test for determining temporal remoteness of evidence of prior misconduct." Id. See Gollman, 436 Mass. at 115 ("no specific time limit on when a prior bad act can no longer be admissible"). Instead, the allowable age of prior bad act evidence often depends upon the strength of the "logical relationship" between the rebuttal evidence and the crime charged. See Helfant, supra. In this case, the "logical relationship" between the rebuttal evidence and the crime charged (vis-à-vis the defendant's interferon theory) was quite strong. As discussed, the Commonwealth's rebuttal case hinged on demonstrating that the defendant's capacity to restrain himself from violence was not meaningfully affected by interferon. According to medical records in evidence, the defendant's first course of interferon treatment occurred in 1994 or 1995. Any rebuttal evidence, to be

relevant, would need to predate that treatment, and therefore would need to predate the charged crime by at least seven or eight years. Under this unique timeline, the ordinary calculus about the age of a defendant's prior bad acts is dramatically altered. Cf. Commonwealth v. Jackson, 417 Mass. 830, 841-842 (1994) (slightly more than two years between incidents "although near the limit, was not too great" in light of probative value of prior bad acts). The rebuttal evidence here was relevant, and its "logical relationship" with the crime charged increased, precisely because it was old, in the sense that it predated the 1994 or 1995 interferon treatment.[6]

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[6] The defendant further suggests that the 1997 incident testified to by Capaldo could have sufficed to rebut the interferon defense notwithstanding this timeline. This was not argued at trial. Even so, the argument fails for two reasons. First, prior bad act evidence does not necessarily become more prejudicial simply because it is not "necessary" to the Commonwealth's rebuttal case. See Commonwealth v. Philbrook, 475 Mass. 20, 28 (2016).

Second, the argument is factually flawed because the defendant's expert witnesses never established a firm endpoint after which the psychological side effects of interferon would no longer manifest in a patient. One witness said the psychiatric effects typically peak between the second and fourth months of treatment, but also suggested that sometimes they may last throughout an entire year. The other expert testified only that the drug's psychological side effects may last "for months." The defendant also introduced evidence that courses of interferon treatment "may last anywhere from six months to a year or more."

Based on this evidence, the jury would have been warranted in finding that the defendant's first course of interferon treatment began as late as 1995, lasted into 1996, and caused side effects into 1997. In other words, the evidence would

The defendant also argues that the rebuttal evidence lacked a substantive nexus, or "identicality," with the charged conduct. He argues that although the injuries between at least one of his former girl friends and the victim were similar, they were not "so unique" as to overcome the undue prejudice of admitting the testimony.[7] However, such similarity is more important when the prior bad acts are introduced on the issue of identity -- in other words, to support an inference that the

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permit an inference that, in 1997, the defendant remained under the influence of interferon. Accordingly, the 1997 incident testified to by Capaldo would not necessarily rebut the defendant's theory that interferon diminished his capacity to appreciate the wrongfulness of his conduct and to exercise self-restraint.

[7] One specific iteration of this argument centers around the fact that the plea memorandum, which formed the basis for the 1989 prior bad act evidence, stated that the defendant and his then-girl friend had engaged in consensual bondage in the course of their relationship. On appeal, the defendant argues that various details of the 1989 attack, which were potentially related to the bondage aspect of the relationship, render the incident so dissimilar from the beating death of the victim that no evidence of this incident should have been admitted.

As discussed in the text, such factual differences between the two incidents are less important where, as here, the prior bad act evidence was admitted not to show identity or a pattern of operation, but rather for the narrow purpose of rebutting the defendant's claim that interferon diminished his capacity to restrain himself from violence. See Commonwealth v. Garrey, 436 Mass. 422, 433 (2002). Although certain details of the 1989 incident may have been more inflammatory than other prior bad act evidence in the rebuttal case, the 1989 incident had particular probative value for the admitted purpose, as it was the most recent pre-interferon illustration of the defendant's inability to restrain himself from extreme violence. In these circumstances, the trial judge did not abuse his discretion in admitting the evidence. See Commonwealth v. Butler, 445 Mass. 568, 576 (2005).

defendant was the perpetrator by demonstrating that a unique technique or distinctive pattern of conduct unites the prior bad acts and crime charged. Compare Commonwealth v. Montez, 450 Mass. 736, 744 (2008) (when offered to show identity, prior bad acts must have "meaningfully distinctive" similarities), with Commonwealth v. Garrey, 436 Mass. 422, 433 (2002) (uniqueness or pattern not required where prior bad acts not offered to prove identity), and Butler, 445 Mass. at 575. Here, identity was never an issue. Rather, the defense hinged on whether, and to what extent, the defendant was in control of himself when he killed the victim. In these circumstances, we are satisfied that the trial judge did not abuse his discretion in determining that the "logical relationship" between the rebuttal prior bad acts and the crime charged was strong enough to overcome the age of the evidence. See Jackson, 417 Mass. at 841-842 (age of prior bad acts "not too great" given strong probative value of evidence).

