

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRreporter@sjc.state.ma.us

SJC-13007

COMMONWEALTH vs. BAMPUMIM TEIXEIRA.

Suffolk. September 12, 2022. - October 20, 2022.

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

Homicide. Practice, Criminal, Argument by prosecutor,
Instructions to jury, Request for jury instructions,
Capital case.

Indictments found and returned in the Superior Court Department on June 28, 2017.

The cases were tried before Mitchell H. Kaplan, J.

Theodore F. Riordan (Deborah Bates Riordan also present) for the defendant.

Benjamin Shorey, Assistant District Attorney, for the Commonwealth.

WENDLANDT, J. The defendant, Bampumim Teixeira, was convicted of two counts of murder in the first degree on theories of deliberate premeditation, extreme atrocity or cruelty, and felony-murder for the deaths of two anesthesiologists, Drs. Lina Bolanos and Richard Field. The

victims, who were engaged to be married, were found in their Boston penthouse having been stabbed, Bolanos with twenty-four sharp force injuries to the neck, two of which severed her jugular veins, and Field with one stab wound to the neck that nearly severed his carotid artery. The defendant, who had previously worked as a concierge in their building, was discovered by police at the scene. He contended that he and Bolanos were having an affair, that the victims' engagement was a sham with Bolanos remaining in the relationship solely for financial reasons, that Field killed Bolanos, and that the defendant killed Field in self-defense.

On appeal, the defendant argues that the prosecutor improperly appealed to the emotions of the jury during closing argument, that the defendant's requested changes to the model jury instruction on extreme atrocity or cruelty should have been allowed, that the trial judge should have instructed the jury that specific unanimity is required for the evidentiary factors relevant to extreme atrocity or cruelty, and that we should exercise our authority under G. L. c. 278, § 33E, to reduce the defendant's convictions or grant a new trial. We affirm the convictions and discern no reason to grant relief under G. L. c. 278, § 33E.

1. Background. a. Facts. The following facts are supported by the evidence presented at trial.

At the time of the killings, the victims were an engaged couple living in a penthouse unit on the eleventh floor of a condominium building in the South Boston section of Boston. They were both anesthesiologists; Bolanos practiced pediatric anesthesiology at Massachusetts Eye and Ear Hospital, and Field owned a pain management clinic.

In March 2016, about thirteen months before the killings, the defendant began working as a concierge in the building. During his three-month employment at the building, he was trained on several of its unique policies and structural features. For example, he learned that contractors working on the premises were required to leave the building by 4 P.M., and that although a key fob was required to access the residential floors from the elevator, the elevator would ascend from the parking garage with someone in it if it was called by a person on a higher floor. In addition, he learned how to access the building's stairwells and which stairwell reached the eleventh floor, where the victims lived. His training also included the monitoring of surveillance cameras, and he knew that security tours of the building were conducted at 4:30 or 5 P.M.

On the day of the killings, the "runner"¹ on duty for the building observed a man, presumably the defendant, wearing

¹ The lead concierge for the building explained that "the runner's position was to support the concierge staff -- help

glasses, a bright green reflective vest, black jeans, and a hoodie, and carrying a backpack, attempt to open the building's locked front door at around 2:40 P.M.. The runner walked to the front door to assist the man, but when he reached the door, he saw that the man had walked away and had turned toward the rear of the building. Later in the afternoon, when the runner moved his car into the building's parking garage, he saw the same man, standing outside by the left side of the garage door.² Video footage from a security camera showed the man following a car into the garage on foot at 3:47 P.M.³ Video footage from a surveillance camera in the lobby showed a carpenter who had been working in the victims' residence on the day of the killings leaving the building at 4 P.M.

Bolanos returned home at 4:50 P.M.; she picked up a few packages from the concierge desk. Between 5:19 P.M. and 6:10 P.M., she received, but did not read, text messages from Field

with packages, deliveries -- so that someone was at the desk all the time."

² The man was also shown wearing a green, fluorescent shirt and carrying a drawstring backpack between 2:30 P.M. and 3:47 P.M. on footage captured by the security cameras installed on a garage across the street, and at 3:08 P.M. on footage captured by the apartment building's security cameras.

