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SJC-11798

COMMONWEALTH vs. JOSE SANTIAGO.

Hampden. January 7, 2020. - August 13, 2020.

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

Homicide. Criminal Responsibility. Mental Impairment.
Intoxication. Practice, Criminal, Instructions to jury,
Assistance of counsel, Capital case.

Indictments found and returned in the Superior Court
Department on June 19, 2012.

The cases were tried before Constance M. Sweeney, J.

Leslie W. O'Brien for the defendant.
Katherine E. McMahon, Assistant District Attorney, for the
Commonwealth.

LENK, J. After a jury trial, the defendant was convicted
of murder in the first degree, G. L. c. 265, § 1, in the death
of his girlfriend, Jessica Rojas, on theories of deliberate

premeditation and extreme atrocity or cruelty.¹ On appeal, the defendant claims error warranting a new trial in the omission of instructions as to the defenses of a lack of criminal responsibility and mental impairment, as well as the judge's failure to reinstruct the jury regarding the effects of alcohol consumption upon whether the defendant acted with extreme atrocity or cruelty. In the alternative, the defendant asks that we reduce his conviction to murder in the second degree, pursuant to G. L. c. 278, § 33E.

We conclude that the claimed instructional errors, to which no objection was lodged at trial, do not give rise to a substantial likelihood of a miscarriage of justice, nor did the failure to so object constitute the ineffective assistance of counsel. Having carefully reviewed the entire record, we discern no other grounds on which to disturb the verdict. Accordingly, we affirm the convictions.

1. Facts. We recite the facts as the jury could have found them, reserving certain details for subsequent discussion. On March 2, 2012, the defendant and the victim gathered with family and friends at a Springfield nightclub to celebrate the victim's twenty-fifth birthday. Witnesses described the

¹ The defendant also was convicted of assault and battery by means of a dangerous weapon against Antonio Camacho, G. L. c. 265, § 15B (b); he was acquitted of the same charge against Jose Rivas.

defendant as intoxicated and apparently upset with the victim. At approximately 1:30 A.M. on March 3, the defendant got into an argument with the victim's cousin, Carmen Aviles, and was removed from the nightclub by a bouncer. Aviles and the victim followed the defendant outside.

Witness testimony differed as to the precise sequence of events that unfolded outside the nightclub; it appears that the defendant continued to argue with Aviles and with the victim. Upset with the defendant for "talking down" to the victim, Aviles punched the defendant, and he, in turn, punched her. At that point, an unknown individual in the crowd that had gathered hit the defendant with enough force to knock him to the ground and, possibly, to lose consciousness.²

A friend of the victim, Alisha Martinez, who had followed the defendant out of the nightclub, escorted the defendant across the street, accompanied by the victim and another friend, Suehaley Arce. The defendant was swearing at the victim, whom he blamed for his having been punched. The group attempted to steer the defendant towards the victim's vehicle, which was located in a nearby parking lot.

² Medical records introduced at trial indicated that on March 5, 2012, the defendant was treated for multiple facial fractures; he told medical personnel that his injuries had been sustained on the evening of March 2, 2012. The medical records also indicate that the defendant denied having lost consciousness when he was hit and knocked down.

They eventually arrived in a park across the street from the nightclub. Arce recalled that the defendant continued to berate the victim and hit her in the mouth. Arce also testified that, at about that point, another man entered the park, grew angry with the defendant for hitting the victim, began to wrestle with the defendant, and then left the area. Antonio Camacho, who was also at the party and left the nightclub approximately five minutes after the defendant, looked across the street and saw the defendant in a heated discussion with the victim, Arce, and Martinez. Camacho saw the defendant raise his hand towards one of the three women, but his view was obstructed as he crossed the street to join the group; Camacho did not see the altercation that followed. By the time Camacho arrived in the park, the defendant was getting up from the ground, and saying that he had been "sucker punched."

