SJC-11310

COMMONWEALTH vs. KENNETH SCOTT RICHARDS.

Essex. March 3, 2020. - October 7, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Homicide. Constitutional Law, Assistance of counsel, Admissions and confessions, Waiver of constitutional rights, Voluntariness of statement. Witness, Expert. Intoxication. Evidence, Intoxication, Expert opinion, Admissions and confessions, Voluntariness of statement. Practice, Criminal, Assistance of counsel, Admissions and confessions, Voluntariness of statement, Instructions to jury, Argument by counsel, Capital case.

Indictment found and returned in the Superior Court Department on July 26, 2006.

A pretrial motion to suppress evidence was heard by John T. Lu, J.; the case was tried before Richard E. Welch, III, J.; and a motion for a new trial, filed on February 9, 2016, was heard by Lu, J.

Rosemary Curran Scapicchio for the defendant.
David F. O'Sullivan, Assistant District Attorney, for the Commonwealth.

[1] Chief Justice Gants participated in the deliberation on this case and authored this opinion prior to his death.

GANTS, C.J. In the early morning hours of June 23, 2006, the defendant, Kenneth Scott Richards, killed his wife, Rachel Richards, by beating her to death with a baseball bat at their home. After officers arrived on the scene, the defendant was taken to a hospital where he underwent surgery for stab wounds. Within hours of surgery, while still impaired by the residual effects of anesthesia and painkillers, the defendant admitted to a nurse and later to law enforcement officers who questioned him that he had killed his wife and that the stab wounds were self-inflicted. At trial, however, he testified that he struck his wife with the baseball bat in self-defense only after she had stabbed him in the chest. A Superior Court jury found the defendant guilty of murder in the first degree on the theories of deliberate premeditation and extreme atrocity or cruelty.

The defendant presents four primary claims on appeal. First, the defendant claims that trial counsel was constitutionally ineffective for failing to retain and offer the testimony of an expert witness at the hearing on the motion to suppress, and then, at trial, to support the defendant's claim that the statements he gave after surgery were not made voluntarily and that he did not make a knowing and voluntary waiver of his Miranda rights. Second, the defendant claims that the judge erred in instructing the jury regarding their

evaluation of the voluntariness of the defendant's statements made after surgery. Third, the defendant claims that trial counsel was ineffective for conceding certain points during closing argument. And fourth, the defendant claims that the judge erred in declining the defendant's request to instruct the jury regarding reasonable provocation and sudden combat and in providing a confusing instruction regarding the use of excessive force in self-defense. We affirm the defendant's conviction of murder in the first degree and the denial of his motion for a new trial, and after plenary review of the entirety of the record, we decline to exercise our authority under G. L. c. 278, § 33E, to reduce the verdict or order a new trial.

Background. Before trial, the defendant moved to suppress his inculpatory statements to a nurse and to the law enforcement officers who interviewed him at the hospital. He argued that, because of his physical and mental condition, none of these statements was made voluntarily and, with respect to the law enforcement interviews, he did not knowingly and voluntarily relinquish his Miranda rights. The motion was denied. We shall discuss this motion in more detail when we address the defendant's claim of ineffective assistance of counsel.

We summarize the evidence presented at trial, reserving certain details for later discussion.

1. Police response to the crime scene. At 7:58 A.M. on June 23, 2006, Rowley police received a 911 call from the young daughter of the defendant and victim, who said that her father had a "hole" in his stomach and that "there was something wrong with [her] mom, too." Asked by the dispatcher why her father had a hole in his stomach, the daughter said, "I don't know," but in response to later questioning by the dispatcher, she said her mother may have "dug" the hole in his stomach. She said that her father was bleeding, that there was blood all over him, and that there was a baseball bat in her parents' room. There is no evidence that the daughter witnessed what had occurred.

A Rowley police officer, an emergency medical technician, responded at 8 A.M. He saw the defendant and the victim lying in bed, covered in blood. He observed a large kitchen carving knife lying between the defendant's left hand and his body; the officer removed the knife and placed it on the dresser. On the floor to the right of the bed was an aluminum baseball bat. The defendant, shirtless, was breathing but making "gurgling" sounds; he had lacerations on his wrists and neck and a puncture wound in his abdomen. The victim was not breathing and had no pulse. She had several indentations in her scalp indicating severe skull fractures, and the pillow beneath her head was completely soaked with blood.

2. Medical treatment. The defendant was transported to the hospital, arriving at around 8:30 A.M., where he underwent an exploratory laparotomy, which revealed that he had a lacerated diaphragm. Medical staff inserted a tube, successfully re-expanding the defendant's lung. The wounds on the defendant's neck and wrists were also cleaned and sutured. During surgery, the defendant was placed under anesthesia and given muscle relaxants. He also received fentanyl, a narcotic analgesic, at the beginning of surgery, and then morphine while in the operating room, between 11:30 A.M. and 11:45 A.M. At 12:15 P.M., the defendant was taken from the operating room to the intensive care unit (ICU).

3. Defendant's statement to nurse. The defendant was still under anesthesia when he was transported to the ICU; as he began to wake, he was given a drug to reverse the muscle relaxants and glycopyrolate to reduce secretions and make extubation easier. The tube was removed at 1:35 P.M. To assess his consciousness and alertness, a nurse (first nurse) asked the defendant his name, date of birth, and where he was; the defendant answered appropriately. When she asked the defendant whether he knew why he was in the hospital, he replied, "Yes. I stabbed myself and I killed my wife." The defendant then began to cry. Soon after, the defendant complained of chest pain and was administered additional morphine.

4. First police interview. At 1:55 P.M., Sergeant Stephen May of the Rowley police department and State police Trooper Robert LaBarge, after consulting with medical staff, began to interview the defendant. Also present in the room were the first nurse, an ICU nurse (second nurse), and a hospital administrator. The defendant was given the Miranda warnings and acknowledged that he understood his rights and was willing to speak with the officers. He also agreed to be audio-recorded.[2] Throughout the interview, the defendant was crying, his speech was mumbled, and at some point he complained of being in pain. The officers frequently repeated back what the defendant said to confirm their understanding of what he had said. Neither officer asked the defendant what effect the anesthesia or the medications he was given at the hospital were having on him.

During the course of the interview, which was conversational in tone, the defendant said that between 4 A.M. and 5 A.M., when the defendant and the victim were in their bedroom, he took a baseball bat out of the closet and hit the victim in the head and "just kept hitting her." The defendant was unable to remember how many times he struck the victim.

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[2] The Miranda warning was not recorded, but at several points during the interview the officers asked the defendant whether he understood that he did not have to keep speaking with them, which he said he did. The defendant also confirmed on the recording that he did not wish to have a lawyer present.