³ Video footage from a camera inside the garage also captured the car and the man.

and others. Field called Bolanos at 6:31 P.M., but she did not answer.

Field arrived home at 6:38 P.M.. Between 7:05 P.M. and 7:09 P.M., six calls to 911 were placed from his cell phone, one lasting four seconds and the others lasting zero seconds. His cell phone received two unanswered callbacks from 911 after the fifth and sixth outgoing calls. At 7:41 P.M., an almost three-minute call to 911 was placed from Field's cell phone. Three people were recorded on the call: Field, Bolanos, and an unknown person. After another unanswered callback from 911 at 7:44 P.M., a one-second call was placed to 911 from Field's cell phone at 7:45 P.M.

At 7:46 P.M., a series of text messages was sent from Field's cell phone to a friend, reading: "Call 111," "Gun man," "In house," "Pls," "Nw," "Eriou," "Erious," and "Serious." The friend did not see the messages until around 8:15 P.M.. The friend sent a text message to Field but did not receive a response. The friend's girlfriend then called the concierge desk of the victims' building, prompting a concierge to call Field and Bolanos, who did not answer; the concierge then called the police.

Five officers arrived at the building around 8:45 P.M. and took the elevator to the eleventh floor. They saw through the frosted glass door of the victims' residence that it was dark.

They observed two packages on the floor of the hallway. A set of keys also lay on the floor a few feet away from the door; using the keys, one officer unlocked the door and entered the unit with his gun drawn, after knocking and announcing himself as a police officer several times.

The officer saw the defendant in silhouette at the end of a corridor and yelled to him to get on the ground. Instead, the defendant held his hands outstretched and together as though he were holding a firearm. The officers yelled at the defendant to drop the gun. When an officer moved to gain cover in the kitchen area, the defendant turned towards the officer, and the officer fired his firearm. The defendant attempted to escape from the unit, fleeing toward the elevator while pointing his outstretched arms at the officers. Taking cover, officers discharged their weapons at the defendant.

The defendant was shot twice but continued toward the elevator on his knees, shouting for police to shoot him. Officers knocked him to the floor and handcuffed him. As they did so, the defendant smiled and said, "There's dead bodies." He told the officers that there was a sniper and that they were "going to die." The defendant also said, "They killed my wife." He asked the police to "[j]ust kill me." The defendant was wearing dark clothing and gloves.

After subduing the defendant, the officers, by then joined by officers from a special weapons and tactics (SWAT) team, found the deceased victims inside the unit: Field on the floor near the main bedroom, and Bolanos on the floor of the second bedroom. Both victims were covered in household cleaning solutions and had their hands cuffed behind their backs.

Bolanos's pants were open, unzipped, and pulled down, and both sides of her underwear were cut. She had duct tape in her hair, and broken pieces of her necklace were in her hair and on her neck. Her engagement ring was on her left ring finger with the stone turned in facing her palm. Her jacket and blouse were discovered in the main bedroom closet, stuck together with duct tape. The blouse was missing buttons, which were found in the kitchen and hallway.

Bolanos had twenty-four sharp force injuries to the neck, two of which severed her jugular veins, three of which hit her vertebrae, and all of which contributed to her death. She also suffered hemorrhages in her scalp and bruises on various parts of her body, including her left eye, her forehead, her right breast, both wrists, both legs, and the fingers of her right hand.

Field had one stab wound to the neck and small abrasions to his right ear and around his mouth and nose. His carotid artery was cut nearly in half, and he had swallowed one hundred

milliliters of blood. The medical examiner determined that he likely died within a few minutes of the stab wound, after suffocating on his own blood. He also had a bruise on his wrist and an abrasion on his right knee, and one pant leg was cut or torn off and had duct tape stuck to it.