The group eventually arrived at the victim's vehicle. At Camacho's urging, the victim agreed to allow Camacho, accompanied by the defendant, to drive her vehicle back to her house. The victim agreed to return home with Arce and Martinez, who were to drive separately to her house. Camacho testified that, during the drive, the defendant asked whether the victim was having an affair. Camacho responded she was not, and the defendant told Camacho that he loved the victim. The defendant

also repeatedly mentioned that he had been "sucker punched," and wanted to know who had hit him.

Camacho and the defendant arrived at the victim's house before she did. The defendant knocked on the door of her next-door neighbor's house; the neighbor's boyfriend, Jose Rivas, answered. Rivas, who was acquainted with the defendant, noticed that the defendant was visibly injured, and that he stumbled into the door while entering the house. Shortly thereafter, the victim arrived with Arce and Martinez; Camacho and the defendant accompanied the three women into the victim's house.

Inside, the defendant and the victim continued to argue; the defendant accused the victim of "cheating on him," and the victim was upset with the defendant for ruining her birthday celebration. Camacho, Arce, and Martinez unsuccessfully tried to find someone to take the defendant home, while the defendant said that he wanted them to leave so he could be alone with the victim. Eventually, Arce and Martinez departed; Camacho continued to make telephone calls in an effort to find a ride for the defendant. The victim said that she wanted the defendant to leave.

Camacho was making a call when the defendant emerged from the kitchen, pressing an object to his leg, and sat down on a couch next to the victim. When the defendant noticed that Camacho was watching, he dropped the object -- a knife -- to the

floor and kicked it out of sight under the couch. The defendant then approached Camacho and told him that everything would be okay, that Camacho should go home, and that he just wanted to "talk to [the victim] alone and resolve what's going on." Camacho refused, and suggested that all three leave and drive the defendant home in the victim's vehicle.

Shortly thereafter, the defendant returned to the kitchen, emerged with a second knife, and began stabbing the victim. When Camacho tried to intervene, the defendant threatened him with the knife; Camacho left the victim's house and sought help from the victim's neighbor and from Rivas. The victim's neighbor telephoned 911, and Rivas returned to the victim's house with Camacho. Rivas entered first. He testified that he saw the victim with a knife embedded in her chest, and the defendant and the victim telling each other that they loved each other. Camacho's recollection was different. He testified that the defendant was still stabbing the victim when he and Rivas returned, although he did hear the defendant tell the victim that he loved her.

According to Rivas, the defendant told him to leave, and then began walking toward the kitchen. Rivas at first thought that the defendant was going to leave, but instead he returned with a different knife, told Rivas to move out of the way, and began to walk back towards the victim. Rivas recalled that the

defendant "was [not] the same person" as usual. Rivas grabbed the defendant and told him to "wake up"; according to Rivas, the defendant seemed to grasp the situation, and immediately returned to the kitchen and left through the rear door.

Police and medical personnel arrived shortly thereafter. The victim, who was still conscious despite extensive stab wounds, identified the defendant as her assailant. She was transported to a hospital, where she succumbed to her injuries. The medical examiner testified that the victim had been stabbed more than one hundred times. Police did not locate the defendant, but did recover a total of four knives -- one embedded in the victim, one on the floor by the couch, one in the kitchen, and one outside the rear door of the victim's house through which the defendant had left.

The defendant was taken into custody on a later date and was indicted on charges of murder in the first degree, G. L. c. 265, § 1, and also on two counts of assault and battery by means of a dangerous weapon, G. L. c. 265, § 15B (b), against Camacho and Rivas.

2. Prior proceedings. Prior to trial, the defendant filed a notice of an intent to rely on a defense of a lack of criminal responsibility, and requested funds to retain an expert witness in support of this defense. On the Commonwealth's motion pursuant to Mass. R. Crim. P. 14 (b) (2) (B), as appearing in

463 Mass. 1501 (2012), the court ordered that the defendant also submit to examination by a court-appointed examiner. The defendant refused to meet with the examiner, and the Commonwealth accordingly moved to preclude the defendant from calling his own expert witness. The defendant did not oppose the motion. At trial, the defendant did not testify or call any witnesses. He did introduce his medical records from his treatment, two days after the assault, which documented his head injuries.