Of course, even where prior bad act evidence is otherwise admissible, see Mass. G. Evid. § 404(b)(2) (2017), the judge still must guard against the risk that such evidence will divert the jury's attention from the charged crime or otherwise unfairly prejudice the defendant. See Mass. G. Evid. § 403 (2017); Dwyer, 448 Mass. at 129. To that end, the defendant argues that the rebuttal evidence, due to its age, quantity, and

inflammatory nature, infected the case with undue prejudice that outweighed its probative value and overwhelmed the Commonwealth's case-in-chief.

This is a closer question, particularly with respect to the admission of two instances of prior bad acts, as opposed to only one. But we cannot say that the trial judge abused his discretion in deciding it in the Commonwealth's favor. "Balancing the probative value of evidence against its possible prejudicial impact is a task committed to the discretion of the judge." Commonwealth v. Jackson, 388 Mass. 98, 103 (1983). When asked to assess a judge's weighing of undue prejudice against probative value, it is not the role of this court to ask whether we would reach the same result as the trial judge. See Commonwealth v. Andrade, 422 Mass. 236, 243 (1996). Instead, we ask only whether the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Here, the trial judge's decision to admit both instances of prior bad acts in the Commonwealth's rebuttal case was made in the context of the defense. In particular, the judge pointed to the testimony of one of the defendant's experts, who opined that accurately assessing the effects of a drug like interferon on a particular patient would turn, in part, on consideration of the

patient's "pre-existing history." As the judge summarized it, "behavior . . . must be seen over a long period of time in order to get a sense of the impact of [i]nterferon on a particular individual." With that purpose in mind, the two instances of the defendant's pre-interferon violent conduct demonstrated that the defendant's inability to control himself pre-interferon was not anomalous.

Where, as here, a party offers inflammatory prior bad act evidence, a trial judge must exercise great care to limit, to the extent possible, the unfair prejudice arising from such evidence. See Commonwealth v. Dwyer, 448 Mass. at 129–130 (trial judge must "take care" to prevent prejudicial prior bad act evidence from "overwhelming" case [citation omitted]). For instance, to guard against the potential for unfair prejudice a judge might limit the quantity of prior bad act evidence admitted, see Commonwealth v. Roche, 44 Mass. App. Ct. 372, 380–381 (1998), or permit only summary versions of the evidence, see Dwyer, supra at 130.

The record makes clear that the judge was acutely aware that the Commonwealth's rebuttal evidence demanded careful analysis. Compare Commonwealth v. Harris, 443 Mass. 714, 728–729 (2005) (error when judge failed to exercise any discretion in determining admissibility of prior conviction). In particular, it shows that he weighed the potential prejudicial

effect of admitting each instance of the defendant's pre-interferon conduct. Further, the judge controlled the potential undue prejudice from the admission of rebuttal evidence by conducting a voir dire examination of the first rebuttal witness, redacting portions of the plea memorandum that formed the basis for the second rebuttal witness's testimony, and declining to submit this memorandum to the jury. See Helfant, 398 Mass. at 225 (judge commended for sensitivity to potential for undue prejudice where she conducted voir dire and strictly limited scope of prior bad act testimony).

The judge here also gave the jury forceful limiting instructions on the narrow purpose for which they could consider any of the prior bad act evidence, including the rebuttal evidence. See Helfant, 398 Mass. at 226, 228 (judge gave "strong and forceful" limiting instructions, and "we must presume the jury followed them"); Commonwealth v. Chartier, 43 Mass. App. Ct. 758, 765 (1997) (no substantial risk of miscarriage of justice where limiting instruction for prior bad act evidence was forceful and to point). Immediately following the direct examination of the first rebuttal witness, the judge spent what equaled approximately one and one-half pages of transcript reminding the jury that it could only use the rebuttal evidence, if at all, for the narrow purpose of rebutting the defendant's diminished capacity defense and not to

find him guilty of the crime charged. Similarly, immediately after the second rebuttal witness, the judge again emphasized to the jury "in the strongest terms the concept of limited admissibility." See Helfant, supra at 226; Chartier, supra.

In balancing all of the considerations discussed above, we are satisfied that the judge did not abuse his discretion in weighing the relevant factors and reached a decision within the range of reasonable alternatives. See Butler, 445 Mass. at 576. There was no error.