When LaBarge asked, "Why did this whole thing happen?" the defendant responded, "I lost it I guess," and cried. When asked why, the defendant offered that his "wife was cheating on [him]" for months with someone named Charlie, who lived in Exeter, New Hampshire. The defendant stated that this was not the first time he had heard about the affair; he had learned about it "a long time ago." He also said that the victim had told him the night before that "she didn't love [him] anymore." The defendant repeatedly expressed that he did not know why he had attacked the victim that morning, that he wished he knew, and that he had not been in his "right mind."

LaBarge asked the defendant, "Did she do anything at all to provoke you? Did she argue with you? Did she yell at you? Did she come at you? Did she do anything like that?" The defendant answered "no." The defendant denied that he and the victim had been arguing over the affair. He also denied drinking alcohol the previous night or taking any other drugs besides his cholesterol medication. The defendant correctly answered questions about his work, address, and living situation, and correctly identified the name of his mother-in-law.

LaBarge told the defendant that he was going to be charged with murder in the first degree and later asked if there was "anything else" the defendant wanted to add. The defendant stated that he was "guilty." The interview ended at 2:06 P.M.

5. Second police interview. At 4:10 P.M. that same afternoon, May and LaBarge returned to the defendant's hospital room for a second interview. The defendant was again informed of his Miranda rights, agreed to speak with the officers, and agreed to audio-record the interview. At this time, the defendant's ability to communicate had improved and his speech was clearer, but when asked how he felt, the defendant responded that he felt "horrible" and that his chest was "sore." When asked to read the Miranda card, he complained that his "eyes [were] all over the place," but he did read the card and later signed it.

The defendant's statements in the second interview were largely consistent with those in the first interview, although he provided some additional information. The defendant disagreed with the characterization that he and the victim had argued on the night before the killing, but conceded that they had a "disagreement" because the victim had told him that they did not have "a future together." He stated that he did not think the victim was planning on leaving him at that moment but mentioned that there were "so many other things going on," such as stressors at work and losing a house that he and the victim had planned to buy.

The defendant stated that during their disagreement the night before, the victim "was raising her voice more than [he]

was," but that she did not provoke him and did not come at him physically. He repeated that the attack occurred around 4 A.M., and, after retrieving the baseball bat from the hallway closet, he hit the victim and then "just kept hitting her." The defendant stated that his wife was restless but sleeping at the time of the attack. When the defendant first hit her, the victim said "stop," but the defendant could not recall her saying anything else after that. After he stopped hitting her with the bat, the defendant put a pillow over the victim's head. He then went to the kitchen and grabbed a serrated knife, cut his wrists and neck, and then stabbed himself in the chest. The interview ended at 4:24 P.M.

6. Forensic and medical evidence. A forensic biologist employed by the State police crime laboratory responded to the scene and analyzed bloodstain patterns. He observed "medium velocity impact" spatter in a "cast off" pattern on the wall above the victim's head, consistent with multiple, downward strikes from a blunt or medium force. He opined that the victim had been struck at least four times while lying prone or sitting up "slightly," and that she was not moving at the time she was struck.

There were bloodstains on the bat, and "impressions" with ridge details that could have been hand or footprints. He also determined that the kitchen knife found next to the victim had

flesh-like material along its edge and bloodstains on the blade and handle. In the kitchen, a knife block with a knife missing contained knives consistent with the one found in the bed. Two trash cans containing tissues with blood stains were also found in the living room. No blood typing or deoxyribonucleic acid analysis was performed on blood samples.

The medical examiner conducted an autopsy of the victim that showed that the cause of death was "blunt head injury with subarachnoid hemorrhage, hemorrhage over the brain, and . . . contusion of the brain." The victim had "multiple sites of blunt injury" and numerous lacerations and bruising to the head, face, and eyes. The victim's forearms and hands suffered blunt trauma, including tubular shaped bruising to her right arm, consistent with a bat strike; metacarpals in her right hand were also fractured. The medical examiner opined that the victim had sustained at least six or seven separate blows -- three to one side of her head, one to her forehead, one to her cheek, and blows to both her arms and hands. Two of the blows to her head could have been fatal in and of themselves and would have rendered her unconscious. In addition to the blunt force injuries, the victim sustained a laceration to the right side of the forehead, lacerations to the right side of the head, a laceration at the left forehead above the left eye, a laceration and bruising to the lower left eye, and "black eyes or

ecchymosis, bleeding into the eyelids of both eyes." He did not know what caused an injury to the victim's eye, or the abrasion on her chin, and he was unable to sequence the victim's injuries. But obvious bruising and swelling of her head, hands, and arms showed that the victim was alive for an estimated fifteen to thirty minutes after the attack.

7. The defense. At trial, the defense, presented primarily through the defendant's testimony, was that he acted in self-defense after the victim stabbed him.[3] In his testimony, the defendant confirmed the accuracy of virtually all of the background information he provided to the police during his statements at the hospital, including his home address; his work as an engineer for the Massachusetts Highway Department; his mother-in-law's name; that he was on cholesterol medication; the recent marital discord due to the victim's affair; and their failed efforts to purchase a home.

The defendant testified that the victim had been on medication for depression for a number of years, but that in late December 2005 she stopped taking her medication. In February 2006, the defendant took his wife to the doctor, as she "seemed suicidal" and "wanted to take her life." She was diagnosed with bipolar disorder and instructed to see a

[3] The defendant also called a friend who testified to the defendant's reputation for peacefulness.

psychiatrist and a therapist; the defendant also testified that doctors were changing her medication dosages.

On June 22, 2006, after the defendant returned home from work and made dinner, he and the victim had a disagreement about her medication. He also testified that they had a second disagreement that evening when the victim refused to help their daughter with her schoolwork. Later in the evening, they watched movies and went to bed between 10:15 P.M. and 10:30 P.M.

At 3 A.M., the defendant woke to urinate and returned to bed. Sometime after, he awoke "disoriented," with the victim kneeling beside him "in a trance." The defendant "was startled" and "reached up and tried to touch her." As soon as he touched the victim, she pushed back, and the defendant pushed her away. The victim "seemed to go over easy," and, as she fell, the defendant "slipped off the bed and . . . fell onto the floor."

After falling, he felt like he had the wind knocked out of him; he could not catch his breath and had a pain in his chest. When he looked down, he discovered a hole in his chest with blood trickling from the wound. The defendant tried to get up but could not; he felt under the bed, grabbed a bat, and used it as a "crutch" to stand. Then:

> "When I looked up [my wife] was . . . right there. She was in a position lying down but moving up and coming toward me. A wave of fear came over me. . . . And suddenly I felt she was going to hurt me. . . . I didn't know how to react."

