SJC-11769

COMMONWEALTH vs. LUCAS WALTERS.

Norfolk. February 14, 2020. - July 23, 2020.

Present: Gants, C.J., Lenk, Budd, Cypher, & Kafker, JJ.

Homicide. Constitutional Law, Admissions and confessions, Voluntariness of statement, Waiver of constitutional rights. Evidence, Admissions and confessions, Voluntariness of statement, Intoxication, Photograph, Knife, Relevancy and materiality. Intoxication. Practice, Criminal, Capital case, Motion to suppress, Admissions and confessions, Voluntariness of statement, Instructions to jury, Assistance of counsel, Argument by prosecutor.

Indictments found and returned in the Superior Court Department on October 1, 2009.

A pretrial motion to suppress evidence was heard by Paul E. Troy, J.; the cases were tried before Kenneth J. Fishman, J., and a motion to set aside the verdict was heard by him.

William S. Smith for the defendant.
Pamela Alford, Assistant District Attorney, for the Commonwealth.

LENK, J. The defendant was convicted by a Superior Court jury of murder in the first degree, on a theory of extreme

atrocity or cruelty, in the stabbing death of his neighbor, Jeffrey Phillips.[1] In this appeal, the defendant asserts multiple errors in the denial of his pretrial motion to suppress, in the trial proceedings themselves, and in the denial of his motion to set aside the verdict. The defendant also asks us to exercise our authority under G. L. c. 278, § 33E, to reduce the verdict or to order a new trial. We affirm the convictions, and we discern no reason to use our authority under G. L. c. 278, § 33E.

Facts. We recite the facts as the jury could have found them, in the light most favorable to the Commonwealth, reserving certain details for later discussion.

In the summer of 2009, the victim and his girlfriend shared an apartment in Braintree in the same three-unit apartment building as the defendant. On the afternoon of Friday, July 24, 2009, the victim left work and returned to his apartment. At approximately 6:45 P.M., he spoke to his mother by telephone and made plans to meet her the following day. Later that evening, the victim spoke by telephone with a friend for about an hour.

At some point thereafter, the victim joined the defendant

[1] The defendant also was convicted of breaking and entering into the dwelling of another during the day time, with the intent to commit a felony while armed, G. L. c. 266, § 18, and larceny from a building, G. L. c. 266, § 20. The jury found him not guilty of murder on a theory of deliberate premeditation.

in a makeshift shed that the defendant had built on the property. The defendant was, by his own account, "messed up"; he had gotten drunk, had smoked "crack" cocaine and marijuana, and had taken Xanax. The defendant asked the victim to lend him money; the victim refused and became angry, because the defendant already owed him money for some drugs the victim had provided him. The defendant told police that a fight ensued, and that the victim attacked him with a rake, injuring his legs. The defendant then hit the victim multiple times in the head and back with an axe.[2]

The defendant covered the body with a tarp, and put mulch over the blood on the pavement. When he saw his landlord later that weekend, he explained that he had spilled oil in the shed, and had placed the mulch to soak it up. The defendant's girlfriend had planned to see him that Friday evening, and had asked him to attend her family reunion on Saturday, but the defendant called her to let her know that he was not going to meet her.

On Saturday, July 25, 2009, the defendant used the victim's credit card to purchase gasoline. He also entered the victim's apartment and removed the victim's television, laptop, and video

[2] The defendant told police that he had hit the victim two or three times, while the medical examiner testified that there had been at least eleven blows.

game system; the defendant traded these items for crack cocaine, which he obtained from his long-time supplier in Springfield. The defendant drove the victim's body to a rural area in West Suffield, Connecticut, near where the defendant lived during the week on property belonging to his girlfriend's parents. The body was wrapped in tarps tied with rope, and placed near an irrigation pond. The defendant put the axe, the remaining rope, and a knife he had used to cut the rope in the toolbox on a trailer he owned.

During the afternoon of Sunday, July 26, 2009, the defendant arrived at his girlfriend's parents' house in Southwick; he and his girlfriend returned to Braintree that evening. During the trip, the conversation was tense, and it was apparent to his girlfriend that something was wrong.

Early on Monday morning, July 27, 2009, the defendant returned to western Massachusetts, where he worked. He remained in western Massachusetts on Monday and Tuesday. His girlfriend's father saw the defendant on Monday, and noted that the defendant seemed "hurried." On Tuesday, July 28, 2009, the defendant told his girlfriend's mother that he loved her, and thanked her for letting him be a part of her family.

On Wednesday, July 29, 2009, the defendant returned to Braintree. At approximately 5:30 P.M., he spoke with the third tenant in his and the victim's apartment building. At around

the same time, the defendant's girlfriend returned home from work. The defendant was crying and hanging onto her, and he would not eat. Eventually, they decided to drive to a store to rent a movie. During the drive, the defendant began apologizing to her for what was happening. After a while, she told the defendant that she wanted to go home. The defendant initially headed toward their apartment, but then passed it and drove to the Braintree police station. When he drove into the parking lot, he said that he had gotten into a fight with the victim and accidentally had hit him too hard. The defendant then told his girlfriend that he loved her, and walked to the police station.

Detectives Robert Joseph and Michael Reynolds of the Braintree police were standing outside the police station at approximately 8 P.M. when the defendant approached and said that he "really need[ed] to speak to someone"; Joseph told the defendant to take a seat in the lobby. The defendant soon reemerged, agitated and distraught, and reiterated his earlier statement. The detectives, who knew that the victim had been reported missing,[3] asked the defendant what he knew about the

[3] The victim had been reported missing on Monday, July 27, 2009. Officers conducted a welfare check on his apartment that day, and canvassed the neighborhood. Police also discovered that the victim's credit card had been used to purchase gasoline. There were no signs of foul play in his apartment, however, and neither the defendant nor anyone else was a suspect at that point.

person; the defendant replied, "I killed him." Joseph and Reynolds handcuffed the defendant and read him the Miranda[4] rights. The defendant indicated that he wished to speak with police.

Sergeant Timothy Cohoon and Detective Sergeant Edward Querzoli interviewed the defendant. During the interview, Detectives Thomas Molloy and Mark Sherrick were dispatched to the victim's and the defendant's apartment building to secure the scene. Molloy put crime scene tape around the shed, and noticed a rake behind it, but did not enter the shed itself.

