COMMONWEALTH OF MASSACHUSETTS

SUFFOLK

SJC DOCKET NO. 28663

APPEALS COURT
NO.: 2019-P-1831

COMMONWEALTH

v.

ELBA MORALES

APPEAL FROM JUDGMENT OF THE SUPERIOR COURT OF SUFFOLK COUNTY
AFFIRMED BY THE APPEALS COURT

APPLICATION FOR FURTHER APPELLATE REVIEW

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Elba Morales (Morales) requests leave to obtain further appellate review of the Appeals Court's decision that affirmed her conviction for one count of voluntary manslaughter. M.R.A.P. 27.1.

STATEMENT OF PRIOR PROCEEDINGS

Morales was indicted for murder in the second degree but was convicted by a jury sitting in the Suffolk County Superior Court of the lesser included offense of voluntary manslaughter. RA16, 18; VIII7.[1] A 9-day jury trial began on December 3, 2018, with Judge Elizabeth Fahey (trial court or trial judge) presiding. RA12-16. On December 19, 2018, the court sentenced Morales to 10 to 12 years to MCI Cedar Junction. RA16; IX:34-5.

Morales filed a timely Notice of Appeal on December 19, 2018. RA19. Oral argument was heard on November 10, 2021, presided by JJ. Milkey, Kinder and Sacks. On January 12, 2022, the panel issued an unpublished opinion affirming the convictions. A copy of the Appeals Court's decision is attached hereto.[2]

STATEMENT OF FACTS

On December 16, 2016, Morales and her boyfriend of 18 plus years, Ronald Lyons (Ronald)[3] planned an evening together to

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[1] The Record Appendix shall be cited as, "RA page number." The transcript shall be cited as, "Volume:Page."
[2] The Memorandum shall be cited as, "Memorandum/page number."
[3] Two brothers named Ronald and Antonio Lyons testified. For ease of reference, their first names will be used.

celebrate his birthday. VI:11, 170. Ronald lived at 7 Fayston Street, a multi-unit family home that he owned and where Morales lived for a period of years with him. VI:71, 88. At about 7:30 pm, Ronald picked Morales up at her home at 26 Shandon Street in Dorchester, after which they went to get gas, food and drinks, and they returned to Morales' apartment. VI:86, 88. Morales went into her apartment while Ronald stayed in his car. They had planned to return to 7 Fayston Street but when Morales went back downstairs, Ronald was gone. VI:88. Morales called Ronald, who had already returned to 7 Fayston Street, and he told Morales to take a cab there. VI:88.

When Morales got to 7 Fayston Street, she went up to Ronald's apartment on the third floor to ask for money to pay the cab. VI:89. On her way up, she noticed a car that belonged to Ronald's brother, Antonio Lyons (Antonio), who lived on the second floor. VI:89. Seeing Antonio's car made Morales anxious because she and Antonio did not get along. Morales testified about one prior argument when Antonio told Morales he had someone for her, which she took as a threat that he would find someone to harm her. VI:73, 78, 89. Morales was scared. She texted her daughter and son. VI:78.[4] Despite her fears, she

[4] Morales' text messages to her son and daughter excluded. VI:78.

continued to go to 7 Fayston Street but only with Ronald and she would only use the back door. VI:78.

After getting money from Ronald to pay the cab fare, on her way down the stairs, Morales saw someone sitting in a chair in Antonio's room but did not know who it was. VI:91. On her way back up after she paid for the cab, she ran into another tenant named Michael Counsel (Counsel) and asked him if he knew the person sitting in Antonio's room. VI:91. Counsel told Morales it was Sasha Morris (Morris). VI:91. Morales also learned that Antonio was in his room asleep. VI:91. Morales, now worried and scared of running into Antonio, continued up to the third floor to Ronald's apartment. VI:92, 118.

Because Ronald was intoxicated, Morales decided she would return to her apartment. VI:118. On her way down she noticed the lights in the kitchen on the second floor were on, and she reached in to turn them off. VI:121. In doing so, she accidentally knocked over a cup of water, causing it to spill on the floor. VI:122. She went to get a mop from the second-floor porch. VI:124. On her way, she saw Morris heading from Antonio's room into the bathroom. VI:125. When she realized that the mop was frozen, she put it back and got another mop. VI:125. On her way back into the kitchen, she saw Morris smoking a crack pipe in the bathroom. VI:125.

As Morales headed to the kitchen, Morris walked toward Morales. VI:128. Morales testified that Morris, "started talking stuff to me," saying, "you don't live here and you come over here and make a mess." VI:129. Suddenly Morris punched Morales, causing Morales' eyeglasses to "fly" out of her face. VI:130. Morris repeatedly punched Morales in the face, eyes and pulled at her hair. VI:200. Morales screamed for Ronald. VI:130-1. Morris had Morales by the hair, pulling her [Morales] into the kitchen. VI:131. In the kitchen, while Morris still had Morales by the hair and punching her, Morales "started touching the counter," "searching for something and the only thing [she] touched was a knife." VI:134, 210. Morales swung the knife, trying to get Morris off of her. VI:135. Antonio came into the kitchen and pulled Morris off of Morales. VI:135. Morales did not know that Morris had been cut or stabbed. VI:137.

Morales went back to the third floor. VI:139. She said she threw the knife into the sink. VI:139. Morales woke Ronald to ask him to walk downstairs with her because she wanted to go home. VI:140. Once outside, she got into Ronald's car. VI:141. She saw a police cruiser blocking the street. VI:142. The police ordered her out of the car and she complied. VI:142. She was handcuffed and placed into a police van. VI:142. Prior to being placed into a police van, Officers Karissa Scano

(Scano) and Michael McDougall (McDougall) claimed Morales said, "this is what you get for fucking with me," to a male standing on the sidewalk. III:75, 110. Morales testified that she did not say anything to anyone. VI:142.