The defendant "wasn't thinking rationally" when he picked up the bat and hit the victim. The victim stated "Scott, stop, stop don't hit me" and reached for the bat. The defendant released the bat, and the victim "held it briefly" until her hands "dropped" and the bat fell. The defendant recalled hitting the victim only once, but admitted on cross-examination that evidence showed there had been more than one blow.

The defendant then "crawled" to the bathroom to find hydrogen peroxide for his chest but "passed out" in the bathroom. He awoke and crawled toward another bathroom to look for peroxide. As he passed the bed, he stood briefly, and then passed out again. He awoke "half on and half off" the bed, and when he looked over, saw that the victim was lying "very still" next to him. The defendant then saw the knife from the kitchen lying between them. His "reasoning was all screwed up" when he picked up the knife and cut both of his wrists and the left and right sides of his neck.

When asked why he did not call for help after being attacked, the defendant testified that he "wasn't functioning properly" and was "thinking [about] survival." The next thing he remembered was waking up in a hospital room. The defendant testified that he had "no recollection of talking to the police at all," and no memory of meeting his lawyer later that day.

While he recognized his voice on the recorded statements he gave to the police, he stated that his voice in the recording was "drug-induced, not my normal voice."

The victim told the defendant that she had been having an affair with another man in late January 2006 and asked for the defendant's forgiveness. The defendant stated that he was "surprised" and "upset," and that he "cried" when initially told about the affair. On cross-examination, he denied discussing his wife's affair the night of June 22, but admitted that earlier that week they had had a "heart-wrenching" conversation about it, in which the victim cried and said she wanted to kill herself. Additionally, the defendant stated that in June 2006, he knew that the victim was "seeing" another man but believed it to be a "friendship" and that he did not know they were "sexually involved."

8. Motion for a new trial. After the defendant was found guilty of murder in the first degree on the theories of deliberate premeditation and extreme atrocity or cruelty, he moved for a new trial, making essentially the same arguments he presents on appeal. Because the trial judge had retired, another judge, who was the same judge who had denied the defendant's motion to suppress, held a nonevidentiary hearing and denied the motion for a new trial.

The defendant appeals both from his conviction and from the denial of his motion for a new trial.

Discussion. 1. Failure to offer expert testimony. The defendant argues that trial counsel was ineffective for failing to engage a medical expert to opine on the voluntariness of the defendant's statements and on whether his waiver of Miranda rights was knowing and voluntary. At the hearing on the motion for a new trial, the defendant offered an affidavit by a medical expert, Dr. Adam J. Carinci, who serves as the director of the Massachusetts General Hospital Center for Pain Medicine, and is board certified in both anesthesiology and pain medicine. After reviewing the defendant's medical records, Carinci stated that "within a five hour period of time, between the hours of 8:45 A.M. and 1:50 P.M., [the defendant] was exposed to at least eight distinct medications classified as either general anesthetics, benzodiazepines, opioids, cholinesterase inhibitors, or anticholinergics." He further stated that "[i]t is [a] medical fact that the residual effects of" these medications "detrimentally impact consciousness, awareness, cognition, orientation, concentration, dexterity, comprehension and recall." Carinci opined, "based on a reasonable degree of medical certainty, that at the time [the defendant] was read his Miranda rights and made statements to [Trooper] LaBarge, he was still under the residual effects of" these medications, as

manifested by "evidence of garbled speech, blurred vision, dry mouth, and dexterity impairment." He also opined that the residual effects of these medications would have "negatively impacted [the defendant's] ability to comprehend his Miranda rights at the time that they were read to him and the voluntariness of the statements that he made to [Trooper] LaBarge." Carinci's affidavit did not specifically address the defendant's statement to the nurse.

The defendant also offered an affidavit by his trial counsel, who declared that he should have called an expert at the hearing on the motion to suppress to testify regarding the effects of the anesthesia and medications given to the defendant at the hospital. His trial counsel wrote that, had he presented such testimony, the Commonwealth would not have met its burden of proving that the defendant's statements were voluntary, or that the defendant knowingly and voluntarily waived his Miranda rights. He also stated that, had the statements been suppressed, his trial strategy would have been different and he "cannot say with certainty that the defendant would have testified at trial." The defendant, in his affidavit, went further and declared that, if his statements at the hospital had been suppressed, he would not have testified at trial.

Where a claim of ineffective assistance is raised in a motion for a new trial that has been denied, and where the

appeal from the denial of that motion is raised in conjunction with a direct appeal under G. L. c. 278, § 33E, we determine whether the attorney erred and, if there was error, whether it resulted in a substantial likelihood of a miscarriage of justice. See Commonwealth v. Alcequiecz, 465 Mass. 557, 562 (2013).

We agree with the motion judge that defense counsel's "failure to develop and introduce expert evidence of the residual effects of the medications administered to [the defendant] for both the motion to suppress and for trial was error." The defendant's statements at the hospital were devastating to his case -- he admitted that he was not provoked by the victim and that he beat her to death with a baseball bat for no apparent reason other than his despair at losing her. It is evident from the recordings of his two interviews with law enforcement officers that he remained, to some extent, impaired by the medications he had received at the hospital and by the physical pain he was suffering from his wounds and from the surgical procedure. Under these circumstances, it was manifestly unreasonable for trial counsel not to retain a medical expert to help him understand the effects of the defendant's medications and physical pain on the voluntariness of his statements or the knowing and voluntary nature of his Miranda waivers. See Commonwealth v. Field, 477 Mass. 553, 556-

557 (2017) (where defendant's mental impairment would be central to defense strategy, error for defense attorney to fail to consult with expert on issue); Commonwealth v. Haggerty, 400 Mass. 437, 442 (1987) (where defendant's only realistic defense to murder charge was that his assault of victim was not proximate cause of death, error for defense attorney to fail to seek expert opinion). Cf. Commonwealth v. Cruz, 413 Mass. 686, 690 (1992) ("evidence at trial that a defendant's mind may have been impaired at the time of a crime, due either to a mental disease or to intoxication by drugs or alcohol, almost always includes expert testimony").

Counsel's error, however, created a substantial likelihood of a miscarriage of justice only if it "was likely to have influenced the jury's conclusion." See Alcequiecz, 465 Mass. at 562, quoting Commonwealth v. Frank, 433 Mass. 185, 188 (2001). In this case, trial counsel's failure to retain and offer testimony of a medical expert was likely to have influenced the jury's conclusion only if (1) the defendant's motion to suppress his statements would have been allowed had the judge heard such expert testimony, and the jury therefore never would have learned of these statements; or (2) the motion was denied and the statements were admitted at trial, but at least one juror concluded under our humane practice, based on the expert's testimony, that there was a reasonable doubt whether the

defendant's statements were voluntary and therefore did not consider the statements as part of the evidence. The defendant bears the burden of showing the likelihood of either of these results. See Alcequiecz, supra at 563.

a. Motion to suppress. The evidence at the hearing on the motion to suppress was essentially the same as the evidence admitted at trial regarding the defendant's statement to the nurse and his statements to LaBarge and May in the two hospital interviews, except that the defendant did not testify at the motion hearing.[4] The motion judge found that, during surgery, the defendant received general anesthesia in the form of fentanyl and morphine sulfate[5] and "remained under the influence of both [m]orphine and [f]entanyl" when questioned by medical personnel and during "much of the first police statement." The judge also found that, after a tube was removed from the defendant's throat, medical personnel asked him basic questions about how he felt, all of which he answered appropriately, albeit occasionally moaning in pain.[6] The judge found that

[4] Additionally, the second nurse testified at the hearing on the motion to suppress but did not testify at trial.