The defendant told the detectives that he had gotten drunk, smoked crack cocaine, and taken Xanax, that the victim had attacked him with a rake, and that he "lost it" and hit the victim in the head with an axe. The detectives noticed scratch marks on the defendant's legs, and inquired whether he had been wandering through any bushes. The defendant said that he had not; later in the interview, the defendant indicated that the scratches on his legs were sustained when the victim hit him with the rake. The defendant told the officers that he had used the victim's credit card and had taken items from the victim's apartment and traded them to his supplier for drugs. He explained the manner in which he had disposed of the victim's

[4] See Miranda v. Arizona, 384 U.S. 436, 444 (1966).

body, and said that the axe could be found in his trailer, which was parked on his girlfriend's parents' property in Southwick. The defendant drew a map of the area where he had put the victim's body, and agreed to lead the officers there. Later that evening, the defendant traveled with police to West Suffield, Connecticut, and guided them to the location.

Prior proceedings. The defendant was indicted on charges of murder in the first degree, G. L. c. 265, § 1; breaking and entering into the dwelling of another during the day time, with the intent to commit a felony while armed, G. L. c. 266, § 18; and larceny from a building, G. L. c. 266, § 20. Prior to trial, he filed a motion to suppress his statements to police on the ground that they were involuntary. The motion was denied, and a video recording of the interview was played for the jury. The Commonwealth proceeded at trial on theories of deliberate premeditation and extreme atrocity or cruelty.

The defendant was convicted of all charges; on the charge of murder in the first degree, he was convicted solely on a theory of extreme atrocity or cruelty. After his convictions, the defendant filed a motion to set aside the verdict; he argued, inter alia, that the jury returned an inconsistent verdict, in light of the acquittal on the theory of deliberate premeditation. The motion was denied, and the defendant filed a

timely notice of appeal.[5]

Discussion. The defendant asserts numerous errors in the trial proceedings, including: (1) the motion judge's improper denial of his motion to suppress his statement to police; (2) the introduction of inflammatory photographs; (3) the absence of an instruction on "lost evidence"; (4) the introduction in evidence of knives that might have been used to cut the rope that bound the victim; (5) multiple improper statements in the prosecutor's closing argument; and (6) a

[5] The Commonwealth has filed a motion in this court seeking to supplement the record to include a transcript of the hearing on the defendant's motion to set aside the verdict. After his motion to set aside the verdict was denied, the defendant asked the trial judge to issue written findings of fact and a more detailed statement of his rulings of law. The judge implicitly denied the motion by taking no action on it, and the defendant unsuccessfully sought relief in this court, asking the court to order the judge to make further findings and rulings. The motion was referred to the single justice, who denied it. At that time, the Commonwealth argued that written findings were unnecessary.

The Commonwealth now asserts that the transcript of the hearing is necessary to provide a complete record pertaining to the defendant's motion to set aside the verdict, and that it is appropriate to supplement the record in light of this court's duty to review the entire record under G. L. c. 278, § 33E. The defendant opposes the motion, on the ground that the Commonwealth previously opposed his motion for further written findings and rulings, and that it should be estopped from now asserting that a transcript of the hearing on the same motion is relevant or necessary. Even if we were inclined to allow such a motion, which we are not, the transcript does not augment our understanding of the issues raised in the defendant's motion to set aside the verdict.

legally inconsistent verdict. The defendant also asks us to use our authority under G. L. c. 278, § 33E, to reduce the degree of guilt or to order a new trial.

1. Denial of motion to suppress statements. Before trial, the defendant moved to suppress his statements to police on the grounds that his physical and mental condition rendered him unable validly to waive his Miranda rights and give police a voluntary statement. After an evidentiary hearing,[6] the motion judge determined that, considering the totality of the circumstances, the defendant knowingly, intelligently, and voluntarily waived his rights, and that the defendant's will was not overborne to the extent that his statements were not a free and voluntary act. Accordingly, the judge denied the motion. On appeal, the defendant does not challenge the judge's findings of fact, but argues that the judge's ultimate findings and conclusions of law did not consider adequately the defendant's mental state.

a. Motion judge's findings of fact. On July 29, 2009, the

[6] The two interviewing officers, as well as the officer who drove with the defendant to Connecticut so that he could show police the location of the body, testified at the hearing. The motion judge also received and reviewed the audio-video recording of the defendant's statement to police. The judge's findings are well supported by this evidence, and, with respect to the audio-video recording, are consistent with our independent review of it. See Commonwealth v. Tremblay, 480 Mass. 645, 654-655 (2018).

defendant approached detectives at the Braintree police station and said that he really "need[ed] to speak to someone" about a missing person. After he said that he had killed the person, the defendant was handcuffed, brought into an interview room, and seated at a table, where he began to cry. Sherrick entered the room and obtained the defendant's permission to record the interview; the defendant agreed, but then appeared to gag, and Sherrick offered him a wastebasket and advised him to relax. The defendant responded, "I can't relax. My brain is fucked up. I did something real bad." He added, "I should just kill myself."

Sherrick left the room and Cohoon, the lead investigator in the missing person investigation, entered dressed in casual clothing. Cohoon asked the defendant if he was okay and offered the defendant water; the defendant indicated he was okay and declined the offer. Cohoon then removed the defendant's handcuffs. The defendant complied with instructions to place one hand, and then the other, on his head as the handcuffs were being removed. He said repeatedly, "Just kill me."

Cohoon informed the defendant that he was going to read the defendant the Miranda rights, and the defendant again muttered, "Just kill me." Cohoon read the Miranda rights. The defendant indicated that he understood and wanted to talk to police, and signed a Miranda waiver form. Throughout the interview, the

defendant cried quietly, and at times sobbed. He repeatedly interjected statements such as "What is wrong with my head?" and "Just fucking kill me." At one point, he put his head on the table and let out a loud scream. Interspersed with these comments, the defendant provided a cohesive narrative of events, answered questions, and gave further details when asked. Despite his emotional state, the defendant was lucid and responsive to questions, and corrected the officers if they misstated details of what he told them. When a State police trooper entered the room, the defendant repeated his account, described where the fight took place, and marked the location of the victim's body on a map.