Antonio Lyons, the Commonwealth's key witness.

Antonio was the Commonwealth's only witness who testified to seeing the fight between Morris and Morales. Antonio was Morris' boyfriend. IV:144. He testified that he and Morris dated for six years. IV:145, 203. He had known Morales 15 or 16 years, or for as long as long as she had been dating his brother Ronald. IV:145. Antonio said Morris and Morales knew each other but that he was not aware that they had problems. IV:146.

Antonio testified that had lived at 7 Fayston Street continuously since 1968, interrupted only by a period of incarceration in "2010 – 2000 – 2013," for a drug distribution conviction. IV:143, 170, 172-3, 186. After Antonio was released from his sentence, he returned to 7 Fayston Street upon learning from his brother that Morales no longer lived there. IV:171.

Antonio denied that he and Morales has problems, but when pressed, he testified that he had arguments or disputes with Morales, "[a]ll the time," over the course of 15 years. IV:211; V:8. The disputes were about him [Antonio] "butting in their

business," referring to Morales and Ronald. IV:212. Antonio's denials of any animus toward Morales contradicts his testimony that he only returned to 7 Fayston Street because Morales no longer lived there. Antonio denied he told Morales during an argument that he had somebody for her. IV:176.

On the evening of December 19, 2018, Antonio picked Morris up at around 8:00 pm. IV:147. They went back to 7 Fayston Street. IV:147. While at his apartment, they "[h]ung out, watched TV," and he went to bed at around 11:00 pm while Morris stayed up. IV:147, 148. Antonio was awakened by an argument about, "spilled water," "something like she was—[Morris] was mopping the floor, and --- and Elba spilled water on the floor while she was mopping it," coming from the porch or kitchen. IV:148. With help of his grand jury testimony minutes, Antonio remembered Morris say, "[y]ou seen me mopping the floor, and you come spilling water on the floor," and Morales saying, "[w]ell, you're mop[p]ing it with dirty water anyway." IV:149. Then Antonio heard Morales yelling for his brother, Ronald. IV:150.

Antonio got up and went toward the kitchen. IV:150. When he got to the kitchen, he saw Morris and Morales "tussling" in the back hallway. IV:150. Morris was on top of Morales. IV:191. Morris and Morales were "grabbing each other" by the arms. IV:192, 196. Antonio pulled Morris off of Morales, a fact he failed to tell the grand jury. IV:151, 192.

As Antonio pulled Morris off of Morales and started to walk back toward the direction of his room, he claimed he heard Morris say, "oh, she's got a knife." IV:151, 152, 153, 193. Antonio could not see Morales and could not see her holding a knife. IV:193. Indeed, he said he "wasn't paying attention to Ms. Morales" and that his back was toward her [Morales]. IV:197, 198. Antonio claimed Morris moved toward his side, "like a defense mode, like covering up her body, and like waiting for something." IV:153. He claimed Morales then came toward Morris and "seen her go in an upward motion, and she had a brown handle and a knife in her hand," adopting the Commonwealth's suggestion of an uppercut movement. IV:153, 158. He claimed he did not see Morris with a weapon. IV:168.

At trial, Antonio said he saw Morales make a swinging motion once; however, the Commonwealth pressed him about his memory, which was then unsurprisingly exhausted. IV:159. Over objection, the Commonwealth again showed Antonio his grand jury testimony, which he claimed refreshed his recollection. IV:161. Antonio's testimony then changed from having seen Morales make a swinging motion once to "two or three times." IV:162. Antonio claimed Morris said, "that bitch stabbed me," and that Morris was "sort of was walking in circles," repeatedly saying she was stabbed. IV:162, 163. Antonio saw Morris' eyes "go up in her head and she fell back." IV:163.

Antonio testified that he did not see where Morales went. IV:165. However, when the Commonwealth was about to approach him for a third time to refresh his memory with his grand jury testimony, Antonio then remembered Morales must have gone out the back way since he did not see Morales pass him. IV:165, 166.

When Antonio heard the police, he went to the door to meet them. IV:167. While at the front door, he saw Morales getting into Ronald's car. IV:167. He also saw the police pull up. IV:167. Antonio claimed Morales said to him, "[s]he smacked me that's why I stabbed her." IV:167. Morales denied saying anything to Antonio. VI:142.

Morales at the police station.

Scano and McDougall observed some swelling around Morales' eyes as well as scratches on her face. III:78. Morales appeared upset, teary-eyed and was crying. III:96, 98, 127-8. She made two phone calls. Her first call was to Ronald, with whom she spoke in English. VI:228. She then called her friend Jonathan, with whom she spoke in Spanish. VI:158. Officers were present during both calls. III:79, 90, 125. Morales testified that she did not tell either Ronald or Jonathan about what happened at 7 Fayston Street, though she recalled telling him about her fears that Antonio "got somebody for her." VI:149,

197. Morales also told Ronald that Sasha was a "crackhead" and that she did not belong in the house. VI:161.

The Investigation

Scano and McDougall were called to 7 Fayston Street for a report of stabbing. III:69, 107. When they got to 7 Fayston Street, they saw a female, later identified as Morales, getting into a red sedan. III:68-9. Scano approached the passenger side and McDougall approached the driver's side. III:72. Scano ordered Morales out of the car. III:73, 108. As soon as Morales got out of the car Scano handcuffed her. III:73, 74. Scano and McDougall claimed they heard Morales say, "this is what you get for fucking with me," directing it at a black male standing on the porch. III:75, 109.