[5] In fact, the evidence reflected that the defendant received general anesthesia and, separately, fentanyl and morphine sulfate.

[6] As found by the motion judge, the first nurse asked if the defendant knew where he was, and the defendant replied that he was in the hospital. She asked if he hurt anywhere, and he said

during the first interview with LaBarge and May, the defendant "continued to feel drugged from the [m]orphine and [f]entanyl," and "[h]is mental functioning was impaired" by them, as well as by the "major surgery he had just undergone and by the injuries from his attempted suicide." The judge specifically rejected the testimony of the two nurses that the anesthesia had completely worn off before the defendant's first police interview, concluding that the defendant's "mental functioning was adversely affected by the drugs." The judge concluded that the defendant "was under the influence of pain medication" and that "his physical and mental condition were poor."

However, the motion judge also found that, even during the first interview, when the defendant's voice was difficult to hear and he mumbled at times, the defendant's answers to the police interview questions "were rational and appropriate, indicating his full understanding of the questions." The judge found it "significant that not one response was illogical, nonsensical, or otherwise did not make sense." He declared that the defendant "knew where he was, was coherent, understood the questions he was asked, and his memory was intact." The judge therefore concluded that the defendant knowingly and voluntarily

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that his chest hurt. She asked, "You stabbed yourself in the chest, do you remember?" The defendant replied, "Yes, and I killed my wife."

waived his Miranda rights during both the first and second interview, and that his statements to the officers were made voluntarily.

Where the motion judge already made factual findings that the defendant, during at least the initial part of the first interview, was under the influence of both morphine and fentanyl and was impaired by them, the question then is whether there is any reasonable likelihood that the motion to suppress would have been allowed if counsel had offered the testimony of Carinci at the hearing -- either because the judge would have found that the defendant did not knowingly or voluntarily waive his Miranda rights, or that the defendant's statements were not voluntarily made.[7] See Commonwealth v. Montez, 450 Mass. 736, 755-756 (2008) (to prevail on ineffective assistance of counsel claim based on failure to file motion to suppress, defendant must demonstrate likelihood of success on motion to suppress). We conclude that there is not.

For all practical purposes, the motion judge found what Carinci ultimately opined -- that the defendant was "still under the residual effects" of the various medications he was given

[7] In his motion to suppress, the defendant also asserted that the Miranda warnings themselves were deficient. But because Carinci's affidavit has no bearing on the sufficiency of police procedure, the motion judge's finding that LaBarge did "all that was required" remains unchallenged.

when he was read the Miranda rights and answered questions during the first interview, and those residual effects would have "negatively impacted" the defendant's ability to comprehend his Miranda rights and the voluntariness of his statements. Given the similarity between the judge's findings and Carinci's opinion, there is no reason to believe that the expert's opinion would have fundamentally affected the legal determination as to whether the defendant's waiver of his Miranda rights was voluntary, knowing, and intelligent.

As the motion judge implicitly recognized in his analysis, in determining whether a defendant's waiver of Miranda rights is voluntary, knowing, and intelligent, a judge does not consider simply whether drugs, medication, or the defendant's physical or mental condition "negatively impacted" his ability to comprehend his Miranda rights. Instead, the determination is based on the totality of the circumstances, which includes other factors such as the defendant's age, education, intelligence, and experience with the criminal justice system, as well as promises of leniency or of immunity, the manner of the interrogation, and the defendant's over-all behavior. See Commonwealth v. Tremblay, 480 Mass. 645, 656 (2018); Commonwealth v. Mandile, 397 Mass. 410, 413 (1986). A finding that the defendant was under the influence of drugs, alcohol, or, as here, medications given to the defendant before, during, and after surgery, may

certainly be considered in determining whether a defendant knowingly, voluntarily, and intelligently waived Miranda rights, but it need not be determinative, and it was not determinative here. See Commonwealth v. Wolinski, 431 Mass. 228, 231 (2000), quoting Commonwealth v. Ward, 426 Mass. 290, 295 (1997) ("intoxication bears heavily on the validity of a Miranda waiver, although it is insufficient alone to require a finding of involuntariness").

What the motion judge found most significant, and what we find most significant from our own review of the interview recordings, see Tremblay, 480 Mass. at 646, was that all of the defendant's answers to the questions posed were responsive, accurate, and, given the senseless nature of what he had just done, sensible. See Commonwealth v. Rivera, 441 Mass. 358, 365 (2004) (valid waiver of rights where defendant was on medication for schizophrenia that causes "memory problems," but answered questions appropriately and was "calm, coherent, and cooperative at all times"). It is apparent from the recordings that the defendant was horrified by what he had done, somewhat perplexed by why he had done it, and eager to admit his guilt. He was a mature adult, a college graduate, and a supervising engineer on highway projects, where he had previously interacted with police officers who were on detail. When the effects of the medication began to wear off, before the second interview, he never

expressed any regret for having spoken to the police and did not appear to struggle with his decision to waive his Miranda rights again.

> "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law."

Moran v. Burbine, 475 U.S. 412, 422-423 (1986). A defendant "does not need to understand or appreciate the tactical or strategic consequences of waiving Miranda rights" in order for the waiver to be knowing and intelligent. Commonwealth v. Hilton, 443 Mass. 597, 606 (2005), S.C., 450 Mass. 173 (2007).

We also conclude that the admission of Carinci's testimony would not likely have changed the determination that the statements to the police were made voluntarily. "The voluntariness of the waiver on the basis of Miranda and the voluntariness of the statements on due process grounds are separate and distinct issues but they are both determined in light of the totality of the circumstances and they share many of the same relevant factors." Commonwealth v. Edwards, 420 Mass. 666, 673 (1995). A confession made to the police or a civilian "is admissible only if it is voluntarily made." Commonwealth v. Sheriff, 425 Mass. 186, 192 (1997). "In determining whether the defendant's statements were voluntary,

we consider whether [they] were the product of a rational intellect and a free will" (quotations omitted). Commonwealth v. Bins, 465 Mass. 348, 360 (2013). "The fact that a defendant may have been in a disturbed emotional state, or even suicidal, does not automatically make statements involuntary." Commonwealth v. LeBlanc, 433 Mass. 549, 555 (2001). And while "special care" is taken where a defendant has ingested drugs or alcohol, "intoxication alone is insufficient to negate an otherwise voluntary act." Commonwealth v. Mello, 420 Mass. 375, 383 (1995). To be involuntary, statements must be attributable "in large measure to a defendant's debilitated condition," whether resulting from drug or alcohol abuse. See Commonwealth v. Waweru, 480 Mass. 173, 180 (2018), quoting Commonwealth v. Allen, 395 Mass. 448, 455 (1985).