Approximately one-half hour into the interview, after responding to a question regarding the number of times he struck the victim, the defendant gagged, vomited into a wastebasket, and fell off the chair onto his stomach. The officers rolled the defendant onto his side and told him to take a deep breath and relax because he was okay. They called medics and helped the defendant back into his chair. He vomited again, said "Kill me," and took a drink of water. The officers took a break from questioning and left the defendant alone in the interview room for several minutes, where he drank water, sobbed quietly, and gagged a few more times without vomiting.

When the detectives reentered the room, they asked him if

he was under the influence of any drugs. He said that he had smoked crack a few hours earlier, and that he had been drinking and taking drugs and driving around in his truck for the past few days. The questioning resumed, while the defendant continued to sob and repeat similar statements such as "Shoot me" and "I just want to die," while continuing to respond to questions. When he said that he did not want to talk anymore, the interview ended approximately one hour and nine minutes after it began.

b. Standard of review. When reviewing a decision on a motion to suppress, we grant "substantial deference to the judge's ultimate findings and conclusions of law, but independently review[] the correctness of the judge's application of constitutional principles to the facts found." Commonwealth v. LeBeau, 451 Mass. 244, 254 (2008), quoting Commonwealth v. Morse, 427 Mass. 117, 122 (1998). "Because the defendant was advised of, and waived, his Miranda rights," in considering whether the judge erred in denying his motion to suppress statements, "the issue becomes whether the Commonwealth has proved, by a totality of the circumstances, that the defendant made a voluntary, knowing, and intelligent waiver of his rights, and that his statements were otherwise voluntary." LeBeau, supra at 254-255, and cases cited. A judge must weigh, among other factors, the "conduct of the defendant, the

defendant's age, education, intelligence and emotional stability, . . . physical and mental condition, . . . and the details of the interrogation, including the recitation of Miranda warnings" (citation omitted). Commonwealth v. Tolan, 453 Mass. 634, 642 (2009).

"Special care must be taken in assessing a waiver and the voluntariness of the statements where there is evidence that the defendant was under the influence of alcohol or drugs." Commonwealth v. Shipps, 399 Mass. 820, 826 (1987). Nonetheless, "|a]n otherwise voluntary act is not necessarily rendered involuntary simply because an individual has been drinking or using drugs." Id.

c. Validity of the Miranda waiver. The defendant argues that his consumption of crack cocaine a few hours before the interview, and his evident emotional distress during the interview, made his waiver of his Miranda rights involuntary, and the waiver invalid. The defendant maintains that the motion judge placed undue emphasis on his initial decision to talk to police, and erred in concluding that the defendant's wish to speak to police, and his remorse during the interview, demonstrated a rational decision to waive his rights.

For a waiver to be knowing, intelligent, and voluntary, a defendant must understand the Miranda warnings themselves, but need not fully appreciate the tactical or strategic consequences

of waiving the enumerated rights. Commonwealth v. Hilton, 443 Mass. 597, 606 (2005), S.C., 450 Mass. 173 (2007). The fact that a defendant repeatedly was given Miranda warnings, indicated that he understood his rights, and signed a form agreeing to waive them, while evidence of voluntariness, is not dispositive. See Commonwealth v. Magee, 423 Mass. 381, 387 n.8 (1996) (signed waiver form, although not dispositive, constitutes evidence of voluntariness). As stated, in making this determination we also must consider evidence of the defendant's intoxication and disturbed mental state.

While intoxication bears heavily on a determination whether a Miranda waiver was voluntary, as discussed supra, intoxication alone is insufficient to invalidate a waiver. Here, the motion judge concluded that, notwithstanding the defendant's statement that he had smoked crack cocaine hours before speaking to the police, there was "no evidence that the drugs caused [the defendant] to be detached from reality or unable to concentrate, or affected his memory." This conclusion was bolstered by the defendant's ability to offer a detailed narrative of the incident, including a self-serving estimate of the number of times he hit the victim. See Commonwealth v. Silankas, 433 Mass. 678, 685-686 (2001) (intoxicated defendant's high degree of concentration, memory, rationality, and coherence at time of questioning support conclusion waiver was voluntary).

As with intoxication, "[t]he fact that a defendant may have been in a disturbed emotional state, or even suicidal," while important, "does not automatically make statements involuntary." Commonwealth v. LeBlanc, 433 Mass. 549, 555 (2001), citing Commonwealth v. Perrot, 407 Mass. 539, 542, 543 (1990) (statements were voluntary even though defendant had asked for gun to kill himself).

Here, the defendant made suicidal statements throughout the interview. He also cried quietly, sometimes sobbed, screamed once, and gagged repeatedly. Nonetheless, the defendant gave lucid and coherent responses to the officers' questions, and at times corrected the officers' misstatements of his account. Accordingly, the motion judge did not err in finding that the defendant was not too intoxicated or mentally disturbed to knowingly, intelligently, and voluntarily waive his Miranda rights.

d. Voluntariness of statements. Although both require the same totality of the circumstances test, the voluntariness of a defendant's statements is a distinct inquiry from the question of the voluntariness of a Miranda waiver. See Commonwealth v. Medeiros, 395 Mass. 336, 343 (1985). A statement is voluntary if it "is the product of a rational intellect and a free will, and not induced by physical or psychological coercion" (citation omitted). Commonwealth v. Weaver, 474 Mass. 787, 802 (2016),

aff'd, 137 S. Ct. 1899 (2017).

i. Coercion. There is no evidence of police coercion here. Police provided the defendant with proper Miranda warnings; the tone of the conversation was "low-key and sympathetic"; police several times told the defendant that it was important to talk, but that they wanted to be sure he was okay before they continued; the defendant was not handcuffed; the officers did not use deceptive tactics or misleading assurances; when he vomited, they offered him medical assistance and water, left him alone briefly to compose himself, and verified that he was willing to continue speaking before continuing.

ii. Intoxication and disturbed mental state. As with the validity of a Miranda waiver, evidence of a defendant's intoxication and mental state are important factors when determining whether the defendant's statements were voluntary. To be sure, the record in this case indicates both that the defendant was intoxicated and in a disturbed mental state. The defendant was highly agitated, and repeatedly commented that he should kill himself, or the police should kill him. He cried throughout the interview. He gagged and vomited, falling off his chair. When the officers asked him whether he was under the influence of any drugs, he responded that he had been drinking and taking drugs and driving his truck around for the past two

days, and had smoked crack cocaine a few hours before coming into the station.