Scano patted down Morales and searched her purse, but did not find anything. III:76. Scano claimed Morales said, "you're not going to find a knife in there," a statement Morales said she did not make. III:76; VI:142. McDougall placed Morales into the transport wagon. III:111.

Scano and McDougall then went inside 7 Fayston Street to the second floor. III:77. Scano said she saw a female, later identified as Morris, "covered in blood and blood around her." III:77. Two officers were already performing CPR. III:77. McDougall said Morris was laying on her side, unconscious, bleeding from her abdomen. III:111. McDougall rolled her onto

her back and took her pulse and asked someone to get a towel. III:114, 115. When EMS arrived, they took over CPR. III:117.

When EMT paramedic John Walton (Walton) arrived at 7 Fayston, he performed, "advanced life support," but there was no pulse, as Morris remained unresponsive. III:133. Walton brought Morris to Boston Medical Center and transported her to the trauma unit. III:134.

Officer Joseph McDonough (McDonough) arrived after McDougall and Scano. IV:15-6. In the kitchen, he saw blood on the walls, door jam, blood splatter on a chair, and some debris on the ground, including a wig. IV:16, 21, 35. The Crime Scene Unit arrived at about 2:05 am. VI:56. Officer Michael Barden (Barden) marked each area with a cone, accompanied by numbers and a scale. IV:67. Barden then took photos of each marked cone. IV:61. Officer Brendan McCarthy (McCarthy), as part of a search warrant execution, processed the third floor only. IV:139. He collected a knife, which he later brought to the crime lab at the station. IV:136.

Detective Richard Daley (Daley) went to the Boston Medical Center. V:22. There, he collected Morris' clothing and personal belongings. V:22, 25, 26, 27, 28, 29. Daley then went to 7 Fayston Street. There, he observed a large pool of thick blood, a towel and observed the walls had blood smears and droppings on the way into the kitchen. V:32. Daley interviewed

Ronald, who appeared to be intoxicated. V:36. Daley secured the scene and returned at 3:20 PM to execute a search warrant. V:36, 37. Daley and other officers collected two knives from the kitchen—though they did not know whether one of them was the knife used in the stabbing. V:38. They also collected mail belonging to Ronald and Morales. V:39. There was a "makeshift crack pipe," at the scene, and though it was photographed, it was not collected as evidence, because, according to Daly, the crack pipe had no evidentiary value. V:62, 84. Daley did not take blood samples from blood stains because "[b]y what I could see, what we collected and the two interviews of the Lyons brothers," the police, "determined pretty quickly what had happened." V:63. Daley did not order blood splatter testing. V:77. In fact, Daley did not request DNA testing because "we knew who all the parties. This was not a classic who done it." V:42. Although the police uncovered a small black screwdriver, Daley did not request DNA testing because "[i]t was in blood. It—it had all the information we had and we still have, it – it played no part in the – the altercation in the kitchen." V:40, 43.

The search warrant did not request a search of any rooms on the second floor, even though it was where the fight occurred, where Antonio's room was located, and the bathroom that Morales testified that she saw Morris smoke a crack pipe. V:77.

Instead, the police searched the third floor and from the kitchen sink, confiscated some knives. V:41. Daley concluded that Morris did not have a weapon based on interviews of Antonio and Ronald and from what was relayed to him about Morales' phone call at the station. V:79. Daley's reliance at all on Ronald's statement is notable given that Daley appeared dismissive of Ronald due to his intoxicated state. But for these factors, Daley testified he would have followed up on the screwdriver because it was found near Morris' body. V:79.

The Medical Examiner

Morris suffered two stabbing injuries to the left side of her chest, which the Medical Examiner, Maria Delmar Capo-Martinez (ME), called Wound A (Exhibit 54B) and Wound B (Exhibit 54C). V:100. The ME ruled that Morris' death resulted from "stab wounds with injuries to the heart and lung." V:130. Wound A was about an inch long and its gape was 3/8th of an inch and its depth measured 14.8 centimeters or 5.94 inches. V:107, 108, 131. Wound B's depth was 13.7 centimeters and its gape measured ¼ of an inch. V:11. The ME testified that Wound A alone would be lethal but Wound B may not be, depending on whether the injured received medical treatment right away. V:112.

The ME testified she observed two abrasions on Morris' face, three abrasions on Morris' chest, one abrasion on her right arm and injuries to her clavicle. V:121, 124. She stated

that these injuries were perimortem, meaning they were recent or near the time of death, an assertion that the Commonwealth was told by the ME, and disclosed to the defense one week prior to trial. I:30-2; V:122, 124.

The ME's toxicology report showed Morris' alcohol level was 0.02. V:125. Morris' ethanol level was 0.06. V:127. There was cocaine, coca ethaline—combination of cocaine and alcohol--, benzoyl embramine and marijuana in Morris' system. V:127, 133. The ME testified that alcohol, generally, can cause an individual to be happy, euphoric, drowsy, sleepy, lower their inhibitions, and slow their reaction time. V:126. While alcohol can be a depressant, it can cause an individual to be hyperactive. V:135. Cocaine, which was at a high level in Morris' system, is a stimulant, it increases the heart rate, it can cause someone to be euphoric, "act without really thinking about consequences, it may make you want to do more drugs, and impair judgment." V:136.