Here, too, the interview recordings themselves demonstrate the voluntariness of the defendant's statements. There is nothing in the recordings to suggest that these statements could be attributed "in large measure" to his medications or pain, or that they were not the product of a rational intellect and a free will. The questions were conversational in tone; the defendant's answers were responsive to the questions; the defendant took care to attempt to answer the questions accurately; and, where the accuracy of the answers could be

objectively determined, they were indeed accurate.[8] See Commonwealth v. Clark, 432 Mass. 1, 12 (2000) (defendant's statement to police voluntary despite gunshot wound to his head and arm where defendant remained "alert and oriented," and "appropriately answered all questions put to him during the examination"); Allen, 395 Mass. at 457 (defendant's incriminating statements to nurse following brain surgery were voluntary where defendant "seemed rational and alert" during conversation, and "was able to understand and his answers made sense").

The defendant correctly notes that the judge who decided the motion for a new trial was the same judge who decided the motion to suppress, and he declined to decide whether Carinci's expert testimony would have changed his ruling on the motion to suppress. Instead, the judge rested his denial of the motion for a new trial on his conclusion that, given the strength of the physical and forensic evidence found in the defendant's home

[8] We note that the motion judge found the defendant's statements to the nurse to be voluntary but rested his conclusion on a mistake of law -- that a statement may be found involuntary only where there was police misconduct in coercing the statement or otherwise overpowering the defendant's will. "An admission by a defendant to a civilian is only admissible if voluntarily made." Commonwealth v. Waweru, 480 Mass. 173, 180 (2018), quoting Commonwealth v. Anderson, 445 Mass. 195, 204 (2005). A statement made to a civilian may be found involuntary even if no police officer was present when the statement was made.

that was presented at trial, "there was not a reasonable possibility that the verdict would have been different even without the challenged statements." The defendant argues that we should not conclude that Carinci's expert testimony would not have affected the outcome of the motion to suppress where the judge who made that decision himself did not so find.

Under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), a motion for a new trial is ordinarily decided by the trial judge, who shall grant it "if it appears that justice may not have been done." Where, as here, the trial judge had retired from the bench, the regional administrative justice refers the motion for a new trial to another judge for decision. See Rule 61A(B) of the Rules of the Superior Court (2020). If a claim of ineffective assistance of counsel necessarily includes an evaluation of the likelihood that a motion to suppress would have been allowed if the defendant had received effective trial counsel, the trial judge would not refer the matter to the judge who had heard the motion to suppress for his or her analysis; nor, if the claim involves an analysis of whether the jury's verdict would have been different, would the trial judge reconvene the jury. Instead, in deciding a motion for a new trial, a trial judge conducts his or her own evaluation of the likelihood of success. Here, the judge assigned to decide the motion for a new trial happened to be the judge who had decided

the motion to suppress; but he apparently chose to put himself in the position of the trial judge and not reevaluate whether his decision on the motion to suppress would have been different had he been provided with Carinci's testimony.

However, the motion judge specifically noted that his choice not to decide the issue did not mean he would have ruled differently:

> "[T]he court does not indicate that had the expert evidence been introduced at the motion to suppress hearing the court's result would have been different. The recordings and transcript of [the defendant's] statements to police contain the same indicia of voluntariness that the court relied upon in denying the motion to suppress. Without deciding, the court could still rely upon those indicia, even if it credited Dr. Carinci's expert testimony."

We respect the judge's choice and accept his suggestion that no inference should be taken from it regarding the likelihood of success on the motion to suppress. We, however, address the likelihood of success on the defendant's motion to suppress, and are in the same position to make that evaluation as the trial judge would have been in, relying on the same record of that hearing, the audio recordings, and the affidavit of Carinci. For the reasons discussed, we conclude that the defendant failed to show that the introduction of Carinci's testimony would likely have resulted in the suppression of his statements.

b. "Humane practice" instruction. Under what we have described as our "humane practice," where a judge determines

that a defendant's inculpatory statements are voluntary, "the judge must instruct the jury that the Commonwealth has the burden of proving beyond a reasonable doubt that the statement was voluntary and that the jurors must disregard the statement unless the Commonwealth has met its burden." Commonwealth v. Tavares, 385 Mass. 140, 152, cert. denied, 457 U.S. 1137 (1982). The jury need not agree unanimously that a defendant's statement is voluntary before it can be considered as evidence; each juror must decide the question for himself or herself, and individually determine whether he or she will disregard the defendant's statement. See Commonwealth v. Watkins, 425 Mass. 830, 836 (1997).

Therefore, in deciding whether defense counsel's failure to retain an expert and offer expert testimony at trial was likely to have influenced the jury's conclusion, we also consider whether any reasonable juror would likely have disregarded the defendant's statements had he or she heard expert testimony regarding the effect of the defendant's medications on the voluntariness of these statements. This question is complicated by the defendant's claim on appeal that the judge erred in instructing the jury on this issue.

In his final instructions to the jury, the judge declared in relevant part:

> "[B]efore you can consider the statements, the Commonwealth has to prove to you by the totality of the evidence and by proof beyond a reasonable doubt that [the defendant] made those statements voluntarily, freely and rationally. Now, what do I mean by that?
>
> "Well, the Commonwealth has to prove to you beyond a reasonable doubt that he made them voluntarily, that no one coerced him into making the statements, and the Commonwealth also has to prove to you beyond a reasonable doubt that the statements were the product of his rational intellect; in other words, the Commonwealth must prove from the totality of the evidence and based on all the circumstances that the defendant was not at the time suffering from some sort of mental defect or psychological condition that prevented him from understanding what he was saying or the content of what he was saying.
>
> "The Commonwealth also has to prove beyond a reasonable doubt that the defendant at the time that he made the statement was not so under the influence of drugs or medication that those drugs or medication prevented him from understanding what he was saying or that he was actually speaking."