The defendant was tried and convicted of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty, and also was convicted of assault and battery against Camacho; he was acquitted of the assault against Rivas.

The defendant's appeal was filed in this court. After oral argument was held, the defendant filed a motion to stay his appeal, so that he could pursue a motion for a new trial in the Superior Court on the ground of ineffective assistance of trial counsel. We denied the motion to stay, and we will ourselves address the asserted ineffective assistance of counsel in conjunction with the defendant's direct appeal. See Commonwealth v. Aguiar, 400 Mass. 508, 511 n.2 (1987). As the defendant's motion for a new trial does not raise any additional arguments beyond those he raises in his appellate brief, we rely

on the defendant's brief, as supplemented by the affidavit of trial counsel appended to the motion for a new trial, to decide the motion.

3. Discussion. The defendant argues (1) that the trial judge should have instructed the jury concerning a lack of criminal responsibility and mental impairment, and (2) that the judge did not properly instruct the jury that they could consider evidence of intoxication when determining whether a murder was committed with extreme atrocity or cruelty. To each of these arguments, the defendant attaches a claim that trial counsel's failure to remedy the asserted error deprived him of the effective assistance of counsel. The defendant also asks that this court reduce the verdict of murder in the first degree, pursuant to G. L. c. 278, § 33E.

a. Instructions on lack of criminal responsibility and mental impairment. The defendant argues that the evidence submitted at trial pertaining to the head injuries he sustained during the altercation outside the nightclub was sufficient to warrant instructions on two defenses: a lack of criminal responsibility, and mental impairment. The defendant contends that the absence of such instructions created a substantial likelihood of a miscarriage of justice. The defendant further maintains that trial counsel's failure to request these instructions constituted ineffective assistance of counsel.

While similar, the defenses of a lack of criminal responsibility and mental impairment are distinct. The defense of a lack of criminal responsibility focuses on whether, notwithstanding sufficient evidence of the elements of a charged offense, a defendant nonetheless should be found not guilty by virtue of a mental disease or defect. See, e.g., Commonwealth v. Monico, 396 Mass. 793, 799-801 (1986) (defense of lack of criminal responsibility was raised where evidence was sufficient to warrant jury finding that, by virtue of "frontal lobe dysfunction," defendant could "commit impulsive or violent acts even though such acts normally would be against that person's nature"). An instruction on a lack of criminal responsibility informs jurors that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he [or she] lacks substantial capacity either to appreciate the criminality [wrongfulness] of his [or her] conduct or to conform his [or her] conduct to the requirements of [the] law" (citation omitted). Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967). The defense of a lack of criminal responsibility operates as a complete defense, in that a defendant cannot be found guilty of a crime if he or she lacks criminal responsibility.

An instruction on mental impairment, by contrast, focuses on a defendant's ability to form the requisite intent necessary

to be convicted of the crime in question. In an instruction on mental impairment, the jury are told that they "'may consider credible evidence' of the mental impairment 'in deciding whether the Commonwealth had met its burden of proving the defendant's state of mind beyond a reasonable doubt'" (citation omitted). See Commonwealth v. Mercado, 456 Mass. 198, 207 (2010). Unlike a defense of a lack of criminal responsibility, a defense of mental impairment does not operate as a complete defense, but, rather, may reduce a defendant's degree of guilt. For example, a jury could find that, by virtue of a mental impairment, a defendant lacked the requisite intent to commit murder in the first degree, but nonetheless was capable of forming the intent necessary to commit murder in the second degree. See, e.g., Commonwealth v. Gould, 380 Mass. 672, 681 (1980) (where there is evidence of voluntary intoxication, or of mental illness or impairment, and jury find defendant to be incapable of deliberate premeditation, defendant cannot be found guilty of murder in first degree, but may be found guilty of murder in second degree.)