Self-defense/*Adjutant* Evidence

The trial court admitted three incidents of Morris' prior bad acts. The first instance involved Patrick O'Connell (O'Connell). VI:174-191. O'Connell, a high school teacher, testified that on December 17, 2006, he was at the intersection of Talbot Street and Blue Hill Avenue in Dorchester. VI:175,

176. While at a red light, a female, later identified as Morris, jumped into the passenger seat of his car. VI:177.

Morris refused to get out of O'Connell's car despite his repeated requests. VI:179. O'Connell then leaned over toward the passenger side, opened the door, and pushed Morris out of his car. VI:180. Morris jumped back into O'Connell's car and he pushed her out again. VI:181. This happened three times. VI:181. O'Connell got out of his car to go toward the passenger side to pull Morris out of his car. VI:182. As he was getting out, Morris dove into the driver's seat. VI:182. O'Connell leapt for his keys. VI:183. The police arrived at the scene. VI:183. Both O'Connell and Morris were arrested. O'Connell was charged with sex for a fee, which was later dismissed. VI:184.

The second prior bad act incident was admitted through a police report only. VII:20; RA27. The report was read into the record and provided that on June 15, 2013, the police went to 51 Judson Street in Dorchester, where they met with Henderson Marx (Marx). VII:20; RA27. Marx told the police that Morris, his girlfriend, physically assaulted him. VII:20; RA27. Officers saw blood on Marx's nose and damage to his car. VII:21; RA27. Kyle Williams, a percipient witness, told the police that he saw Morris "repeatedly punching Mr. Marx in the face and then punched Mr. Marx's passenger side mirror." VII:21; RA27.

A third incident was admitted through Morales' testimony, who only after *voir dire*, was permitted to testify about an incident where she observed Morris and another individual named Brandy engaged in a fight. VI:94-111; VI:117. Brandy and Antonio have a child together. VI115. Sometime in 2013, while at 7 Fayston Street, Morales "heard some noises and furniture being moved around." VI:115. When she got to the bottom floor, she saw Morris and Brandy fighting on the porch, punching each other. VI:115, 116. Brandy was trying to get Morris off the property. VI:117. Morris, while out in the street, continued to urge Brandy to fight her. VI:117.

POINTS ON WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Appellate review is necessary to clarify whether the trial judge's belligerence toward defense counsel deprived the defendant of a fair trial.
2. Permitting to stand the Appeals Court's holding that the trial judge properly excluded *Adjutant* evidence on the basis that it would overwhelm the trial and also that it would prejudice the Commonwealth impermissibly expands the grounds on which *Adjutant* evidence can be admitted.
3. The Appeal's Court did not resolve inconsistencies in the defendant's favor, as it must, in determining whether involuntary manslaughter instructions were warranted.

4. By interpreting the judge's denial of omissions instructions to mean that it was not her practice to give them, the Appeals Court failed to give the judge's words their plain and ordinary meaning.

WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

I. Further appellate review is necessary to clarify whether the trial judge's belligerence toward defense counsel deprived the defendant of a fair trial.

The Appeals Court held, "the judge's behavior during the trial was not always a model of restraint. The judge's periodic impatience with, and curtness toward, defense counsel came through in the transcript." (Memorandum/2.) However, the Appeals Court did not find that the trial judge's behavior manifested obvious bias toward the defendant," and that the trial judge instructed the jury that they "should not consider anything that [she had] said or done during the trial as any indication that [she had] any opinion as to how [they] should decide the case," was curative. (Memorandum/2.) The judge's instructions did not cure it. See. *Commonwealth v. Johnson*, 429 Mass. 745, 752 (1999).

A. First motion for a mistrial.

When defense counsel asked Antonio, "[a]nd you went away for how long," the trial judge, *sua sponte*, in the presence of the jury, exclaimed, "[e]xcuse me. Move on, please. The jury is to totally disregard that improper question." IV:172-3. Defense counsel appropriately requested a sidebar, the judge in the

presence of the jury dismissively and condescendingly rejected his request. IV:173. Defense counsel asked for a sidebar a second time, but the judge denied him, in the presence of the jury, stating, "No. Not now." IV:173.

As cross examination resumed, the Commonwealth's objection to defense counsel's question to Antonio if he knew that Morris was using drugs on the evening in question triggered a heated exchange at sidebar. IV:177. The judge immediately snapped, "I can't tell you how furious I am." IV:177. Although this occurred at sidebar, it is illustrative of the judge's overall antagonistic demeanor toward defense counsel.

Still at sidebar, after defense counsel argued he had a good faith basis for asking the question, the judge replied in demeaning manner, "I would normally expect a halfway decent lawyer to raise at the sidebar a question; okay?" IV:177, 78. When defense counsel stated, "I don't know what you mean by that," "Oh, please," the judge replied with notable disdain. IV:178. The defense moved for a mistrial, arguing, "it's clear that you've been siding with the Commonwealth since the – pretty much the beginning of the trial. You're restricting my cross-examination. You've insulted me in front of the jury," and "you snapped at me." IV:178. The judge denied the allegations, stating, "[t]he record is what it is." IV:179. When defense counsel continued to press the matter, the judge warned, "[y]ou're digging a hole." IV:179.