The defendant maintains that the correct inquiry is not whether the "drugs or medication prevented [the defendant] from understanding what he was saying or that he was actually speaking," but rather whether the drugs "rendered the defendant incapable of understanding the meaning and effect of his statement, or incapable of withholding it." Model Jury Instructions for Use in the District Court § 3.560 (2018). See Commonwealth v. Vazquez, 387 Mass. 96, 100 n.8 (1982); Commonwealth v. Paszko, 391 Mass. 164, 177 (1984). We agree with the defendant that the formulation approved by the District Court is better than the formulation provided by the trial

judge. Although we appreciate that the judge might have sought to put the legal formulation in simpler language, we fear that too much of its meaning was lost in the translation.

The defendant also asserts that the absence of an instruction to evaluate the defendant's statement with "special care" was error. The District Court's model instructions provide: "If there is evidence of the defendant having a compromised mental state and/or that he was under the influence of drugs or alcohol, you must take special care in determining whether any statement was the product of the defendant's rational intellect and free will. . . . Obviously, a person cannot give up a valuable right freely if his brain is so clouded that he is not thinking straight." Model Jury Instructions for Use in the District Court § 3.560. We agree with the defendant that the better practice is to give this instruction when the evidence so warrants, as it did here.[9]

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[9] We note that the trial judge's final instruction to the jury regarding voluntariness was not his only instruction on this issue. When the statements were initially introduced in evidence, the judge instructed the jury that they "may not consider" the defendant's statements "unless the Commonwealth proves by a totality of the evidence . . . and . . . beyond a reasonable doubt that the defendant made these statements freely and voluntarily." He further explained that, essentially, the Commonwealth had to prove that the statements were "a product of [the defendant's] own free will and rational intellect," i.e., that "he wasn't somehow coerced into making the statements" and that his "physical and mental condition" did not prevent him from understanding "what he was saying." Additionally, the judge enumerated factors for consideration, including the

However, the defendant did not object to the judge's instruction, so we must determine whether it resulted in a substantial likelihood of a miscarriage of justice. See Commonwealth v. Oliveira, 445 Mass. 837, 842 (2006). And in doing so, we must consider whether it is likely that a reasonable juror, with a proper humane practice instruction and with the benefit of Carinci's testimony, would have concluded that the Commonwealth failed to meet its burden of proving that the defendant's statements to police were voluntary and therefore disregarded them.

We conclude that there is no such likelihood. The virtue of the humane practice instruction is that it requires jurors to consider the voluntariness of a defendant's inculpatory statements, and therefore think hard about their reliability, before adding those statements to the jurors' evidentiary calculus. See Commonwealth v. Jordan, 439 Mass. 47, 56 (2003), citing Commonwealth v. Cryer, 426 Mass. 562, 571-572 (1998). The judge's instruction, although flawed, was adequate to accomplish this purpose. And the jury, in making this determination, had the benefit of the oral recordings in

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defendant's "age," "medical condition at the time, any sort of ingestion of alcohol or administration of drugs," and "any psychotic condition." The defendant did not object to this instruction when it was given, and does not challenge it on appeal.

reaching this determination. We do not believe that any reasonable juror, having heard those recordings, would reach the conclusion that the defendant's statements were not made freely or that the defendant's mind was so clouded by his medications that his statements were so unreliable that they should be disregarded. Therefore, we conclude that there was no substantial likelihood of a miscarriage of justice arising either from defense counsel's failure to offer expert testimony at trial or from the judge's flawed humane practice instruction.

Additionally, pursuant to our plenary power of review under G. L. c. 278, § 33E, we consider an issue not raised by the defendant on appeal but relevant to the voluntariness analysis: whether counsel was ineffective for failing to request an instruction pursuant to Commonwealth v. DiGiambattista, 442 Mass. 423, 447-448 (2004). We declared in that case:

> "[W]hen the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation . . . and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt."

Id. Here, the defendant was in custody when he provided statements to the police, and the police clearly had the ability to record the statements, so the failure to record the Miranda warnings and the defendant's waiver of his rights during the first interview is contrary to our stated preference that the entirety of such interrogations be recorded whenever practicable. See id. at 446. Thus, "counsel erred in not requesting a DiGiambattista instruction as a result of the nonrecording of the defendant's initial acknowledgment and waiver of his rights." Commonwealth v. Colon, 483 Mass. 378, 393 (2019).

We conclude, however, that, even with a DiGiambattista instruction, a reasonable juror was not likely to have found that the Commonwealth failed to prove the voluntariness of the defendant's confession to police beyond a reasonable doubt. Both LaBarge and May testified that the defendant was given the Miranda warnings before the tape recorder was activated. Perhaps more importantly, the first nurse testified that the defendant was given Miranda warnings before the first interview, and contemporaneously so stated in her clinical notes. And the recording of the first interview shows that the defendant acknowledged that the officers had previously provided him with the Miranda warnings. Consequently, a reasonable juror was not likely to conclude that the failure to record the initial

Miranda warnings suggested that the warnings were not given or that the defendant did not waive his rights. Nor would a reasonable juror likely conclude that the delay in recording placed in question the voluntariness of the waiver or of the subsequent confession.

2. Closing argument. The defendant also contends that trial counsel's closing argument constituted ineffective assistance of counsel because he "conceded" that the jury could find murder in the first degree based on the evidence presented at trial and undermined the defendant's theory of excessive use of force in self-defense. The defendant also raised this issue in his motion for a new trial, arguing specifically that defense counsel's statements amounted to a "concession" of guilt requiring a colloquy with the defendant. See Commonwealth v. Evelyn, 470 Mass. 765, 771 (2015). The motion judge rejected this claim, finding that "the identified statements did not constitute a waiver of constitutional rights." We agree with the motion judge. Considering the closing argument as a whole, counsel's statement was not "tantamount to an admission of his client's guilt" (citation omitted). Commonwealth v. Triplett, 398 Mass. 561, 569 (1986).

In his closing argument, trial counsel did not contest that the defendant killed the victim but argued there was reasonable doubt as to whether the defendant committed murder in the first

degree. He argued that the defendant's statements were not voluntary given his physical and mental condition, and that the jury could not find those statements credible "beyond a reasonable doubt because there [was] some question about what he said, the circumstances under which those statements were made, the drugs he was on at the time." Counsel stated that, while the defendant's testimony was not "a model of clarity," it was supported by the 911 call from the defendant's daughter, in which she said that her mother "may" have "dug" a "hole" in her father. The defendant's failure to call the police, counsel argued, was due to the traumatic event he had endured. Further, he argued that without the defendant's statements, "the evidence [was] largely circumstantial." Counsel concluded his argument by stating that while "it's certainly possible to come back with a verdict of first-degree murder, . . . I believe it's equally possible to come back with something less than that."