Notwithstanding these differences, the analysis of both issues here is essentially the same. Absent a request from a defendant, we have never held that a judge is required to instruct the jury on either defense. See Commonwealth v. Gulla, 476 Mass. 743, 747-748 (2017) (no error where judge did not give

instruction of lack of criminal responsibility that was not requested by defendant at trial). See also Commonwealth v. Rutkowski, 459 Mass. 794, 798 (2011) (where defense counsel fails to request or object to absence of mental impairment instruction, issue is unpreserved and we review for substantial likelihood of miscarriage of justice). See also Commonwealth v. Stroyny, 435 Mass. 635, 649 (2002). Because the defendant did not request either instruction, the question thus becomes whether the absence of both gave rise to a substantial likelihood of a miscarriage of justice, and whether the failure to request such instructions constituted ineffective assistance of counsel. The answer is no.

In cases of murder in the first degree, we review claims of ineffective assistance under "the standard of G. L. c. 278, § 33E, to determine whether there was a substantial likelihood of a miscarriage of justice." See Gulla, 476 Mass. at 745-746. More precisely, we "determine whether there was an error in the course of trial by defense counsel . . . 'and, if there was, whether that error was likely to have influenced the jury's conclusion'" (citation omitted). Id. at 746.

The defendant argues that the evidence was sufficient to entitle him to instructions on a lack of criminal responsibility as well as on mental impairment, had defense counsel requested them. According to the defendant, trial counsel's failure to

request such instructions was not a strategic choice, but the product of counsel's erroneous assumption that expert testimony would have been required to receive either instruction.³ The defendant contends that trial counsel's error deprived him of his best opportunity to obtain a verdict less than that of murder in the first degree, and thus "was likely to have influenced the jury's conclusion" (citation omitted). See Gulla, 476 Mass. at 746. Because the defendant's claim rests on the assumption that he was entitled to either instruction, we turn to consider whether the evidence presented would, in fact, warrant instructions on a lack of criminal responsibility or mental impairment, had they been requested.

i. Evidence pertaining to defenses of lack of criminal responsibility and of mental impairment. At trial, defense counsel took steps to develop evidence that arguably was relevant to the defenses of a lack of criminal responsibility and mental impairment. First, counsel introduced the defendant's medical records, dated two days after the stabbing; the records showed that the defendant had suffered multiple

³ The defendant's trial counsel acknowledged this error in an affidavit attached to the defendant's motion for a new trial. Expert testimony is not required in order to pursue a defense of a lack of criminal responsibility or mental impairment, or to seek relevant instructions. See, e.g., Commonwealth v. Monico, 396 Mass. 793, 798 (1986). See also Commonwealth v. Frank, 433 Mass. 185, 192 n.6 (2001).

facial fractures, noted that the defendant "[could] not stand alone," and indicated that his discharge materials included literature informing him of the warning signs of a concussion.

The defendant did not present any expert testimony. Prior to trial, he notified the Commonwealth of his intent to present expert testimony in furtherance of a defense of a lack of criminal responsibility, pursuant to Mass. R. Crim. P.

14 (b) (2) (A).⁴ In response, the Commonwealth sought the appointment of a psychiatric examiner pursuant to Mass. R. Crim. P. 14 (b) (2) (B).⁵ The Commonwealth's motion was allowed.

⁴ Pursuant to Mass. R. Crim. P. 14 (b) (2) (A), as appearing in 463 Mass. 1501 (2012),

"If a defendant intends at trial to raise as an issue his or her mental condition at the time of the alleged crime, or if the defendant intends to introduce expert testimony on the defendant's mental condition at any stage of the proceeding, the defendant shall . . . notify the prosecutor in writing of such intention."

The notice must inform the prosecutor of the identity of any expert witnesses the defendant expects to call, and whether those expert witnesses "intend to rely in whole or in part on statements of the defendant as to his or her mental condition. See id.

⁵ Pursuant to Mass. R. Crim. P. 14 (b) (2) (B),

"If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition will be relied upon by a defendant's expert witness, the court, on its own motion or on motion of the prosecutor, may order the defendant to submit to an examination"

After the defendant declined to meet with the court-appointed expert, the Commonwealth moved, pursuant to Mass. R. Crim. P. 14 (b) (2) (B) (iv), to preclude the defendant from introducing his own expert opinion pertaining to his mental state.⁶ The defendant did not oppose the motion, and ultimately did not seek to introduce any expert testimony.