1. Second motion for a mistrial.

Cross-examination of Antonio resumed but when defense counsel asked Antonio whether he testified on direct that he did not know where Morris lived, the trial judge, *sua sponte*, interjected, in the presence of the jury, and in an exasperated tone, said, "[e]xcuse me. That wasn't his testimony. Please." IV:203-4. At the end of the first day of Antonio's testimony, the defense moved for a second time for a mistrial. IV:213-6. Out of the presence of the jury, the defense argued:

> the Court has interfered with the defendant's right to cross-examination, and I take that view –I don't make this claim lightly. I don't usually ask for mistrials, but I think the defendant has an absolute right to cross-examine a witness who has in this case the only witness as to the events, the only witness, and the Court has interrupted me, in moments where the Commonwealth is not objecting, is – is talking in – I think in tones in front of this jury that is inappropriate.
>
> …the comments that this Court has made at sidebar I think are inappropriate and – and not professional.
>
> I think that it's un – it's unfortunate that we're this far along here, we've – we've come to this very important witness.
>
> I – I think I have a right to challenge [Antonio's] credibility. I think the jury is – is picking up on cues that the Court just doesn't believe any of it and it's– that's just not the role of this – of this Court, I respectfully say. And therefore, I'm asking for the Court to grant a mistrial for the defendant.
>
> …and I really do think that this case should not be in this session. I just don't think we're getting a fair trial.

IV:213-5. Ignoring the arguments, the judge instead made disparaging remarks about his cross-examination, stating, "I doubt it. I'm disappointed that your cross-examination isn't more organized." IV:215. When defense counsel stated, "I don't think it's appropriate for the Court to jump in, dress me down in front of the jury multiple times now, multiple times." IV:216. The judge responded, "I'm not buying that either." IV:216.

2. A mistrial was warranted.

Regardless of whether defense counsel was properly kept from asking certain questions, the trial judge, through her statements and demeanor, exhibited such belligerence toward the defense that it tainted the jury against the defendant and her counsel. Simply put, the judge improperly gave the appearance of favoring the prosecution over the defense. *Commonwealth v. Sylvester*, 388 Mass. 749, 751 (1983).

In another instance when defense counsel requested a sidebar, the judge denied his request, which compelled him to make his argument in the presence of the jury, "I just want to put on the record that this is precisely what was happening with Antonio Lyons, and the Court permitted it to happen." VI:213. The judge replied, "[c]ounsel's statement is stricken." VI:214.

In a show of force between the judge and defense counsel, the judge carries greater weight given her role as the authority in

the courtroom and arbiter of the trial. *Johnson*, 429 Mass. at 752; see also *Commonwealth v. Sneed*, 376 Mas. 867 (1978).

Like in *Sneed*, the judge in the instant case disparaged defense counsel routinely, impugned his authority to mount a zealous defense for his client, including but not limited to when she clearly fumed at him at sidebar, telling him how furious she was at him (VI:177), when she forcefully denied his request for sidebars (IV:173) and casted aspersions on his cross-examination by telling him he was unorganized and questioned his abilities as an attorney. VI:177, 215; see *Sylvester*, 443 Mass. at 751. In doing so, the judge impugned his character and by extension, the defense. More significantly, the trial judge's intervention during defense counsel's cross-examination of Antonio likely had the effect of bolstering Antonio's credibility.

Although the trial judge instructed the jury to not be influenced by her exchanges with defense counsel during the trial, it did not cure it. It was too late: The bias was solidified throughout the course of the trial. VII:60.

II. Permitting to stand the Appeals Court's holding that the trial judge properly excluded *Adjutant* evidence on the basis that it would overwhelm the trial and that it would prejudice the Commonwealth impermissibly expands the grounds on which *Adjutant* evidence can be admitted.

The Appeals Court held that "[t]he judge's assessment that allowing additional evidence could 'overwhelm the case' to the prejudice of the Commonwealth was well supported on this record

and a valid factor for her to consider." (Memorandum/4.). The exclusion of admissible hearsay evidence on the ground that it could overwhelm a trial or that it prejudices the Commonwealth does not rest on any sound legal principle.

In the instant case, the trial court admitted three out of the five prior instances of Morris' bad acts. VI:174-191. The excluded incidents were probative of the identity of the initial aggressor in a fight between Morris and Morales; yet, the trial judge limited the evidence, ruling that she did not want the evidence to "take over the case." Further, Morris' prior acts of violence would have aided the jury in assessing whether her violent character was "relevant to the defendant's theory of self-defense in that it makes his version that the victim attacked him 'more probable'." *Commonwealth v. Adjutant*, 443 Mass. 657 (2005) citing *United States v. Greschner*, 647 F.2d 740, 741 (7th Cir.1981); see also *Commonwealth v. Chambers*, 465 Mass. 520, 529 (2013) ("[w]here a defendant claims self-defense and there is a dispute of fact whether the defendant or the victim was the first aggressor, *Adjutant* evidence is admissible to help the jury determine what happened during the altercation and to give the jury a "as complete a picture of the [often fatal] altercation as possible before deciding on the defendant's guilt.)

Morris' prior bad acts were relevant to Morales' self-defense claim. *Adjutant*, 443 Mass. at 657-8 ("[w]hether [the victim] was

a violent man, prone to aggression when intoxicated or under the influence of drugs, 'throws light' on the crucial question at the heart of Adjutant's self-defense claim—who attached first in the final moments before the fatal stabbing.")

Where the incident happened within a matter of seconds and where Morris had the better of Morales the entire time, it was reasonable that Morales believed she was still in danger of imminent harm from Morris even as Antonio was pulling Morris away. Moreover, given the history of animus Antonio harbored and displayed toward Morales, it was reasonable for her continue to fear for her safety when he suddenly appeared. VI:132, 133, 236.

The Appeals Court's holding that the evidence "could 'overwhelm the case' to the prejudice of the Commonwealth" is not grounded in caselaw. Indeed, the Appeals Court did not cite to any. Further, prejudice attaches to the defendant, not the Commonwealth. The evidence would not have delayed or disrupted the flow of the trial. Even the *Adjutant* evidence that was admitted did not take up much of the trial. On the contrary, it took up very little time and there was no suggestion that the excluded incidents would have taken much more.