The analysis whether a defendant's intoxication renders the defendant's statements involuntary is similar to the analysis whether a defendant's Miranda waiver was voluntary. See Commonwealth v. Howard, 469 Mass. 721, 727-728 (2014), S.C., 479 Mass. 52 (2018). Here, the facts that the defendant gave a detailed and coherent narrative, and appeared lucid throughout the interview, indicate that his level of intoxication did not render his statements involuntary. See id.

Turning to the defendant's disturbed mental state, the motion judge concluded that, notwithstanding the defendant's emotional distress, his intoxication, and his suicidal ideation, the defendant's statements were voluntary in the totality of the circumstances. The judge reasoned that the defendant's detailed, coherent narrative of facts, attempts at exculpation by underplaying the number of times he hit the victim, and apparent grounding in reality demonstrated that his statements were voluntarily and intelligently made.

Where, as here, it is clear that a defendant makes a statement in an agitated or emotional mental state, the question whether the statement was freely given requires close analysis. In Magee, 423 Mass. at 386-387, for example, the court held that a defendant's statements were involuntary after seven hours of

prolonged questioning, where the defendant, in an exhausted and sleep-deprived state, cried and shook uncontrollably.[7] Similarly, in Commonwealth v. Scherben, 28 Mass. App. Ct. 952, 952-953 (1990), the Appeals Court held that there was no clear error in a motion judge's findings and ultimate conclusion of involuntariness ,where the defendant was not drunk but was under the influence of alcohol, and was nervous and upset; where three police officers were present; and where the interrogation was conducted at a late hour, close to midnight.

Nonetheless, a defendant's disturbed, or even suicidal, mental state does not automatically render his or her statements involuntary. See LeBlanc, 433 Mass. at 555. An agitated or distressed mental condition, for example, could be "natural for someone who [has] admitted the commission of serious crimes." See Perrot, 407 Mass. at 542-543 (statement voluntary despite fact that defendant was emotional, asked for police officer's gun to kill himself, and was placed on suicide watch).

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[7] Importantly, in Commonwealth v. Magee, 423 Mass. 381, 386-387 (1996), the defendant's physical and emotional condition was not the only relevant factor; unlike here, the judge in that case also observed that police failed scrupulously to honor the defendant's right to remain silent and her right to counsel; that the seven-hour length of the interrogation, taking place in the early morning after a sleepless night, and the presence of as many as three officers at one time created a coercive environment; and that the promise that the defendant would receive the psychological help she sought if she gave police the information they wanted affected her capacity to give a knowing and voluntary waiver.

Moreover, despite his distressed demeanor, here the defendant repeatedly provided officers with a coherent narrative of the incident, and there was no indication that he was acting irrationally. See LeBlanc, supra at 552, 554-555 (statement was voluntary where defendant, although suicidal and in emotional turmoil, described incident in detailed narrative form). We discern no error in the judge's conclusion that the defendant's statements were voluntary.

2. Introduction of crime scene and autopsy photographs. Over the defendant's objection, photographs of the victim's body were introduced in evidence. These included photographs taken at the scene where the body was recovered, and five autopsy photographs.[8] The defendant asserts that these photographs,

[8] The photographs from the crime scene showed the body as it was found wrapped in a tarp, and then showed the body partially unwrapped. At a pretrial hearing, the Commonwealth argued that these photographs were relevant to show the efforts undertaken to conceal the victim's body, and thus to counter the possible defense that the defendant had been highly intoxicated at the time of the killing, as well as to show insect activity to indicate the time of death. After the judge asked the prosecutor what the relevance of the photographs was in the case, "other than horror engendered by the insects to somebody who there is no doubt he was dead when he was placed there," the prosecutor agreed that there was "no doubt as to the timing," and also that the body had been kept in the shed, unmoved, "for two days or so," as evidenced by insect activity in the shed. Thus, it is unclear how the wrapping and tying on a Sunday had any relevance to the victim's mental state or level of intoxication on Friday evening, or why the judge allowed the introduction of admittedly gruesome photographs as duplicative evidence to establish a fact that the Commonwealth agreed it had more than ample evidence to establish without them.

which depicted the body in a state of decomposition and highlighted gruesome post-mortem injuries to the victim's head and face, were inflammatory and unduly prejudicial. In particular, the defendant challenges the admission of an autopsy photograph showing the bulging left eye of the victim. We agree that the risk of unfair prejudice arising from that photograph substantially outweighed its probative value. See Mass. G. Evid. § 403 (2020).

"The question whether the inflammatory quality of a photograph outweighs its probative value and precludes its admission is determined in the sound discretion of the trial judge" (citation omitted). Commonwealth v. Amran, 471 Mass. 354, 358 (2015). A reviewing court will defer to the trial judge's exercise of this discretion unless the judge has made "'a clear error of judgment in weighing' the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (citations omitted). Commonwealth v. Alleyne, 474 Mass. 771, 779 (2016).

Where it is probative of a material issue, the fact that a photograph is gruesome, or may have an inflammatory effect on the jury, does not necessarily preclude its admission. See Commonwealth v. Keohane, 444 Mass. 563, 572-573 (2005). "Recognizing the heightened risk of prejudice from autopsy photographs depicting a body in a state of decomposition, we

have cautioned[, however,] that such photographs should be admitted only if the judge determines that 'they are important to the resolution of any contested fact in the case'" (citation omitted). Alleyne, 474 Mass. at 779. See Commonwealth v. Berry, 420 Mass. 95, 108-109 (1995); Commonwealth v. Cardarelli, 433 Mass. 427, 431 (2001).

Photographs depicting the extent of a victim's injuries, such as the force applied and the number of wounds, may be probative of whether a defendant acted with deliberate premeditation or with extreme atrocity or cruelty. See Commonwealth v. Meinholz, 420 Mass. 633, 635-636 (1995), and cases cited. See also Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983). Given that the Commonwealth proceeded at trial on the theories of deliberate premeditation and extreme atrocity or cruelty, the judge's decision to allow introduction of at least some of the challenged photographs was not an abuse of discretion.