Officers discovered a backpack near the front door that contained jewelry and the missing portion of Field's pant leg. In the hallway outside the unit, they found boots, a baseball hat, a knit hat, a blood-stained yellow shirt with reflective material on the front and back, a large knife, and a black drawstring backpack containing a rubber mask, clumps of hair, duct tape with hair stuck on it, a folding knife, wire cutters, a satin sleep mask, a fake beard, scissors, a black BB gun, and bank cards in both victims' names. Field's blood was on the large knife, and medical examiners concluded that the blood on the yellow shirt was likely from the victims. The rubber mask had blood on both sides; Field was identified as "the possible major contributor to that mixture." The sleep mask, wire cutters, and folding knife each had blood from one or both victims.

In the kitchen, officers found a second large knife on the counter next to a reddish-brown stain, hair, and a wallet containing Bolanos's driver's license and credit cards. Bolanos's blood was on the knife. Written on the wall of the

apartment in marker was the statement, "He killed my wife." A large "X" was drawn through a photograph of Field that was hanging on the wall.

The defendant was transported to the hospital to receive treatment for his gunshot wounds. He refused to tell the emergency medical services responders his name, address, or date of birth.

The following morning, the defendant was questioned at the hospital by two Boston police detectives.⁴ After reading the defendant his Miranda rights, the officers questioned the defendant for almost ninety minutes; the interview was recorded, and a redacted version of the recording was played for the jury. The defendant told the officers that he gained access to the building by following a car into the garage on foot, entering the elevator, and waiting until someone on an upper level summoned the elevator. Once on an upper level, he used the stairs to reach the penthouse. The defendant said that he had met Bolanos about a year earlier while he was the building's concierge, and that they had had a months-long affair. He said

⁴ The defendant's nurse determined that it was medically acceptable for the defendant to talk with officers because he was awake and alert, and because she had been communicating with him. The defendant was receiving twenty-five micrograms per hour of fentanyl for pain.

that Bolanos had advised him to sneak into the building discreetly any time that he wanted to talk with her.

The defendant told officers that, on the day of the killings, he was in the penthouse for about two to three hours. He said that Bolanos told him that Field was busy that evening, that they would have four or five hours together, that Field used to beat her, and that the engagement was sham, but she was staying with Field for financial reasons.

The defendant said that when Field returned and saw the defendant and Bolanos talking or kissing, Field became enraged, punched her in the eyes, grabbed two knives, and continued to beat her. According to the defendant, Field said that he was going to kill both the defendant and Bolanos, and then pointed a gun at them. The defendant said that Field handcuffed Bolanos, and as she begged him not to hurt her, Field said, "You got no idea who I am," and stabbed her repeatedly. The defendant said that he tried to help Bolanos, but Field swung a knife at him. Then Field covered Bolanos "with all kind of things," "white stuff and things like that," from the bathroom.

The defendant stated that he managed to lock himself inside the bathroom. The defendant heard running water, and Field said from the other side of the bathroom door that he was going to drown the defendant. According to the defendant, Field found the bathroom key and opened the door; Field was carrying the gun

and a small knife. A struggle ensued, and the defendant grabbed Field and swung his head into a wall; Field dropped the gun, and the defendant kicked it away. The defendant grabbed the knife, held it to Field's throat, and then handcuffed Field with Field's second pair of handcuffs. The defendant stated that, though handcuffed, Field nonetheless managed to kick the defendant to the ground and attack him. Enraged, the defendant stabbed Field, which the defendant said was in self-defense.

Afterwards, the defendant saw "a lot of jewelry"; he said to himself, "[T]hese two is [sic] dead let me have some myself"; and he put the jewelry in his backpack. The defendant told officers that he realized that Field had covered Bolanos's body with substances from the bathroom to "get away with . . . murder." Thinking that Field was "a smart dude," and because when someone kills, "you have to do the same thing to them" -- an "eye for an eye" -- the defendant covered Field's body with the same substances.