III. The Appeals Court did not resolve inconsistencies in the defendant's favor, as it must, in determining whether involuntary manslaughter instructions were warranted.

The Appeals Court, citing *Commonwealth v. Pike*, 428 Mass. 393 (1998), held, "in determining a defendant's entitlement to an

[involuntary] manslaughter instruction, 'all reasonable inferences should be resolved in favor of the defendant, and, no matter how incredible [her] testimony, that testimony must be treated as true'." (Memorandum/5.) The Appeals Court's ruling precisely contradicts this proposition when it resolved inconsistencies against Morales.

The Appeals Court held that Morales gave inconsistent testimony and it gave greater weight to the medical examiner's testimony, which bolstered one of two of Morale's inconsistent statements. (Memorandum/5, 6.) Yet, the Appeals Court failed to resolve the inconsistency in Morales' favor. Even if "incredible," Morales' testimony must be "treated as true." *Commonwealth v. Pike*, 428 Mass. 393, 395 (1998).

IV. By interpreting the judge's denial of omissions instructions to mean that it was not her practice to give them, the Appeals Court failed to give the judge's words their plain and ordinary meaning.

The Appeals Court interpreted the trial judge's denial of omissions in police investigation instructions to mean that it was her practice not to give them, rejecting the defense's argument that the judge was under the mistaken belief that the instructions were categorically impermissible. (Memorandum/8.)

The defense sought what was she called, "Bowden Instructions." *Commonwealth v. Bowden*, 379 Mass. 472 (1980). RA60; VII:17-18; IV:98, 99. The defense's request was taken

directly from the model jury instructions on omissions in police investigations. RA54-61.[5] The trial judge denied the request, stating, "I don't give Bowd[en] instructions. There's no such thing as a Bowd[en] instruction. You can argue it but I'm not giving a Bowd[en] instruction," "I think there's SJC case that says there's no such thing as a Bowd[en] instruction, but I'm not giving a Bowd[en] instruction." VII:17, 18.

The instruction unfortunately suffers from the inaptly named, "Bowden Instructions," perhaps so ubiquitous as to overshadow the substance of the actual requested instructions. The Appeals Court noted that "[t]he Commonwealth acknowledged that the police did little to collect forensic evidence at the scene but suggests that this was appropriate given that the identity of the person who stabbed the victim was never in doubt." (Memorandum/7.) But this is precisely the circumstance in which the omissions in police instructions is appropriate.

Reading the judge's comments as a whole, but with particular attention to her statement, "there is no such thing as Bow[den] instructions," and applying the plain meaning of those words, there can be no mistake that the judge intended to convey her understanding that there is no such instruction. Moreover, the

[5] Model Jury Instructions 3.740. See Addendum.

judge did not consider whether the evidence was sufficient to warrant such an instruction. But had she applied the appropriate evaluation to determine whether the instructions were appropriate, given that the Commonwealth "acknowledged that the police did little to collect forensic evidence at the scene," it is likely she would have given them. The trial judge clearly under the mistaken belief that the instructions were categorically impermissible. See *Commonwealth v. Williams*, 439 Mass. 678 (2003); *Commonwealth v. Andrews*, 403 Mass. 441, 463 (1988). The Appeals Court's interpretation of the judge's words did not give them their plain meaning.

The Appeals Court also held that Morales did not demonstrate that she was prejudiced by the lack of instructions. (Memorandum/9.) The jury's compromised verdict convicting Morales of the lesser included voluntary manslaughter from the second-degree murder indictment, suggests that the jury was willing to consider all mitigating circumstances. Further, the compromised verdict, contrary to the Appeals Court's assertion that the defense's underlying argument about the inadequacy of the police investigation had little force, suggests that the defense challenges to the Commonwealth's case were impactful.

Without instruction, the jury was left without direction on how to consider the investigations' failings. "The fact that certain tests were not conducted or certain police procedures not

followed could raise a reasonable doubt as to the defendant's guilty in the minds of the jurors," *Bowden*, 379 Mass. at 486, but the jury could not be reasonably expected to appreciate this analysis if it were not specifically told to consider it. The instructions were meant to inform the jury that it could consider the lack of testing or actions omitted by the police during the course of its investigation, and whether reasons the police provided were reasonable. RA60-1; *Commonwealth v. Reid*, 29 Mass.App.Ct. 537, 541 (1990) (although the Appeals Court did not reverse on the trial court's failure to give omissions instructions, it stated that "it might have been preferable for the judge to inform the jurors that the evidence of police omissions could create a reasonable doubt… .")

CONCLUSION

For the foregoing reasons, further appellate review should be granted.

Respectfully submitted,
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By her attorney,

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CERTIFICATION PURSUANT TO MASS.R.APP.16(K)

I, Chaleunphone Nokham, certify that the foregoing application for further appellate review complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16, 18, and 20 of the Massachusetts Rules of Appellate Procedure, in particular, this brief complies with the length and typeface limitations in Rule 20(a)(2) and 20(a)(4) because it is in the monospaced font Courier New size 12, and contains 10 pages in the parts of the brief required by Rule 16(a)(3)—(9) as counted using the page count feature of Microsoft Word 2016.

/s/Chaleunphone Nokham
Chaleunphone Nokham

CERTIFICATE OF SERVICE

On this the 15th day of February, 2022, I hereby certify that I have caused a copy of the herein Application for Further Appellate Review served by Massachusetts Court System eFileMA and by electronic mail to Attorney Kathryn Sherman, Suffolk County District Attorney's Office, Appeals Unit, kacie.sherman@state.ma.us.