This statement, in context, was not an admission of the defendant's guilt of murder in the first degree. Instead, it was a recognition of the reality that it was possible for the jury to reach that verdict based on the circumstantial evidence in this case, but also a plea for the jury to consider that a conviction of a lesser crime was equally consistent with that circumstantial evidence. Where defense counsel concluded his argument by suggesting that the Commonwealth failed to meet its

burden of proving murder in the first degree beyond a reasonable doubt, a reasonable jury would not have inferred that defense counsel was conceding the defendant's guilt of this charge. Nor did counsel's closing argument abandon the excessive use of force in self-defense theory of the case or fail effectively to argue that theory, leaving the client "denuded of a defense." Commonwealth v. Street, 388 Mass. 281, 287 (1983).

The defendant also claims that his counsel undermined the defendant's challenge to the voluntariness of his confessions when he said that, within "a matter of minutes" after he was awakened from general anesthesia, "he's interrogated by the police, questioned by the police. Interrogation might be too strong. You use your own judgment." It was reasonable for defense counsel to back away from his assertion that the police questioning constituted "interrogation," given the conversational nature of the interviews, in order to maintain his credibility with the jury and focus the jury on the purportedly confused state of the defendant's mind rather than a claim of aggressiveness by the law enforcement officers.

He also claims that his trial counsel undermined the credibility of the defendant's testimony by admitting it was "not a model of clarity." The fact of the matter, however, is that the testimony was not a model of clarity, and defense counsel may have acknowledged this in order to maintain his

credibility with the jury in asking for a lesser verdict. Cf. Commonwealth v. Bonnett, 472 Mass. 827, 842 (2015), S.C., 482 Mass. 838 (2019) ("a tactical decision to focus on the most important or promising lines of defense, while relinquishing others, can serve to enhance the credibility of a defense, in part by warding off the impression that a defendant is grasping at straws").

In conclusion, we recognize that trial counsel's closing argument was far from compelling advocacy, but the fact that it might have been stronger "does not make out a claim of ineffective assistance." Commonwealth v. Denis, 442 Mass. 617, 628 (2004). Trial counsel had the formidable task of arguing against the overwhelming evidence of the defendant's guilt. See Commonwealth v. Degro, 432 Mass. 319, 333 (2000). There is no reason to believe that a better closing argument might have yielded a better result for his client.[10]

[10] The defendant also asserts that trial counsel erred by noting in his opening statement that "an awful lot . . . is not disputed." However, trial counsel then continued: "To be sure, there are issues that are disputed that you'll hear I contest on behalf of [the defendant]." This statement does not support a claim of ineffective assistance of counsel where there was, in fact, much that was undisputed, including that the victim was killed by the defendant's beating her over the head with a baseball bat and that the defendant made statements at the hospital admitting that he killed her and that his chest wound was self-inflicted.

3. Jury instructions. The defendant argues that the trial judge erred by declining to instruct the jury on manslaughter under the theories of reasonable provocation and sudden combat, and by providing an inaccurate jury instruction regarding the manslaughter theory of excessive use of force in self-defense.

a. Reasonable provocation and sudden combat. "Voluntary manslaughter is an unlawful killing 'arising not from malice, but from . . . sudden [heat of] passion induced by reasonable provocation, sudden combat, or [the use of] excessive force in self-defense.'" Commonwealth v. Gonzalez, 465 Mass. 672, 686 (2013), quoting Commonwealth v. Acevedo, 446 Mass. 435, 443 (2006). In deciding whether an instruction is warranted regarding these mitigating circumstances, the evidence must be viewed in the light most favorable to the defendant. See Acevedo, supra.

An instruction on reasonable provocation is required

> "where the evidence raises 'a reasonable doubt that something happened which would have been likely to produce in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint, and that what happened actually did produce such a state of mind in the defendant.'"

Commonwealth v. Rhodes, 482 Mass. 823, 826 (2019), quoting Commonwealth v. Felix, 476 Mass. 750, 756-757 (2017). At the charge conference, counsel argued that a reasonable provocation instruction was warranted because the defendant in his testimony

reported that he was in a state of fear after his wife stabbed him in his belly. The judge declined to give the instruction because he believed that such an instruction was warranted when "you beat someone because someone has just told you something or done something to you that has insulted your dignity in some way." The judge added that the stabbing might suggest self-defense "but it sure isn't reasonable provocation." The judge erred: the fear arising from the victim having stabbed the defendant in the chest, if the jury were to credit the defendant's testimony, warranted a reasonable provocation instruction. See Acevedo, 446 Mass. at 445, quoting Commonwealth v. Amaral, 389 Mass. 184, 189 (1983) (defendant entitled to reasonable provocation instruction where "jury could conclude that a reasonable person in the defendant's position would have felt an 'immediate and intense' threat, and lashed out in fear as a result"). Even a "single blow," where it posed a risk of serious harm to the defendant, "can constitute reasonable provocation." Acevedo, 446 Mass. at 444 & n. 14. Here, where the alleged single blow was a knife stab in the chest, there was abundant risk of serious harm to justify a reasonable provocation instruction.[11]

[11] The defendant on appeal also claims that he was entitled to a reasonable provocation instruction based on what the victim told him earlier about her affair, and the statements she made that night about her no longer loving the defendant and about

Where a nonconstitutional error is preserved, we order a new trial unless we are "sure that the error did not influence the jury, or had but very slight effect." Commonwealth v. Vinnie, 428 Mass. 161, 163, cert. denied, 525 U.S. 1007 (1998), quoting Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). We are sure in this case that the error did not sway the jury for two reasons. First, in light of the defendant's repeated statements in his interview with LaBarge and May that the victim did nothing to provoke him and that his wounds were all self-inflicted, considered together with the physical and forensic evidence that were inconsistent with the defendant's testimony at trial, it is extremely unlikely that any reasonable juror would have a reasonable doubt as to whether the victim stabbed the defendant. Second, if any juror did, it is extremely unlikely that the juror would conclude that the defendant did not use excessive force in self-defense but acted instead with

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their having no future together. This evidence alone would not have warranted a reasonable provocation instruction. See Commonwealth v. Gulla, 476 Mass. 743, 748–749 (2017) (no reasonable provocation instruction warranted where "defendant had prior knowledge of the victim's relationship"); Commonwealth v. Eugene, 438 Mass. 343, 353–354 (2003) (same). Nor is this an appropriate case to revisit whether the sudden revelation of infidelity should continue to suffice to warrant such an instruction. See Commonwealth v. LeClair, 429 Mass. 313, 317 (1999), citing Commonwealth v. Schnopps, 383 Mass. 178, 181–82 (1981), S.C., 390 Mass. 722 (1984) ("A sudden oral revelation of infidelity may be sufficient provocation to reduce murder to manslaughter").

reasonable provocation. When one combines these two improbabilities, we can say "with fair assurance" that the error had no substantial effect upon the verdict that was rendered (citation omitted). Flebotte, supra.