According to the defendant, he did not open the penthouse door when the officers knocked because he knew he needed to think of an explanation for what had happened. During the interview, he also told officers that he did not recall saying anything to the arresting officers about someone killing his "wife," and that he was unaware of the statement "He killed my

wife" written on the penthouse wall, but that he did tell them, "Kill me now."

b. Procedural history. The defendant was indicted in June 2017 on two counts of murder in the first degree in violation of G. L. c. 265, § 1; one count of home invasion in violation of G. L. c. 265, § 18C; two counts of kidnapping in violation of G. L. c. 265, § 26; and two counts of armed robbery in violation of G. L. c. 265, § 17. The defense at trial was that the defendant was having a "real or imagined" affair with Bolanos, that Field killed Bolanos, and that the defendant subsequently killed Field in self-defense.

Following a jury trial, the defendant was found guilty on all counts. As to the two counts of murder in the first degree, the jury found the defendant guilty on all three theories: deliberate premeditation, extreme atrocity or cruelty, and felony-murder. The defendant was given two consecutive life sentences for the two counts of murder in the first degree.⁵ The defendant filed a timely notice of appeal.

⁵ On the single count of home invasion, the defendant was sentenced to from twenty years to twenty years and a day, concurrent with his first life sentence. On the two counts of kidnapping, he was sentenced to from nine years to ten years, consecutive with the home invasion sentence. On the two counts of armed robbery, he was sentenced to from twenty-five years to twenty-five years and a day, concurrent with the kidnapping sentence.

2. Discussion. On appeal, the defendant maintains that the prosecutor improperly appealed to the emotions of the jury during closing argument, that the defendant's requested modifications to the model jury instruction on extreme atrocity or cruelty should have been allowed, that the trial judge should have instructed the jury that specific unanimity is required for the evidentiary factors relevant to extreme atrocity or cruelty, and that we should exercise our authority under G. L. c. 278, § 33E, to reduce the defendant's convictions or grant a new trial. We address each argument in turn.

a. Appeal to jury's sympathy. The defendant first argues that during closing argument, the prosecutor improperly appealed to the emotions of the jury by stating that the victims are "[n]ow engaged for eternity" and "Lina [Bolanos] will forever be Richard[Field]'s fiancée but never his bride." The Commonwealth contends that the statement was proper for three reasons: first, because it was relevant to "the consciousness and degree of suffering of the deceased," which was one factor of extreme atrocity or cruelty at the time of the trial, see Model Jury Instructions on Homicide 56 (2018); second, because it was in response to the defendant's claim in defense that the victims were in an abusive relationship and a sham engagement; and third, because it permissibly humanized the victims.

Because the defendant did not object at trial, we review to determine whether the statement was error, and if so, whether it created a substantial likelihood of a miscarriage of justice. See Commonwealth v. Huang, 489 Mass. 162, 181 (2022). "In determining whether an argument was improper we examine the remarks in the context of the entire argument, and in light of the judge's instructions to the jury and the evidence at trial" (quotation omitted). Commonwealth v. Kolenovic, 478 Mass. 189, 199 (2017), quoting Commonwealth v. Gaynor, 443 Mass. 245, 273 (2005). It is well settled that a prosecutor may not appeal to the jury's sympathy. Commonwealth v. Guy, 454 Mass. 440, 444-445 (2009). Neither may a prosecutor emphasize "personal characteristics [that] are not relevant to any material issue," if such emphasis would "risk[] undermining the rationality and thus the integrity of the jury's verdict." Commonwealth v. Fernandes, 487 Mass. 770, 791 (2021), cert. denied, 142 S. Ct. 831 (2022), quoting Commonwealth v. Santiago, 425 Mass. 491, 495 (1997). A prosecutor may, however, "tell the jury something of the person whose life had been lost in order to humanize the proceedings," Fernandes, supra, quoting Santiago, supra, and "respond to the defendant's closing argument," Commonwealth v. Henley, 488 Mass. 95, 130 (2021).