/s/Chaleunphone Nokham
Chaleunphone Nokham

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ADDENDUM

Model Jury Instruction 3.740: OMISSIONS IN POLICE INVESTIGATIONS

You have heard some evidence suggesting that the Commonwealth did not conduct certain scientific tests or otherwise follow standard procedure during the police investigation. This is a factor you may consider in evaluating the evidence presented in this case. With respect to this factor, you should consider three questions:

First: Whether the omitted tests or other actions were standard procedure or steps that would otherwise normally be taken under the circumstances;

Second: Whether the omitted tests or actions could reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence; and

Third: Whether the evidence provides a reasonable and adequate explanation for the omission of the tests or other actions. If you find that any omissions in the investigation were significant and not adequately explained, you may consider whether the omissions tend to affect the quality, reliability or credibility of the evidence presented by the Commonwealth.

All of these considerations involve factual determinations that are entirely up to you, and you are free to give this matter whatever weight, if any, you deem appropriate based on all the circumstances.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1831

COMMONWEALTH

vs.

ELBA MORALES.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

It is undisputed that the defendant stabbed Sasha Morris (victim) twice in the chest during an altercation between the women on December 20, 2016. The victim died from those injuries. A Superior Court jury acquitted the defendant of second degree murder but convicted her of the lesser included offense of voluntary manslaughter. On the defendant's appeal, we affirm. We address her four arguments in turn.

1. Mistrial. The defendant twice moved for a mistrial. As grounds, she claimed that the judge exhibited fractiousness toward her trial counsel to such a degree that it could have swayed the jury to convict her. She now claims error in the judge's denial of her motions. We review the denial of a motion for a mistrial only for an abuse of discretion. Commonwealth v. Martinez, 476 Mass. 186, 197 (2017).

As the Commonwealth acknowledges, the judge's behavior during the trial was not always a model of restraint. The judge's periodic impatience with, and curtness toward, defense counsel come through in the transcript. However, such interactions generally occurred outside the jury's presence.[1] More substantively, none of the judge's behavior manifested obvious bias against the defendant. Contrast Commonwealth v. Sneed, 376 Mass. 867, 870 (1978) (new trial warranted where judge "adopted the role of an advocate" and his "partiality" was "transparent"). In addition, the judge instructed the jury that her own beliefs were beside the point and that the jury "should not consider anything [she had] said or done during the trial as any indication that [she had] any opinion as to how [they] should decide this case."[2] We presume that the jury followed

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[1] At one point, the judge told defense counsel at side bar that "I can't tell you how furious I am." In her appellate brief, the defendant states that "[a]lthough this did not occur in front of the jury, it cannot be said that they did not hear it. Indeed, given the fiery tone of the judge's exclamation, it is likely the jury heard it." If the defendant wanted to maintain on appeal that the statement was made in a loud manner that the jury could hear, it was her burden to see that the record so reflected. See Allen v. Christian, 408 Mass. 1007, 1007 (1990) (burden is on appellant to provide appellate court with record showing error).

[2] The judge went on to instruct as follows:

> "If you, the jury, believe that I have expressed or hinted at any opinion about the facts of this case, or if you think from my tone of voice now or at any time during the trial that I have an opinion about the facts of the case or

those instructions. Commonwealth v. Williams, 450 Mass. 645, 651 (2008). The judge did not abuse her discretion in denying the defendant's motions for a mistrial.

2. Adjutant evidence. The defendant, who testified at trial, claimed that she acted in self-defense after the victim attacked her. There was one other eyewitness, the victim's boyfriend, who came upon the scene after the altercation between the women already was in progress. The boyfriend's testimony did not undercut the defendant's claim that the victim was the first aggressor. Instead, the problem that the defendant faced was that the defendant made no claim to having seen the victim wield a weapon, and it was uncontested that the defendant escalated the fight through grabbing a knife. In addition, there was testimony that the defendant made damaging admissions to both the victim's boyfriend and responding police officers. For example, two police officers testified that in the immediate aftermath of the stabbing incident, they overheard the defendant state to a man standing on the sidewalk, "This is what you get for fucking with me."

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about what your verdict should be, please disregard it. I have no opinion about the facts or about what your verdict should be. That is solely your duty, your responsibility."

The judge further instructed that, if the jury thought she had admonished an attorney during the trial, they should draw no inference from her having done so, and that she appreciated the conscientious efforts of both attorneys during the trial.

Pursuant to Commonwealth v. Adjutant, 443 Mass. 649 (2005), the defendant offered evidence of the victim's past violent behavior toward others. The judge allowed evidence of three such incidents. On appeal, the defendant claims that the judge committed reversible error by excluding evidence of additional instances of such behavior. The Commonwealth counters that no Adjutant evidence should have been admitted at all, because it essentially was uncontested that the victim was the first aggressor and the defendant was the first to use deadly force.[3] We need not reach the Commonwealth's argument that the judge erred in admitting any Adjutant evidence. For present purposes, it suffices to say that having allowed the jury to hear significant Adjutant evidence, the judge did not abuse her considerable discretion in deciding not to allow such additional evidence. See Commonwealth v. Olsen, 452 Mass. 284, 294 (2008). The judge's assessment that allowing the additional evidence could "overwhelm the case" to the prejudice of the Commonwealth was well supported on this record and a valid factor for her to consider.