It is not evident, however, that all of the photographs introduced were more probative than prejudicial. In particular, we note, as the defendant argues, that the photograph showing the victim's face, and the bulging left eye, after the body had been decomposing for six days, was likely to be particularly

inflammatory, and had little probative value.[9] Indeed, the substitute medical examiner[10] himself testified during voir dire that the appearance of the victim's left eye had no medical significance. At a pretrial hearing on the defendant's motion to exclude the photographs, the Commonwealth argued that the photograph was relevant to the condition of the victim's body when it was found, the time of death, and the extent of the injuries. At trial, when the objection was renewed, the prosecutor argued that the photographs were relevant to show the extent of the victim's injuries. The photograph was at best slightly relevant as to the time of death and the extent of the injuries. The decision to place this indisputably gruesome photograph before the jury, however, did not weigh appropriately the probative value and the prejudicial effect of the

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[9] Before us, the defendant argues, as the substitute medical examiner stated, that the photograph showing the eye had no medical relevance, and was not relevant to the issue of extreme atrocity or cruelty because it showed post-mortem decomposition and not pre-mortem injuries. At a pretrial hearing, the defendant opposed admission of the photograph, although ultimately he agreed that the photograph potentially was relevant to show the nature of the victim's injuries, because it depicted a cut above the eye. At that hearing, the defendant argued that if the photograph were admitted, the portion showing the eye should be obscured.

[10] The Commonwealth relied upon a substitute medical examiner because, at the time of trial, the medical examiner who performed the autopsy was facing criminal charges in an unrelated matter.

photograph. See Commonwealth v. Chalifoux, 362 Mass. 811, 817 (1973). The time of death was not seriously in dispute,[11] the injuries shown were primarily post-mortem, the medical examiner testified that the photograph had no medical relevance, and the other autopsy photographs provided ample, indeed better,[12] evidence of the extent of the injuries that caused the victim's death. Thus, the risk that the photograph would distract the jury outweighed any probative value. See Commonwealth v. Richmond, 371 Mass. 563, 565-566 (1976) (reversing murder conviction where jury were shown photographs of victim's face after it had been eaten by dogs because evidential value of photographs was overwhelmed by prejudicial effect and "it would take a pretty sophisticated [j]ury not to be affected by that kind of photo").

Nonetheless, although this photograph should not have been introduced, we discern no cause to disturb the verdict. We note in particular the precautionary measures taken by the judge to attempt to mitigate the prejudice. See Amran, 471 Mass. at 358. The judge limited the number of photographs that could be shown,

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[11] See note 8, supra.

[12] The fatal injuries were to the back of the victim's head. The substitute medical examiner testified that the injuries to the shoulder and neck were not fatal, and the injury to the forehead might have been simply an extension of the wound to the back of the head.

and repeatedly cautioned the jurors that, despite the gruesome nature of the photographs, they were to render a verdict based on the evidence, rather than on sympathy, anger, or passion. The judge also prevented the prosecutor from displaying enlarged versions of the autopsy photographs, instead ordering that booklets be distributed to each juror so that the juror could control exposure to the photographs. Moreover, the evidence in this case, which included the defendant's detailed statement to police, was overwhelming, thereby making much less likely the possibility that the autopsy photographs had a significant impact on the jury's thinking. See Commonwealth v. Barbosa, 463 Mass. 116, 124 (2012).

3. Instruction on lost evidence. The defendant argues, for the first time on appeal, that the judge should have, sua sponte, instructed the jury that they were permitted, but not required, to draw an inference adverse to the Commonwealth because of the Commonwealth's failure to recover a rake from the defendant's shed.[13] The defendant contends that the inability to test the rake for his deoxyribonucleic acid (DNA) prejudiced his defense. He argues that the evidence from the rake would have

[13] The defendant cites a comment in the Model Jury Instructions for Use in the District Court pertaining to "Omissions in Police Investigations," which noted that such an instruction might be appropriate in certain circumstances where evidence was lost or destroyed. See Model Jury Instructions for Use in the District Court, Instruction 3.740 note 3 (2009).

corroborated his statement that he hit the victim with an axe only after the victim had hit him with a rake and injured his legs. The absence of an instruction on "lost" or "missing" evidence, in the defendant's view, created a substantial likelihood of a miscarriage of justice.

The affidavit supporting the search warrant for the defendant's shed referred to the existence of a rake. No rake was recovered at the time of the search. While Molloy saw a rake when he put up the crime scene tape, he was unaware at that time of the defendant's statements, or that a rake might be significant to the case. Molloy testified before the grand jury and at trial, however, that he had observed a leaf rake with a wooden handle and plastic teeth behind the defendant's shed when he was securing the scene. Molloy did not participate in the subsequent search of the shed, and did not mention the rake to the other detectives involved in the investigation, who only learned of Molloy's observations as the trial was underway.

On cross-examination, several investigators conceded that they would like to have located the rake, and that such a rake could have been useful to corroborate the defendant's statement. The investigators did not recall whether the area behind the shed had been searched thoroughly, although at least one crime scene technician testified that he went behind the shed and did not recall observing anything of note.

In closing, the prosecutor queried whether a rake such as the one described by Molloy, even if it did exist, could have caused the scratches on the defendant's legs. The prosecutor also suggested that the rake had never existed. At the defendant's request, the judge provided the jury with the so-called Bowden instruction concerning an inadequate police investigation.[14] While the defendant did not request a more specific instruction at trial pertaining to lost or missing evidence, he now asserts error in the absence of such an instruction, and ineffective assistance of counsel for the failure to have requested one.

Where "potentially exculpatory evidence is lost or

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[14] The Bowden instruction, based on the court's holding in Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980), informs jurors that they may consider whether a failure to conduct scientific tests or otherwise follow standard procedure, if significant and not adequately explained, affects the reliability of the Commonwealth's evidence or indicates investigators' bias against the defendant.

The judge's presentation of the instruction was largely consistent with the instruction requested by the defendant. The only exception was the omission of an introductory sentence stating, "You have heard some evidence suggesting that the Commonwealth did not conduct certain scientific tests or otherwise follow standard procedure during the police investigation." The defendant did not object to the form of the instruction at trial; on appeal, he asserts that the omission of this prefatory language "compounded" the prejudice incurred from the absence of a "lost evidence" instruction. Given the prominence afforded to the rake on cross-examination and in closing arguments, we are confident that the jury could understand and apply the instruction notwithstanding this omission.

destroyed," courts craft an appropriate outcome after balancing the Commonwealth's culpability against "the materiality of the evidence and the potential prejudice to the defendant" (citation omitted). See Commonwealth v. Phoenix, 409 Mass. 408, 412 (1991). The proper remedy is left to the discretion of the trial judge; "[i]n certain cases . . . it may be appropriate to instruct the jury that they may, but need not, draw an inference against the Commonwealth." See Commonwealth v. Kee, 449 Mass. 550, 557 (2007).