Although the defendant did not testify or call any witnesses, defense counsel developed evidence through cross-examination related to the impact of the injuries the defendant sustained during the altercation outside the nightclub. Witnesses testified, for example, as to the defendant's visually apparent facial injuries. Rivas, the victim's neighbor's boyfriend, testified that, when he saw the defendant attacking the victim with the knife, the defendant seemed like a different person, and seemed to "wake" after Rivas confronted him. Rivas further testified that, when he arrived to assist Camacho in coming to the victim's aid, the defendant and the victim were

⁶ Rule 14 (b) (2) (B) (iv) of the Rules of Criminal Procedure provides:

"If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination."

telling each other that they loved each other. Defense counsel also vigorously cross-examined Martinez, who testified that the defendant did not lose consciousness when he was punched in the face, about her prior statement to police that the defendant had been "out cold."⁷

In his closing argument, defense counsel reminded the jury of the evidence that the defendant might have lost consciousness, which counsel told the jury was relevant to the defendant's intent, and suggested that the defendant's conduct was "crazy." Addressing conflicting witness testimony as to whether the defendant indeed had lost consciousness, counsel told the jury that witnesses "don't need to play that game unless there's something that's really seriously at risk. And what's at risk is a determination . . . that [the defendant] couldn't form an intent that's necessary for first degree murder [or] second degree murder."

ii. Whether the defendant was entitled to instructions on a lack of criminal responsibility and of mental impairment. To be entitled to an instruction on a lack of criminal

⁷ Defense counsel engaged in similar efforts in his cross-examination of Anthony Wilson, another witness to the altercation outside the nightclub. On cross-examination, Wilson first acknowledged having signed a statement saying that the defendant had been "knocked out" (a statement he repeated in his testimony at trial), but also testified that he was unsure whether the defendant lost consciousness.

responsibility, a defendant first must establish, either through expert testimony, lay testimony, or the facts of the case, that he or she suffered from a mental defect. See Commonwealth v. Seabrooks, 425 Mass. 507, 516 (1997), S.C., 433 Mass. 439 (2001). The defendant maintains that the evidence he sustained a head injury in the hours before the stabbing was sufficient to permit the inference of a mental disease or defect. We disagree.

The defendant's reliance on this court's decision in Monico, 396 Mass. at 800-801, for the proposition that evidence of a single blow to the head is sufficient to warrant an instruction on a lack of criminal responsibility, is misplaced. In that case, we did not hold that an isolated head injury, standing alone, was sufficient to entitle the defendant to an instruction on a lack of criminal responsibility. There, the jury also heard evidence that the defendant had had a history of prior head injuries, as well as evidence that the defendant had been acting normally in the period immediately preceding the shootings, and that his behavior "appeared to change drastically" after he sustained a head injury. See id. at 801.

Here, by contrast, there is no evidence from witness testimony or medical records that the defendant's behavior changed as a result of his injuries. To the contrary, the witnesses who had the opportunity to observe the defendant

throughout the evening testified that there was no notable change in his behavior, or in his ability to move or speak coherently, as a result of being punched in the face and knocked down. According to the witnesses who were with the defendant immediately before and after the altercation, he had been angry and acting aggressively towards the victim and others throughout the evening. Rivas did note that the defendant had stumbled into a door when the defendant initially entered the neighbor's house, but he also described no issues with the defendant's ability to speak or respond, or otherwise to walk and move normally. Although Rivas testified that the defendant seemed like a different person following the assault, and seemed to "wake" when confronted by Rivas, he was not present before the defendant was punched in the head. Thus, nothing in Rivas's testimony establishes the defendant's head injury as the source of his violent behavior.