The defense was grounded on the theory that the engagement was a sham. In these circumstances, the statement to which the

defendant now objects was a permissible -- if hyperbolic -- response to the defense. See Commonwealth v. Grier, 490 Mass. 455, 472 (2022), quoting Henley, 488 Mass. at 131-132 ("where a prosecutor's language is 'based in fact' and tracks the 'odious . . . nature of the crime[] committed,' emotive language in a prosecutor's closing argument is permissible as merely 'enthusiastic rhetoric, strong advocacy, and excusable hyperbole'"); Henley, supra at 130. Significantly, in closing argument, defense counsel contended that any inconsistencies in the defendant's statement to police in the aftermath of the killings were the result of his injuries and the pain medications he had been prescribed following his surgery. Responding, the prosecutor referred to the evidence of the writing on the victims' residence's walls that "He killed my wife," which inferably was written by the defendant at a time when the defendant was not injured or under the influence of pain medication. The challenged statement contrasted the couple's engagement and Bolanos's status as Field's fiancée with the statement written by the defendant on the penthouse wall, referring inferably to Bolanos as the defendant's "wife." Thus, the prosecutor's statement, which was made once at the beginning of the closing argument, immediately following the defendant's closing, was not improper and was responsive to the defense.

Moreover, the challenged statement, together with the prosecutor's brief description of the victims' ages, "their . . . careers ahead of them in the areas of pain management and pediatric anesthesiology," and their lost future, "t[old] the jury something of the person[s] whose li[ves] had been lost in order to humanize the proceedings," Fernandes, 487 Mass. at 791, quoting Santiago, 425 Mass. at 495. Accordingly, the brief statement was not improper.

b. Jury instructions on extreme atrocity or cruelty. The defendant next contends that the trial judge erred by giving the instruction on extreme atrocity or cruelty as set forth in the Model Jury Instructions on Homicide (2018) and declining to adopt the defendant's proposed changes to the instruction.

Because the jury also convicted the defendant based on the theories of deliberate premeditation and felony-murder, and no errors are presented as to those theories, the defendant's convictions would stand regardless of whether his arguments concerning his convictions on the theory of extreme atrocity or cruelty prevailed. See Commonwealth v. Barbosa, 463 Mass. 116, 135 (2012), citing Commonwealth v. Chipman, 418 Mass. 262, 270 n.5 (1994) (declining to address defendant's contentions regarding theory of extreme atrocity or cruelty because jury also convicted defendant based on theory of deliberate premeditation); Commonwealth v. Nolin, 448 Mass. 207, 220

(2007), citing Chipman, supra ("If a jury return[ed] a guilty verdict based on two theories, the verdict will remain undisturbed even if only one theory is sustained on appeal"). Nevertheless, because the issues are fully briefed, we address the defendant's arguments in connection with our review pursuant to G. L. c. 278, § 33E.

The defendant preserved these issues with timely objections; accordingly, we review for prejudicial error. Commonwealth v. Cruz, 445 Mass. 589, 591 (2005). "This requires a two-part analysis: (1) was there error; and (2) if so, was that error prejudicial." Id. "An error is not prejudicial if it did not influence the jury, or had but very slight effect; however, if we cannot find with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, then it is prejudicial" (quotations omitted). Id., quoting Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994).

"A trial judge has the duty to state the applicable law clearly and correctly," Commonwealth v. Wall, 469 Mass. 652, 670 (2014), citing Commonwealth v. Corcione, 364 Mass. 611, 618 (1974), but "is not required to grant a particular instruction so long as the charge, as a whole, adequately covers the issue," Commonwealth v. McGee, 467 Mass. 141, 154 (2014), quoting Commonwealth v. Daye, 411 Mass. 719, 739 (1992). "In assessing

the sufficiency of the jury instructions, we consider the charge in its entirety, to determine the 'probable impact, appraised realistically . . . upon the jury's factfinding function.'" Wall, supra, quoting Commonwealth v. Batchelder, 407 Mass. 752, 759 (1990).

At the time of the defendant's trial, the model instructions on extreme atrocity or cruelty listed seven factors for jurors to consider, as articulated in Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983). See Model Jury Instructions on Homicide 54-57 (2018). Here, the trial judge properly instructed the jury with the model instructions that were in effect at the time of the trial. See Commonwealth v. Bonner, 489 Mass. 268, 285 (2022), quoting Commonwealth v. Howard, 479 Mass. 52, 61 (2018) ("we have urged trial judges to adhere to the Model Jury Instructions on Homicide, and to 'proceed with caution' when not doing so").