3. Involuntary manslaughter. Next, the defendant argues that the judge erred when she declined to instruct the jury on

[3] The Commonwealth also points to the fact that the judge allowed the defendant to rely on hearsay evidence (a police report) to substantiate one instance of the victim's penchant for violence.

the lesser included offense of involuntary manslaughter. "An involuntary manslaughter instruction must be given if any reasonable view of the evidence would have permitted the jury to find wanton and reckless conduct rather than actions from which a plain and strong likelihood of death would follow" (quotations and citation omitted). Commonwealth v. Horne, 466 Mass. 440, 444 (2013). As the Commonwealth acknowledges, an instruction on involuntary manslaughter may be warranted even where a defendant killed the victim with a weapon, if the jury reasonably could conclude that the defendant was wielding the weapon in a manner that did not involve "a plain and strong likelihood of death." See Commonwealth v. Iacoviello, 90 Mass. App. Ct. 231, 245 (2016) (involuntary manslaughter instruction warranted where there was evidence defendant aimed gun at air or ground, not at victim). In determining a defendant's entitlement to an instruction, "all reasonable inferences should be resolved in favor of the defendant, and, no matter how incredible [her] testimony, that testimony must be treated as true." Commonwealth v. Pike, 428 Mass. 393, 395 (1998). See Commonwealth v. Abubardar, 482 Mass. 1008, 1009 & n.2 (2019); Commonwealth v. Magadini, 474 Mass. 593, 600 (2016).

The defendant claimed in her direct testimony that she did not intend to stab the victim, but rather that the stabbing somehow occurred while the defendant was merely swinging the

knife to try to get the victim to let go of her hair and "get [the victim] off of [her]."[4] On cross-examination, however, the defendant agreed that she "stabbed [the victim] twice," and that she "intended to make those motions that led to [the] stabbing." This was consistent with unchallenged medical evidence that the victim died of two deep stab wounds to her chest, one through her ribs that pierced her heart twice, and the other through her ribs and into her lung. Because the actions necessary to cause such wounds presented such an obvious risk of death, and because the defendant admitted that she intended those actions,[5] an involuntary manslaughter instruction was not warranted. See Commonwealth v. Sowell, 22 Mass. App. 959, 962-963 (1986) (no involuntary manslaughter instruction warranted where "deadly weapon was used to inflict a wound inconsistent with the reckless use of the weapon"). Accepting all reasonable views of the evidence in the defendant's favor, we are unpersuaded that rational jurors could have concluded that the defendant's stabbing of the victim was an unintended result of wanton or reckless conduct.

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[4] At the Commonwealth's request, the defendant showed the jury how she was brandishing the knife, a demonstration that the judge described for the record as a "swinging circular motion."

[5] The defendant did not claim that she was merely swinging the knife in a less dangerous manner and that it was the victim who moved her own chest onto the knife -- twice -- so as to cause the two deep stab wounds.

For similar reasons, even if we were to conclude that an involuntary manslaughter instruction should have been given, we also would conclude that the defendant has not shown sufficient prejudice to warrant a new trial even under a prejudicial error standard. In light of the unchallenged evidence about the nature of the victim's stab wounds, we are confident that the absence of an instruction on involuntary manslaughter would not have affected the jury's verdict.[6]

4. Adequacy of the investigation. At trial, the defendant sought to convince the jury that the police failed to conduct an adequate investigation and that this raised reasonable doubt about her guilt. The Commonwealth acknowledged that the police did little to collect forensic evidence at the scene, but suggests that this was appropriate given that the identity of the person who stabbed the victim was never in doubt.

While a judge may not instruct a jury to ignore alleged deficiencies in a police investigation, Commonwealth v. Bowden,

[6] During oral argument, the Commonwealth touched on a different issue related to prejudice. Specifically, it argued that whether the defendant was convicted of voluntary or involuntary manslaughter was of no consequence, because the two forms of manslaughter are set forth in the same statutory section, with the same sentencing consequences. This ignores the fact that the two forms of manslaughter are treated somewhat differently under the sentencing guidelines. Without resolving whether there is any merit to the Commonwealth's separate argument on prejudice, we note that we do not rely on it in affirming the judgment.

379 Mass. 472, 485-486 (1980), the defendant makes no such claim of error here. Nor does the defendant argue that the judge otherwise curtailed her ability to argue for an acquittal based on alleged inadequacies in the police investigation. Instead, she claims error only in the judge's refusal to instruct the jury that an inadequate police investigation could raise reasonable doubt about the defendant's guilt. However, the Supreme Judicial Court repeatedly has stated that a judge is not required to give such an instruction. See, e.g., Commonwealth v. O'Brien, 432 Mass. 578, 590 (2000). Accordingly, the defendant is left to argue that certain comments by the judge revealed her mistaken belief that she lacked any discretion to provide the requested instruction.[7]

Reading the judge's remarks in context, we interpret them as stating that it was her firm practice not to give such an instruction, not that she was prohibited from doing so. In addition, the tone and substance of the judge's remarks lead us to conclude that, in any event, she had no intention of giving such an instruction regardless of whether she knew she had authority to do so. Under these circumstances, even if the

[7] The judge stated: "I don't give Bowd[en] instructions. There's no such thing as a Bowd[en] instruction. You can argue it, but I'm not giving a Bowd[en] instruction. . . . I think there's [an] SJC case that says there's no such thing as a Bowd[en] instruction."

judge mistakenly believed she could not provide such an instruction, the defendant cannot demonstrate that she thereby was prejudiced. This is especially true given that the defendant's underlying arguments about the inadequacy of the investigation here had little force.

Judgment affirmed.

By the Court (Milkey, Kinder & Sacks, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: January 12, 2022.

[8] The panelists are listed in order of seniority.