The medical records introduced by the defendant indicate that, two days after the encounter at the nightclub, he was treated for multiple injuries, which the defendant told medical providers had been sustained during an altercation outside the nightclub. These injuries included multiple facial fractures and extensive swelling on the right side of his face. The medical records also indicate that the defendant was having difficulty standing unaided. The defendant was, however,

described as "alert." While he apparently was not diagnosed as having a concussion at that time, the records state that he was provided with written information advising him of the warning signs of a concussion, which, according to these materials, potentially could manifest multiple days after the injury.

Although the defendant's medical records evince severe facial trauma, they do not establish that he had suffered any brain injury as a result of the encounter. Significantly, as the attack occurred within a few hours of the altercation outside the nightclub, the fact that the defendant had difficulty standing several days later does not, without more, support an inference that he sustained any immediate brain injury.

The only other evidence of a head injury is the nature of the assault itself, including Rivas's testimony that the defendant told the victim that he loved her during the attack. Even taken together with the other evidence, this is insufficient to have warranted an instruction on a lack of criminal responsibility. "That the crimes were heinous would not alone support a conclusion that they were the product of an insane mind" (citation omitted). See Commonwealth v. LaPlante, 416 Mass. 433, 443-444 (1993), S.C., 482 Mass. 399 (2019). See also Commonwealth v. Mattson, 377 Mass. 638, 643-644 (1979) (although defendant's "unprovoked 'Jekyll and Hyde' change

[from] 'soft-spoken'" to "violent" was "bizarre," this evidence was insufficient to warrant jury finding that defendant lacked capacity to appreciate wrongfulness of conduct or to conform conduct to law).

Similar reasoning yields the same conclusion with regard to evidence of mental impairment. As with an instruction on a lack of criminal responsibility, to be entitled to an instruction on mental impairment, a defendant must, at a minimum, introduce evidence that such an impairment existed at the time of the conduct in question. See Gould, 380 Mass. at 680-681. To be sure, "where evidence of . . . mental impairment is significant[,] and where it is a critical aspect of [the] defense, the failure to instruct the jury that they could consider evidence of that impairment" gives rise to a substantial likelihood of a miscarriage of justice. See Rutkowski, 459 Mass. at 799. In Rutkowski, for example, the issue of mental impairment was "critical" to the defense because a lack of criminal responsibility and mental impairment, due to mental illness and brain damage, were the sole defenses raised by the defendant. See id. at 796-797, 799. Moreover, there was no doubt that the defendant in that case had presented "significant" evidence of mental impairment. Evidence was introduced that the defendant had a "long history" of mental illness. See id. at 796. The evidence also included, inter

alia, expert testimony that the defendant suffered from a brain injury that would impede her ability to reason effectively, and that her mental illness and head injuries played a role in her criminal conduct. See id. at 796-797 & n.1.

Here, however, the evidence of mental impairment was not "significant." As discussed, the defendant did not introduce any evidence that established a relationship between his head injuries and his behavior on the night of the attack. Mental impairment, moreover, was less "critical" to the defense here than it was in Rutkowski, where, unlike here, a lack of criminal responsibility and mental impairment were the sole defenses raised. In this case, the defendant also argued that, by virtue of his consumption of alcohol, he could not have formed the requisite intent to commit murder in the first degree. This line of defense was amply supported by the evidence at trial, and the jury were instructed on the impact of intoxication on the ability to form the necessary intent for murder.

In sum, the evidence was not sufficient to warrant instructions on a lack of criminal responsibility or mental impairment. Because the defendant has not shown that the judge would have been required to issue either instruction, had it been requested, the absence of the instructions did not create a substantial likelihood of a miscarriage of justice. Cf. Commonwealth v. Doucette, 391 Mass. 443, 459 (1984) (no

prejudice from failure to pursue defense of lack of criminal responsibility where evidence insufficient to entitle defendant to jury instruction on issue).

b. Instruction on intoxication. The defendant also claims error in the instructions given in response to the jury question on "the difference between first and second degree murder in regards to premeditation." He argues that the judge omitted from that instruction a reminder that the jury could consider evidence of the defendant's intoxication when deciding whether the Commonwealth had proved that he acted with extreme atrocity or cruelty. The defendant does not dispute that the judge included such an instruction in her original charge; rather, the defendant contends that the judge erred by not repeating that instruction in response to the jury question. The defendant maintains that this error, and defense counsel's failure to object at trial, created a substantial likelihood of a miscarriage of justice. We discern no error in the judge's instructions.

i. Original and supplemental instructions on intoxication.