Having so found, we need not reach the more difficult question whether the facts of this case warranted a sudden combat instruction because, even if they did, we conclude that the defendant would not have been prejudiced by any such error. See Commonwealth v. Howard, 479 Mass. 52, 58 (2018) ("Reasonable provocation encompasses a wider range of circumstances likely to cause an individual to lose self-control in the heat of passion than does sudden combat. . . . Thus, it is more accurate to view sudden combat as a form of reasonable provocation" [citation omitted]).

b. Excessive use of force in self-defense instruction. The trial judge instructed the jury:

> "In this case, you must consider whether the Commonwealth has proved beyond a reasonable doubt that the defendant used excessive force in defending himself. If the Commonwealth proves to you beyond a reasonable doubt that the defendant used excessive force in defense of himself which caused the death of the deceased, then you should return a verdict of guilty of manslaughter. If the Commonwealth fails to prove that the defendant used excessive force in rightfully defending himself, then you must find the defendant not guilty. . . . [Y]ou only reach the issue of manslaughter if the Commonwealth has failed to prove first-degree murder or second-degree murder."

The defendant asserts that the highlighted statement had the effect of removing the possibility of manslaughter on the theory of excessive use of force in self-defense. The defendant did not object to this instruction, so we therefore determine whether there was error and, if so, whether that error created a substantial likelihood of a miscarriage of justice. Oliveira, 445 Mass. at 842.

"Error in a charge is determined by reading the charge as a whole, and not by scrutinizing bits and pieces removed from their context" (quotation omitted). Commonwealth v. Rodriguez, 437 Mass. 554, 559 (2002). "[T]he adequacy of instructions must be determined in light of their over-all impact on the jury." Oliveira, 445 Mass. at 842, quoting Commonwealth v. Ferreira, 417 Mass. 592, 595 (1994). In addition to the quoted statement, the judge instructed the jury that "if you find the defendant was legitimately acting in self-defense, that is, the Commonwealth has failed to prove that he was not acting in self-defense, but you find that the defendant used excessive force in self-defense, then that would be what the law terms manslaughter"; "[i]f you find that someone was in self-defense but used excessive force in self-defense, then they have not committed murder but they have committed the crime of manslaughter"; and "[i]f the Commonwealth proves to you beyond a reasonable doubt that the defendant used excessive force in

defense of himself which caused the death of the deceased, then you should return a verdict of guilty of manslaughter." These statements conveyed "[t]he proper rule" that where excessive force in self-defense is used "the crime may be mitigated from murder to manslaughter." Commonwealth v. Allen, 474 Mass. 162, 172 (2016), quoting Commonwealth v. Young, 461 Mass. 198, 212 (2012). Reading the charge as a whole, the jury instructions clearly indicated the proper outcome should the jury find the defendant used excessive force in self-defense. The offending statement did not create a substantial likelihood of a miscarriage of justice.

3. Relief pursuant to G. L. c. 278, § 33E. Pursuant to our duty under G. L. c. 278, § 33E, to consider errors not raised by the defendant on appeal, apart from the other error we identified, supra, we address the judge's instruction to the jury regarding the meaning of proof beyond a reasonable doubt.

In his instruction,[12] the judge incorporated elements of both our traditional reasonable doubt instruction derived from

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[12] The judge explained reasonable doubt to the jury as follows:

> "The term is often used and is probably pretty well understood by jurors, but it is not easy for judges to define it to jurors. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. On the other hand, it is not enough for the Commonwealth to establish a probability, even a strong

Commonwealth v. Webster, 5 Cush. 295, 320 (1850), and the Federal Judicial Center, Pattern Criminal Jury Instructions § 21 (1987). See Commonwealth v. Russell, 470 Mass. 464, 469-470 (2015). In doing so, "he omitted the 'moral certainty' and 'abiding conviction' language found in the Webster charge and, in its place, inserted the 'firmly convinced' and 'real possibility' language found in Instruction 21." Id. at 470-471. In Russell, where the defendant objected to essentially this same instruction by this same judge, we did not endorse the instruction and instead crafted a new Webster instruction that used "more modern language," id. at 477, but we concluded that the given instruction adequately "impress[ed] upon the [jury] the need to reach a subjective state of near certitude of the guilt of the accused," id. at 474, quoting Victor v. Nebraska, 511 U.S. 1, 15 (1994). We therefore held that it "met the

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probability, that the defendant is more likely to be guilty than not guilty. That is not enough.

"So what is proof beyond a reasonable doubt? Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty."

minimum requirements of due process under the Fourteenth Amendment and art. 12" of the Massachusetts Declaration of Rights. Russell, supra at 474. Here, where the defendant did not object to the reasonable doubt instruction, we reach the same conclusion and determine that the instruction did not create a substantial likelihood of a miscarriage of justice.

We have examined the entirety of the record in accordance with our obligation under § 33E and discern no reason to reduce the verdict or to order a new trial. The defendant did not receive a perfect trial, but none of the errors cause us to believe that the trial was unfair or that the verdict of murder in the first degree is not consonant with justice.

Judgment affirmed.

CYPHER, J. (concurring, with whom Gaziano and Budd, JJ., join). I concur. Although I recognize, as does the majority in note 11, that the issue need not be resolved in this case, I write separately to emphasize that it is time to retire the legal principle that spousal infidelity, even if it is a sudden discovery, entitles a defendant to an instruction on reasonable provocation for murder. See Commonwealth v. Gulla, 476 Mass. 743, 748-749 (2017) (defendant cannot claim sudden discovery that would constitute reasonable provocation where he had prior knowledge of victim's relationship); Commonwealth v. Tassinari, 466 Mass. 340, 356 (2013) (defendant not entitled to instruction that "'sudden oral revelation of infidelity may be sufficient provocation to reduce murder to manslaughter' [where t]here was ample evidence, including the defendant's testimony, that the idea of the victim's infidelity was not new to the defendant"); Commonwealth v. LeClair, 429 Mass. 313, 317 (1999) ("sudden oral revelation of infidelity may be sufficient provocation to reduce murder to manslaughter").[1]

"The killing of a spouse (usually a wife) by a spouse (usually a husband)" is not an acceptable response to the

[1] The defendant relied on Commonwealth v. Schnopps, 383 Mass. 178, 181-182 (1981), S.C., 390 Mass. 722 (1984), to support his argument that he was entitled to a provocation defense. I conclude that it is unlikely that we would decide Schnopps the same way today.

discovery of infidelity. State v. Shane, 63 Ohio St. 3d 630, 637 (1992). Labeling such a killing as either "'reasonable' or 'excused'" reinforces "male irrationality as normal, and legitimates the view of women as property." See Milgate, Note, The Flame Flickers, But Burns on: Modern Judicial Application of the Ancient Heat of Passion Defense, 51 Rutgers L. Rev. 193, 224-225 (1998).