Here, however, the Commonwealth has neither "lost" nor "misplaced" any evidence that was previously in its possession. Cf. Phoenix, 409 Mass. at 412 (fingerprint in blood and paper bag containing bullet hole destroyed during testing); Commonwealth v. Neal, 392 Mass. 1, 2 (1984) (samples from breathalyzer test not preserved). "While the prosecution remains obligated to disclose all exculpatory evidence in its possession, it is under no duty to gather evidence that may be potentially helpful to the defense" (citation omitted). Commonwealth v. Wright, 479 Mass. 124, 140 (2018).

The defendant's contention that the rake should be considered "lost" in light of the fact that Molloy testified to having observed a rake within a secured crime scene is unavailing. Molloy was the only law enforcement official to recall seeing a rake, and thus the only person to whom custody

of the rake theoretically could be attributed. As the rake bore no significance to Molloy at the time of his observation, we assign no error to his decision not to collect it. Cf. Wright, 479 Mass. at 139 (2018) (rejecting argument that failure to collect certain evidence unduly prejudiced defendant "primarily because the potentially exculpatory value of this evidence was not apparent at the time"). Moreover, Molloy was responsible for securing the scene, not for collecting the evidence that the technicians later retrieved from it. Hence, we discern neither error in the absence of a sua sponte instruction on lost evidence, nor ineffective assistance of counsel in not requesting such an instruction.

4. Introduction of knives in evidence. The Commonwealth introduced two knives and related photographs in evidence. One knife was found in the defendant's trailer near the axe and a ball of yellow synthetic rope with human blood near the end that had been cut; the other knife was found in the shed.[15] The Commonwealth argued that the knives were relevant in connection with testimony showing that the rope tied around the victim's body was frayed as if it had been cut with a knife, and the proffered knives could have been used to cut the rope. In overruling the defendant's objection to the admission of the

[15] No DNA test was performed on the red-brown stain near the tip of the knife that had tested positive for human blood.

knives, the judge said that the Commonwealth was "not offering [the knife evidence] as a weapon but as a tool consistent with the manipulation of a body fluid."

The defendant argues that allowing the introduction of the knives was error, as they were irrelevant to the cause of death or the placement of the body, and the knives created a danger that the jury incorrectly would infer from them that the defendant had had the wherewithal to be armed, and thus to act with extreme atrocity or cruelty.

We review a trial judge's decision to allow the introduction of proffered evidence for abuse of discretion, and do not disturb such a decision absent "palpable" error (citation omitted). See Commonwealth v. Spencer, 465 Mass. 32, 48 (2013). "Where a weapon definitively could not have been used in the commission of the crime, [however,] we have generally cautioned against admission of evidence related to it." See Barbosa, 463 Mass. at 122. Such evidence creates a risk that the jury will use the evidence impermissibly to infer that the defendant has a bad character or a propensity to commit the crime charged. See Commonwealth v. Monico, 396 Mass. 793, 807 (1986).

Nonetheless, evidence of "[a] weapon that could have been used in the course of a crime is admissible, in the judge's discretion, even without direct proof that the particular weapon was in fact used in the commission of the crime." See Barbosa,

463 Mass. at 122. See, e.g., Commonwealth v. Perez, 460 Mass. 683, 695-696 (2011); Commonwealth v. Williams, 456 Mass. 857, 871 (2010). "Such evidence is relevant for demonstrating that the defendant had the 'means of committing the crime.'" Barbosa, supra, quoting Commonwealth v. Ashman, 430 Mass. 736, 744 (2000). Here, the Commonwealth offered the knives as "tools," because of their possible connection to cutting the rope used to bind the victim. Although the knives were of limited probative value, the evidence received "scant" attention during trial and had, at most, a "very slight effect" on the jury (citation omitted).[16] See Barbosa, supra at 124.

5. Improprieties in prosecutor's closing argument. The defendant contends that a number of the prosecutor's statements in his closing argument were improper and, collectively, prejudiced the defendant. We agree that certain statements were improper, but conclude that the improprieties do not require a new trial.

a. Characterization of defense theories as "excuses."

[16] We note, however, some discrepancy between the stated reason that the judge provided, that the evidence of the knives was consistent with the "manipulation of body fluid"(for which there was no evidence and which would have been erroneous), and the Commonwealth's use of the knives, which focused on the possibility that the knives had been used to cut the ropes that bound the victim's body. See Commonwealth v. Washington, 449 Mass. 476, 483 (2007) (court may affirm judge's decision on any ground supported by record).

Throughout his closing, the prosecutor argued that the defendant's case consisted of "excuses." The prosecutor told the jury, for example, that defense counsel "has spent virtually this entire trial trying to show you what the defendant feels is an excuse why. . . . What excuses can we come up with to show this jury that [the defendant] didn't mean to do what he did?" Later, referring to evidence that the defendant told a neighbor, shortly before turning himself in to the police, that he had placed mulch in the shed to cover up an oil spill, the prosecutor argued that, "ninety minutes before the defendant walks into that police station, he is still making excuses and he is still telling lies." The prosecutor urged the jury not to "be distracted by all these excuses," and suggested that the defendant's actions had a financial motive.

The defendant did not object at trial; he now contends that these statements were improper ad hominem attacks. He argues that describing his case as an "excuse" misstated the law, and that he had been arguing, inter alia, that his intoxication mitigated, but did not excuse, his actions, while the prosecutor's choice of language conveyed to the jury that the defendant was claiming that his intoxication would entirely excuse his actions.

As the defendant argues, prosecutors undoubtedly may not disparage the defense. See Commonwealth v. Gentile, 437 Mass.