After the defendant's trial, we modified the Cunneen factors and issued a revised model instruction. See Commonwealth v. Castillo, 485 Mass. 852, 865-866 (2020). We expressly held, however, that the revisions were "to be applied only in murder trials that commence after the date of issuance of this opinion." Id. at 866. Indeed, we declined to apply the revised instructions even to the defendant in Castillo. See id.

("we do not apply [the Castillo factors] retroactively even here").

Moreover, the defendant's first suggested modification to the model instruction concerned restating that the Commonwealth has the burden of proof as to extreme atrocity or cruelty.⁶ Yet, the defendant is not entitled to instructions that repeat the Commonwealth's burden of proof at every turn.⁷ See Commonwealth v. Veiovis, 477 Mass. 472, 489 (2017).

⁶ The defendant asked the judge to insert "To prove this element, the Commonwealth must prove beyond a reasonable doubt" before the model jury instruction's first sentence, "that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of a human life," and to insert that "the Commonwealth must prove beyond a reasonable doubt that the defendant intended to commit an extremely atrocious or cruel death" after the subsequent two sentences that the defendant asked the judge to delete, see infra.

⁷ For this same reason, we reject the defendant's argument that the jury should have been instructed specifically that the Commonwealth prove at least one Cunneen factor beyond a reasonable doubt. The Model Jury Instructions on Homicide 55-57 (2018) provide:

"In deciding whether the Commonwealth has proved beyond a reasonable doubt that the defendant caused the death of the deceased with extreme atrocity or cruelty, you must consider the following factors You cannot make a finding of extreme atrocity or cruelty unless it is based on one or more of the factors I have just listed."

In Commonwealth v. Stroyny, 435 Mass. 635, 651 (2002), we concluded that, where a judge told the jury that the jury "must" consider the Cunneen factors and stressed multiple times in the jury instructions that the Commonwealth bore the burden of proof beyond a reasonable doubt, "a reasonable juror would have understood that the Commonwealth bore the burden of proving at

The defendant's next proposed change, which would instruct the jury that the Commonwealth was required to prove that "the defendant caused the person's death by a method that substantially surpassed the cruelty inherent in any taking of human life," misstates the law, which did not at the time of trial, and does not presently, require the method of killing to "substantially" surpass the inherent cruelty in taking a human life. See Castillo, 485 Mass. at 869 n.2 (Appendix), quoting Commonwealth v. Noeun Sok, 439 Mass. 428, 437 (2003) ("judge correctly impressed on the jury that '[e]xtreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of human life'"); Model Jury Instructions on Homicide 55 (2018).

The defendant's next suggested change would delete two sentences from the model jury instruction: "You must determine if the method or mode of killing is so shocking as to amount to murder with extreme atrocity or cruelty"; and "The inquiry focuses on the defendant's actions in terms of the manner and means of inflicting death, and the resulting effect on the victim." In their place, the defendant suggested:

"Further the Commonwealth must prove beyond a reasonable doubt that the defendant intended to commit an extremely atrocious or cruel death. That is, [(1)] he intended to inflict extreme physical or psychological pain, suffering,

least one of the Cunneen factors beyond a reasonable doubt." The same is true here.

or torture on the victim; or (2) the defendant was callous or indifferent to the extreme physical o[r] psychological pain, suffering or torture that this intentional conduct inflicted on the victim."

The defendant contends that the revised language would "refocus the issue as being whether the defendant had the intent to commit an extremely atrocious or cruel murder." Notably, we considered and rejected the language urged by the defendant -- namely, that the defendant "intended to commit" an extremely atrocious or cruel murder. See Castillo, 485 Mass. at 864-865, quoting Cunneen, 389 Mass. at 227 ("proof of malice aforethought is the only requisite mental intent for a conviction of murder in the first degree based on murder committed with extreme atrocity or cruelty"). See also Commonwealth v. Sun, 490 Mass. 196, 206 (2022), quoting Commonwealth v. Watson, 487 Mass. 156, 165 (2021) ("A defendant need not intend 'to commit the murder in an extremely atrocious or cruel way'").