4. Motion for a new trial. Following oral argument, the defendant filed a motion for a new trial with this court. See G. L. c. 278, § 33E. The motion presents four arguments alleging that trial counsel was ineffective because: (1) he failed to object to certain hearsay testimony or request limiting instructions regarding prior bad act testimony in the Commonwealth's case-in-chief; (2) he did not properly oppose or minimize the Commonwealth's rebuttal evidence; (3) he made an improper and prejudicial closing argument; and (4) he failed to obtain a second psychiatric evaluation of the defendant to bolster his interferon defense.

Because the defendant has been convicted of murder in the first degree, we examine his claims of ineffective assistance of counsel under the rubric of § 33E "to determine whether there exists a substantial likelihood of a miscarriage of justice."

Commonwealth v. Frank, 433 Mass. 185, 187 (2001). This standard is "more favorable" to the defendant than the general constitutional standard for determining ineffective assistance of counsel. See Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014). Accordingly, our analysis of the defendant's motion for a new trial focuses on "whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion." Id.

The defendant's first argument has two components. Primarily, he argues that his lawyer failed to object to two pieces of hearsay testimony pertaining to his trip to the Ford dealership. In essence, the defendant argues that two police officers were permitted to testify, without objection, to hearsay statements regarding the defendant's "strange and belligerent conduct" at the Ford dealership and that their testimony placed uncharged prior bad act conduct by the defendant (operating a motor vehicle under the influence of alcohol) before the jury.

Even assuming this testimony was erroneously admitted, it would not likely have influenced the jury's conclusion because it was cumulative of other properly admitted testimony. See Commonwealth v. Dyer, 460 Mass. 728, 743 n.22 (2011), cert.

denied, 132 S.Ct. 2693 (2012). In particular, a dealership employee testified that he could "definitely smell alcohol" on the defendant's breath after he drove up to the dealership, and that the defendant "was a little irate when he came in." The employee further testified that he saw the defendant "drinking something, so [he] assumed that [the defendant] was intoxicated" and called the police. The employee later witnessed the police place the defendant in custody. Thus, the same evidence to which the defendant now objects would have come before the jury notwithstanding defense counsel's lack of an objection to the testimony of the two officers.

The defendant also argues that counsel inappropriately failed to request limiting instructions regarding the testimony of Rippetoe, Capaldo, and the victim's father about this conduct. Again, even assuming this constituted error, counsel's inaction would not have had any influence on the jury's conclusion. With respect to Rippetoe and Capaldo, the judge ultimately did instruct the jury on the limited purpose for which they could use the conduct to which these individuals testified. See Commonwealth v. Donahue, 430 Mass. 710, 718 (2000) (presumption that jury understand and follow limiting instructions "ordinarily renders any potentially prejudicial evidence harmless"). With respect to the victim's father, the defendant correctly points out that the judge, at sidebar,

sustained counsel's objection to the father's testimony about the defendant being incarcerated for a period of time, but never communicated his ruling to the jury. Regardless, this testimony was cumulative of other, properly admitted, evidence that informed the jury of the defendant's prior incarceration, as discussed above. As a result, any error with respect to this component of the father's testimony would not have influenced the jury's conclusion. See Dyer, 460 Mass. at 743 n.22.

Second, the defendant argues that his lawyer failed to properly oppose or minimize highly prejudicial rebuttal evidence regarding the defendant's relationships with former girl friends, discussed above. We have already decided that the judge did not abuse his discretion in admitting this evidence. That conclusion dispatches with those portions of the defendant's argument pertaining to counsel's failure to file a motion in limine or object to various aspects of the Commonwealth's rebuttal evidence. This leaves one claim: that, by cross-examining the first rebuttal witness and objecting to a redaction in the 1989 plea memorandum, defense counsel could have elicited the fact that the defendant's prior relationships involved aspects of sadomasochism or consensual bondage, and that the first witness may have been biased against the defendant because the defendant left her for another woman. According to the defendant, the jury's lack of access to this

information left them with an incomplete picture of the relationships in question and thereby prejudiced the defendant.

Given the overwhelming evidence of the defendant's guilt, we are confident that even if counsel had elicited this evidence at trial, it would not likely have influenced the jury's verdict. With respect to the first rebuttal witness, the defendant avers that their relationship included consensual sadomasochistic practices such as the witness "being tied up and whipped with a leather belt or paddle on every part of her body." The defendant asserts that he asked his lawyer to cross-examine the witness regarding these practices in order to "impeach her testimony that [the defendant] had inflicted unwanted or nonconsensual abuse on her." However, even if this cross-examination had occurred, the witness testified to incidents of extreme and grossly disproportional violence that would have remained unexplained by the sadomasochistic practices described in the defendant's affidavit. As discussed above, this witness testified that the defendant would strike her in the face whenever the songs of a former boy friend played on the radio, and detailed one incident where the defendant beat her with a long metal bar because she had turned down the heat too low in their apartment. These incidents, along with the witness's testimony about the defendant's short temper and threat to kill her, overwhelmingly supported the Commonwealth's

rebuttal theory notwithstanding the potential evidence that sadomasochism played a role in their relationship or the possibility that the witness may have been upset with the defendant for leaving her.