569, 581 (2002) (characterization of defense tactic as "despicable" went "beyond labeling it as unworthy of belief . . . and smacks more of an ad hominem attack"). A prosecutor may, however, "argu[e] forcefully for a conviction based on the evidence and on inferences that may reasonably be drawn from the evidence." Commonwealth v. Kozec, 399 Mass. 514, 516 (1987). The realm of appropriate "forceful" advocacy includes commentary on the relative merits of the defendant's arguments. See Commonwealth v. Simpson, 434 Mass. 570, 586 (2001) (characterization of defense argument as "insult" was not improper where "remark was designed to demonstrate the lack of evidence to support the self-defense claim"). Here, although the choice of the word "excuse" well may have been ill-advised, it did not cross the line into impropriety. The prosecutor's remarks, as evidenced by his reference to the defendant's fabricated explanation that he placed mulch on the pavement to cover an oil spill, appear designed to suggest that the jury should disbelieve the defendant's version of events.

"We have repeatedly warned that, in 'closing argument, "[l]awyers shall not and must not misstate principles of law."'" Commonwealth v. Rollins, 470 Mass. 66, 81 (2014), quoting Commonwealth v. Bins, 465 Mass. 348, 367 (2013). While an unfortunate choice of words, the prosecutor's statements about "excuses" here stand in clear contrast to those cases where we

have concluded that a prosecutor explicitly misrepresented a principle of law. See Commonwealth v. Rivera, 482 Mass. 259, 271 (2019) (repeated use of word "justification" in lieu of "mitigation" improperly suggested that defendant had to demonstrate "justification" to reduce degree of guilt to voluntary manslaughter); Commonwealth v. Morales, 461 Mass. 765, 783-784 (2012) (prosecutor failed to mention that theory of deliberate premeditation requires deliberation in addition to intent to kill); Commonwealth v. Killelea, 370 Mass. 638, 644 (1976) (prosecutor falsely implied that if jury found defendant lacked criminal responsibility, defendant would be set free).[17]

b. Statements pertaining to the missing rake. The defendant argues that the prosecutor's statements regarding the missing rake exceeded the scope of the evidence, and impermissibly shifted the burden of production to the defendant. At one point in his closing, the prosecutor argued,

> "Let's assume that there was, in fact, a rake . . . . It's a big mouth plastic leaf rake. Does it look like the type of rake that could inflict the injuries that we see in the defendant's leg? You all understood in your common experience what one of those rakes look like.
>
> " . . .

[17] The facts of this case differ from Commonwealth v. Salazar, 481 Mass. 105, 118 (2018), where we held that the prosecutor's "statement that the defendant's possible intoxication did not 'excuse' his actions," while technically correct, improperly implied that intoxication could not diminish the defendant's culpability.

> "You know where he got those injuries from. He got them through all the thorny vines that he traipsed through dragging the body of [the victim] through the woods.
>
> " . . .
>
> "If there was, in fact, really a rake that any significance to this case whatsoever, don't you think the police would have found it? Because the defendant . . . hid all the incriminating evidence against him . . . . If it's the rake that is going to make or break this case . . . don't you think he would have put it front and center before he traveled thirty seconds down the street to the police? There was no rake."

The defendant maintains that these statements concerning the source of the scratches on his legs went beyond the scope of the evidence, and thus were impermissible. We disagree.

"The prosecutor is entitled to argue the evidence and fair inferences to be drawn therefrom," Commonwealth v. Paradise, 405 Mass. 141, 152 (1989), but cannot base an argument "on mere conjecture or surmise," id. at 153. Although there was no rake in evidence, the relevant evidence included (1) a description of a rake observed by Molloy, (2) photographs of the scratches on the defendant's legs, (3) testimony and photographs regarding thorny vegetation where the victim's body was found, and (4) the defendant's statements that his legs had been injured when the victim hit him with a rake. That the thorns, rather than the rake, could have been the source of the defendant's injuries is a reasonable inference from this evidence. Cf. Commonwealth v. Buckman, 461 Mass. 24, 37-38 (2011), cert. denied, 567 U.S. 920

(2012) (not improper for prosecutor to argue that scratches on defendant's head had been inflicted by victim).

Moreover, contrary to the defendant's assertion, expert medical testimony is unnecessary to support such an inference. Expert testimony is required where an inference is "beyond [the] 'common knowledge and experience of the ordinary lay[person]'" (citation omitted). Commonwealth v. Scott, 464 Mass. 355, 363 (2013). Here, whether the scratches on the defendant's legs were caused by a rake or by thorny bushes was within an ordinary juror's common experience.[18]

The prosecutor's suggestion that the defendant would have made sure that the police could find a rake likewise was not beyond the bounds of propriety. Without question, a prosecutor may not make statements that "adversely implicate the defendant's fundamental right to be presumed innocent." Commonwealth v. Thomas, 401 Mass. 109, 113 (1987) (error to argue that jury should acquit defendant if they find he is "truly innocent"). Although we urge prosecutors to tread with caution when discussing the evidentiary support (or lack thereof) of a defendant's case, the prosecutor did not suggest that the defendant had an obligation to present evidence in his

[18] Indeed, defense counsel adopted similar reasoning to suggest a different result; he argued that the evidence demonstrated that there was a rake, and that the rake, not the thorns, was the source of the defendant's injury.

defense. Instead, the prosecutor noted gaps and inconsistencies in the defendant's explanation of the events. "The question is whether the challenged remark, when viewed in the context of the entire argument, is directed more at the general weakness of [the] defense than toward the defendant's own failure to testify" (citation and quotations omitted). Commonwealth v. Nelson, 468 Mass. 1, 12 (2014). Cf. Commonwealth v. Amirault, 404 Mass. 221, 236-237 (1989) (prosecutor's remark that there was no evidence defendant ever tried to tell his side of story infringed upon right to remain silent).

c. Reference to Lamb warning. During the Commonwealth's cross-examination of Dr. Ronald Ebert, a forensic psychologist who testified as an expert for the defense, Ebert acknowledged that he had warned the defendant that any statements he made could be used against him in court.[19] In closing argument, the prosecutor argued that Ebert's assessment could not be trusted because, having received the Lamb warning, the defendant was unlikely to be truthful with Ebert.[20]

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[19] This procedure, derived from this court's decision in Commonwealth v. Lamb, 365 Mass. 265, 270 (1974), is known as a "Lamb warning."

[20] The prosecutor argued, "Ebert told you that he gave the defendant the specific warnings that he had to at the outset of the interview. Whatever we discuss is not going to remain confidential. It can be used against [the defendant]. It can be used in court. . . . Of course the defendant isn't going to give anything that's going to help the Commonwealth."