During her original charge, the judge instructed the jury that they could

"consider [the defendant's] medical condition at the time of the killing, including any credible evidence of the effect on the defendant of his consumption of alcohol in determining whether the Commonwealth has proved beyond a

reasonable doubt that [the defendant] committed the killing with extreme atrocity or cruelty."

The asserted error arose in a supplemental set of instructions given, as discussed, in response to a jury question asking the judge to clarify "the difference between first and second degree murder in regards to deliberate premeditation." After having discussed the question with counsel, the judge decided to reinstruct the jury more broadly on the elements of murder in the first and second degrees.

The judge began her reinstruction by saying,

"I'm going to go through the elements with you of first degree murder, both theories, and then what second degree murder is. I'm not going to give you the entire instruction I gave you before. I ask that you recall all of the descriptions I gave you before, all the definitions I gave you before" (emphasis supplied).

The judge proceeded to review the elements of murder in the first degree, including the elements required for the theories of deliberate premeditation and extreme atrocity or cruelty. At the defendant's request, the judge also repeated her instruction that the jury could consider intoxication when deciding whether the Commonwealth had proved the element of intent. She explained:

"[T]he ingestion of alcohol by the defendant is a factor you may consider in determining whether or not the Commonwealth has proven beyond a reasonable doubt the necessary intent required of the particular crime and/or the state of mind required of the particular crime."

The judge did not, however, repeat her separate initial instruction that the jury also could consider evidence of intoxication when determining whether the defendant had acted with extreme atrocity or cruelty. Defense counsel did not object to this omission.

ii. Whether the instructions were in error. "We judge the adequacy of a particular instruction not in isolation but in the context of the entire charge, as the adequacy of instructions is determined by their over-all impact on the jury." Commonwealth v. Stokes, 440 Mass. 741, 750 (2004). In her initial charge, the judge properly instructed the jury that they could consider evidence of the defendant's consumption of alcohol when deciding whether the Commonwealth had proved that the killing was committed with extreme atrocity or cruelty. Although the judge did not repeat this instruction in giving her supplemental charge, when considered as a whole, the instructions were adequate.

The defendant maintains that the incomplete supplemental instructions "were the last statements of law that the jury heard on a critical aspect of the case" and, as such, undermined the original, correct instruction. See Commonwealth v. Young, 461 Mass. 198, 210 (2012). When reinstructing the jury, however, the judge expressly stated that her supplemental instructions were incomplete, and that, in conjunction with the

new instructions, the jury also were to remember and consider all of her original instructions. We discern no error in the judge's reinstruction of the jury and, accordingly, no substantial likelihood of a miscarriage of justice in counsel's decision not to object to that instruction.⁸

c. Review under G. L. c. 278, § 33E. The defendant argues, in light of his intoxication, his head injury, and the asserted deficiency in the jury instructions, that it would be appropriate to reduce the verdict to one of murder in the second degree. We see no reason to do so on these grounds. In addition to considering the defendant's arguments, we have reviewed the entire record, as is our duty under G. L. c. 278, § 33E, and identify no other grounds on which to reduce the degree of guilt or order a new trial.

Judgments affirmed.

⁸ In any event, the asserted error in the judge's reinstruction applies only to the defendant's conviction on a theory of extreme atrocity or cruelty. The defendant also was convicted of murder in the first degree on the theory of deliberate premeditation, and we could affirm his conviction of murder in the first degree on that theory even if the judge had erred in providing the reinstruction. See Commonwealth v. Barbosa, 463 Mass. 116, 135 (2012). Thus, any error in the reinstruction would not have resulted in prejudice to the defendant.