Similarly, the defendant argues that his violence in the 1989 incident "mirrored" sadomasochistic activities in which he and this former girl friend consensually participated on a regular basis. Even assuming that is so, the defendant acknowledges that he went "overboard" during this incident, a statement that is corroborated by the fact that the defendant pleaded guilty to a crime in connection with the event. Thus, even if this component of the relationship was before the jury, it only would have bolstered the core of the Commonwealth's rebuttal argument: that the defendant was unable to restrain himself from acts of extreme physical violence well before he ever took interferon. Accordingly, there was no substantial likelihood of a miscarriage of justice. See Commonwealth v. Franklin, 465 Mass. 895, 909, 914 (2013) (failure to request jury instruction not ineffective assistance resulting in substantial likelihood of miscarriage of justice given overwhelming evidence of defendant's guilt); Commonwealth v. Griffith, 404 Mass. 256, 263 (1989) (counsel's tactics not ineffective assistance "[c]onsidering the overwhelming evidence against the defendant").

Third, the defendant argues that counsel made an improper and prejudicial closing argument. Specifically, he contends that counsel (1) offered personal opinions about the defendant's bad character, for example, stating that "he is a disgusting human being"; (2) vouched for the credibility of Rippetoe's testimony regarding the defendant's statement that he would have killed the victim if Rippetoe was not present; and (3) referred to facts not in evidence by suggesting to the jury that the defendant had abused other women not mentioned in any part of the case.

These remarks, in context, are properly understood as furthering counsel's interferon-based defense strategy, and typically we do not characterize strategic decisions as ineffective assistance merely because they prove unsuccessful. See Commonwealth v. White, 409 Mass. 266, 272 (1991). Further, the judge firmly instructed the jury to "keep in mind that the closing arguments of counsel [are] not evidence." But most importantly, we are confident that these remarks, even assuming they were improper, did not likely influence the jury's verdict in light of the overwhelming evidence supporting the Commonwealth's case. Cf. Commonwealth v. Satterfield, 373 Mass. 109, 113, 115 n.9 (1977) (rejecting defendant's ineffective assistance claims based, in part, on counsel's remarks in closing argument).

As discussed above, the only live issue for the jury, in light of the defendant's interferon defense, was whether this drug precluded the defendant from forming the mental state required to sustain a conviction for murder in the first degree. We have already described in detail how the Commonwealth's rebuttal evidence supported the inference that the defendant was unable to control his violent behavior even before he took interferon. Indeed, he admits as much in the aforementioned affidavit where he stated that he went "overboard" during the 1989 incident. In this context, it is clear that the contested remarks of defense counsel were not central to either the defendant's or the Commonwealth's theory of the case, and would have likely had no discernible influence on the jury's verdict. See Commonwealth v. Obershaw, 435 Mass. 794, 806-807 (2002) (improper statements by prosecutor in closing argument harmless in light of strength of Commonwealth's case). If anything, these remarks indicate merely that "the basic trouble from the defense standpoint was weaknesses in the facts rather than any inadequacy of counsel." Satterfield, 373 Mass. at 111.

The defendant's fourth argument concerns counsel's failure to call a psychiatric expert to testify that the interferon affected the defendant. In particular, the motion for a new trial includes an affidavit from a psychiatrist (who was not called to testify) offering the opinion that the defendant did

not have the capacity to conform his behavior to the requirements of the law when he attacked the victim because of the side effects of interferon. Trial counsel explained that he was "dissatisfied" with this psychiatrist's approach to the case. However, appellate counsel represents that trial counsel's main concern about presenting this expert -- that the defendant had used the drug Prozac as a defense in an earlier case, which largely mirrored his interferon defense in this case -- could have actually bolstered the second psychiatric expert's testimony. Trial counsel's reason for not presenting the second psychiatric expert was, in the circumstances, a reasonable strategic decision. Had the jury learned that the defendant had advanced a similar defense in another case, although involving a different medication, it could have further damaged trial counsel's ability to frame the defendant's aggression and violence as influenced by the interferon. The potential effects of interferon on the defendant's capacity to conform his conduct to the law were thoroughly explored at trial. The decision not to call the psychiatric expert was not manifestly unreasonable. Commonwealth v. Kolenovic, 471 Mass. 664, 674-675 (2015), S.C., 478 Mass. 189 (2017).

5. Review under G. L. c. 278, § 33E. Finally, the defendant asks us to exercise our power under § 33E to reduce the verdict or order a new trial. Having carefully reviewed the

entire record, we discovered nothing that warrants a reduced verdict or a new trial under § 33E.

Judgment affirmed.