The defendant also suggested the elimination of the second Cunneen factor ("the consciousness and degree of suffering of the deceased"). In Castillo, 485 Mass. at 864, we concluded that although the "consciousness and degree of suffering of the victim," if "divorced from the egregiousness of the defendant's conduct," could not, by itself, support a finding of extreme atrocity or cruelty, "[a] victim's substantial degree of conscious suffering may support a finding of extreme atrocity or

cruelty where it is the reasonably likely consequence of the defendant's actions." Here, the evidence of the victims' conscious suffering was not "divorced from the egregiousness of the defendant's conduct." Id. Rather, it was the direct and inescapable result of that conduct. Therefore, the inclusion of this factor in the instruction on extreme atrocity or cruelty was not error.^{8,9}

Finally, as to the defendant's request to instruct that the jury "must consider [the Cunneen] factors not in terms of the relative numbers of the factors, but in terms of their respective substantiality and persuasiveness," even the revised

⁸ Regardless, we are confident that the inclusion of the second factor had very "slight effect." Cruz, 445 Mass. at 591. There was abundant evidence on the other six Cunneen factors, for example, the stab wounds that hit Bolanos's vertebrae and severed both victims' veins and arteries (relevant to the "extent of physical injuries," Cunneen, 389 Mass. at 227); the twenty-four stab wounds on Bolanos's neck and multiple contusions and abrasions on both victims (the "number of blows" and "manner and force with which delivered," id.); the large knife (the "instrument employed," id.); and the evidence that both victims' hands were bound and that each was stabbed multiple times with great force (evidencing the "disproportion between the means needed to cause death and those employed," id.).

⁹ As to the suggested elimination of the other Cunneen factors that the defendant requested at trial, the third factor ("the extent of the injuries to the deceased"), the fourth factor ("the number of blows delivered"), the fifth factor ("the manner, degree, and severity of the force used"), and the seventh factor (the disproportion between the means needed to cause death and those employed) were retained in the revised model instructions. Castillo, 485 Mass. at 869-870 (Appendix).

factors do not require this instruction. See Castillo, 485 Mass. at 869-870 (Appendix).

c. Specific unanimity on evidentiary factors. The defendant argues that the judge erred in denying his request for an instruction that specifies that unanimity is required as to at least one of the Cunneen factors in order for the jury to convict the defendant of murder in the first degree on the theory of extreme atrocity or cruelty. As the defendant acknowledges, however, we have already considered this same argument and concluded that a defendant is not entitled to a specific unanimity instruction on the Cunneen factors. See, e.g., Commonwealth v. Morganti, 455 Mass. 388, 407 (2009), S.C., 467 Mass. 96, cert. denied, 574 U.S. 933 (2014) ("The jury need not unanimously agree on which of the Cunneen factors they have found in order to convict a defendant of murder in the first degree on a theory of extreme atrocity or cruelty . . ."); Commonwealth v. Obershaw, 435 Mass. 794, 809 (2002).

We reaffirmed this holding in Castillo, concluding that "the jury did not need to be unanimous as to the particular Cunneen factor or factors they found"; rather, "it suffices that each individual juror found beyond a reasonable doubt one of the Cunneen factors." Castillo, 485 Mass. at 859, citing Obershaw, 435 Mass. at 809. We reasoned that, because "the Cunneen factors are not elements of the crime or separate theories of

culpability," but rather are simply "'evidentiary considerations' that guide the jury's determination as to whether the Commonwealth has proved beyond a reasonable doubt the element of a killing with extreme atrocity or cruelty," the jury did not need to be unanimous as to a particular Cunneen factor. Castillo, supra, quoting Kolenovic, 478 Mass. at 197-198. We see no reason to disturb this conclusion.

d. Review under G. L. c. 278, § 33E. After review of the entire record, we discern no error warranting relief under G. L. c. 278, § 33E.

Judgments affirmed.