The prosecutor's statement was over the line. The Lamb warning is an extension of the defendant's right to remain silent. See Commonwealth v. Lamb, 365 Mass. 265, 270 (1974), invoking Miranda v. Arizona, 384 U.S. 436 (1966). It is well established that a prosecutor may not invoke a defendant's silence to suggest the defendant's guilt. See Commonwealth v. Fowler, 431 Mass. 30, 39-40 (2000). Absent such a protection, the right to remain silent would be of limited value.

Because the defendant did not object at trial, we review for a substantial likelihood of a miscarriage of justice. See Commonwealth v. Frank, 433 Mass. 185, 195 (2001). We conclude that there was none. On direct examination, Ebert testified that the defendant provided him a less detailed version of the incident than he had given to police. On cross-examination, Ebert was questioned regarding possible discrepancies between the defendant's statements to police and to Ebert. Ebert agreed that his assessment of the defendant was heavily dependent on the defendant's account of what had transpired. Therefore, without the prosecutor's reference to the Lamb warning, the jury had an independent basis on which to question the reliability of the defendant's statements to Ebert. Hence, while improper, the prosecutor's comment did not create a substantial likelihood of a miscarriage of justice.

d. Duty to convict. The defendant argues that the

prosecutor impermissibly urged the jury to do their duty to convict the defendant when he said:

> "All of you are here for a specific reason . . . . You are the ones who were chosen because you are the ones who could most pay attention, most focus, and give both sides a fair trial in this case."

The defendant contends that the "palpable" inference to be gleaned from this statement is that the jury had a duty to convict.

"It is improper for a prosecutor to equate a guilty verdict with justice." Commonwealth v. Carriere, 470 Mass. 1, 20 (2014), quoting Commonwealth v. Francis, 450 Mass. 132, 140 (2007), S.C., 477 Mass. 582 (2017). "[A] reference to the jury's 'duty,' [even] without an explicit statement that its exercise will result in a verdict of guilty, should be held to pass the line of permissible advocacy" (citation omitted). Commonwealth v. Sanchez, 405 Mass. 369, 375 (1989) (prosecutor erred by urging "the jury to convict the defendant in order to end the victims' nightmares"). A prosecutor is, however, permitted to remind jurors of their duty to consider the evidence and to render a "just" verdict, even while urging the jury to convict. See Commonwealth v. Lyons, 426 Mass. 466, 471-472 & n.10 (1998) (not improper for prosecutor to argue that the "one just verdict . . . is guilty as charged" where prosecutor also urged jury to consider evidence and not act with

"vengeance"). As in Lyons, supra, the prosecutor here concluded his closing by urging the jury,

> "Ladies and gentlemen, find [the defendant] guilty of first degree murder . . . that's what you should do. And don't do it for [the victim]. Don't do it for his family. Don't do it for his friends. Convict [the defendant] because that's where the evidence leads you."

These statements were not impermissible.

e. "Parading" of photographs. At multiple junctures during closing, the prosecutor showed the jury eight- by ten-inch prints of a number of the autopsy photographs.[21] At the end of closing arguments, defense counsel moved for a mistrial; he argued that the prosecutor repeatedly had "paraded" the photographs in front of the jury in an inflammatory manner.

The judge agreed that the prosecutor had done so on one occasion, or, at least, had "walked in front of the jury." Although the judge did not express concern about the display of the photographs, which were the same as those the jury would be able to review during deliberations, the judge did observe that,

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[21] Contrary to the defendant's assertion, it is not apparent from the transcripts that any of the photographs displayed were "inadmissible." Each of the photographs had been introduced in evidence. Earlier during trial, the judge had informed the prosecutor that he could not display enlarged versions of the autopsy photographs during the medical examiner's testimony. Instead, the parties agreed that any testifying witness would use the eight- by ten-inch copies that were entered in evidence, and that the jurors would be provided with a booklet containing the same copies to enable them to follow the testimony as it was given.

on one occasion, the prosecutor had held up a photograph and said, "Did [the victim] deserve this?" The judge denied the defendant's request for a mistrial, but instructed the jury that they were to disregard the prosecutor's comments concerning the photographs. The defendant maintains that the judge erred in denying his request for a mistrial, and that the curative instruction was inadequate.

"A trial judge is in the best position to determine whether a mistrial . . . is necessary, or whether a less drastic measure, such as a curative instruction, is adequate." Amran, 471 Mass. at 360. Hence, we review the denial of a motion for a mistrial for abuse of discretion. See id. at 359. Here, the judge, who repeatedly had reminded the jury not to be swayed by the gruesome nature of certain photographs, gave a specific curative instruction that the jury were to disregard the improper statements.

The judge also instructed the jury that closing arguments are not evidence. Absent an "'overwhelming probability' that the jury will be unable to follow the court's instructions," and "a strong likelihood that the effect of the [statements] would be 'devastating' to the defendant," we presume the judge's instructions are sufficient. See Commonwealth v. Crayton, 470 Mass. 228, 252 (2014), quoting Bruton v. United States, 391 U.S. 123, 136 (1968). See also Gentile, 437 Mass. at 581. The

jurors each had received copies of the same photographs during the medical examiner's testimony, and would have had access to them during deliberations. While the display should have been avoided, and the improper statement should not have been made, the brief display was mitigated by the curative instruction, and thus was unlikely to have had any prejudicial effect.[22]

6. Review pursuant to G. L. c. 278, § 33E. The defendant argues that the verdict was not consonant with justice, and that we should exercise our power to reduce the verdict or to order a new trial. We have reviewed the entire record, as is our duty under G. L. c. 278, § 33E, and identify no grounds raised by the defendant or otherwise, on which to reduce the degree of guilt or to order a new trial.

Judgments affirmed.

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[22] The defendant also maintains that his acquittal of murder in the first degree on a theory of deliberate premeditation and his conviction of murder in the first degree on a theory of extreme atrocity or cruelty were legally inconsistent, and that the denial of his motion to set aside the verdict on these grounds was error. This argument is unavailing. A verdict is legally inconsistent "when there exists no set of facts that the government could have proved in the particular case that would have resulted in the verdict at issue." See Commonwealth v. Gonzalez, 452 Mass. 142, 151 n.8 (2008). Deliberate premeditation and extreme atrocity or cruelty each require proof of at least one element that the other does not. See 2013 Model Jury Instructions on Homicide at 38, 44. As such, the verdicts were not legally inconsistent.