SJC-12533

COMMONWEALTH vs. ALDO W. DUNPHE.

Worcester. December 10, 2019. - October 7, 2020.

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

Homicide. Criminal Responsibility. Insanity. Mental Impairment. Practice, Criminal, Instructions to jury, Capital case.

Indictments found and returned in the Superior Court Department on March 18, 2014.

The cases were tried before James R. Lemire, J., and a motion for a new trial, filed on May 31, 2018, was heard by Anthony M. Campo, J.

Leslie W. O'Brien for the defendant.
Susan M. Oftring, Assistant District Attorney, for the Commonwealth.

GANTS, C.J. On November 5, 2013, four days after he was voluntarily admitted to the psychiatric ward of the University of Massachusetts Memorial Medical Center (medical center), the

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

defendant physically attacked and killed Ratna Bhattarai, another patient there. The sole issue at trial was whether the Commonwealth had proved beyond a reasonable doubt that the defendant was criminally responsible for the killing.

There was no dispute that the defendant had smoked cannabis almost daily, often in large amounts, for approximately six or seven years before he was admitted to the psychiatric ward and that he had not smoked cannabis after he was admitted. Nor was there any dispute that, at the time of the killing, the defendant suffered from hallucinations and believed, with no rational basis, that the victim was his biological father, who had abused the defendant as a child.

The Commonwealth's expert testified that, at the time of the killing, the defendant suffered from a "substance-induced psychotic disorder and a cannabis withdrawal condition" that resulted in hallucinations; the expert further testified that the defendant did not have a mental disease or defect. The defense expert testified that the defendant's delusions at the time of the killing were consistent with a diagnosis of schizophrenia, which he characterized as a mental disease or defect. He noted that some of the symptoms of cannabis withdrawal may have played a role in the killing and that it was "a bit of a challenge" to assess because some of the symptoms of cannabis withdrawal are the same as schizophrenia. But he

declared that delusions and hallucinations are not part of cannabis withdrawal disorder and that the defendant's marijuana use, by itself, could not explain his conduct on the day of the killing.

A Superior Court jury, after having been provided by the judge with legal instructions regarding criminal responsibility that closely tracked those in our Model Jury Instructions on Homicide (2018)[2], found the defendant guilty of murder in the first degree on the theory of extreme atrocity or cruelty.[3] We conclude that that there is a substantial likelihood of a miscarriage of justice arising from the application of our model jury instructions regarding criminal responsibility to the peculiar facts in these cases. We therefore vacate the convictions and remand the cases for a new trial. We also provisionally revise our model jury instructions regarding

[2] The trial in these cases took place in 2016, when the 2013 version of our Model Jury Instructions on Homicide was in effect. In 2018, we significantly revised these instructions. However, because there were no substantive changes in our instructions regarding criminal responsibility, we refer to the current version of the Model Jury Instructions on Homicide throughout this opinion.

[3] The jury also convicted the defendant of assault and battery, causing serious bodily injury, in violation of G. L. c. 265, § 13A (b), and assault and battery by means of a dangerous weapon, in violation of G. L. c. 265, § 15A (b).

criminal responsibility to address what we conclude is a potential and problematic risk of confusion.[4]

Background. 1. Evidence at trial. We summarize the facts that the jury could have found at trial, reserving certain details for our discussion of the legal issues. See Commonwealth v. Waweru, 480 Mass. 173, 174 (2018).

a. Events leading to the defendant's admission to the psychiatric ward. When the defendant was eight years old, he and his younger sister were adopted. His adoptive mother testified that, although he had been a good student, he had difficulty adjusting to college and began experimenting with cannabis during his freshman year.

In 2008, after having dropped out of college, the defendant began dating a woman he later married. The defendant's wife testified that in the first couple of years of their relationship, the defendant used cannabis "occasionally," once or twice a month, but in 2010, he began to smoke more frequently. Although he sometimes stopped using cannabis for

[4] We leave the final revisions to be crafted by the Standing Committee on the Model Jury Instructions on Homicide. See, e.g., Commonwealth v. Gomes, 470 Mass. 352, 376 (2015), S.C., 478 Mass. 1025 (2018) (proposing jury instruction regarding eyewitness identification but making it "provisional to allow for public comment and possible future revision before [declaring] it a model").

weeks at a time, there were other periods when he smoked on a daily basis. She never saw him suffer from withdrawal symptoms.

The couple dated for five years before getting married on October 13, 2013. It was in the months leading up to their wedding that the defendant's wife began to notice changes in the defendant's personality and behavior. In February 2013, the defendant accused her of giving his mother "dirty looks." He also accused his wife of having been unfaithful, both before their wedding and during their honeymoon. He made a number of additional unsubstantiated accusations during that period, such as that she had told her father that the defendant had beaten their cat and that her mother had wanted the family dog to be killed. During their honeymoon, the defendant also expressed concern that his wife was being followed.

When the couple returned to Massachusetts after their honeymoon, the defendant continued to accuse his wife of infidelity and called her "psychotic." She found it increasingly difficult to have conversations with the defendant because he would skip between topics without finishing his train of thought. He also began staring into space and smiling at inappropriate times, and his laugh changed. The defendant's wife said that the defendant began to complain that he was having bad dreams and difficulty sleeping.

On October 31, 2013, the defendant's wife received a telephone call from the defendant saying he was "going to rehab" and would not be home for a few weeks. Later that night, he came home and told her that he had been followed by members of a biker gang called the Vigilantes and that he had considered killing himself by overdosing on sleeping pills. He also told her that he wanted to break up with her and behaved "aggressive[ly]" toward her, which he had never done before. He eventually left and went to his parents' house.

b. The killing. The next day, on November 1, 2013, the defendant was voluntarily admitted to the psychiatric ward. Doctors diagnosed him with "Psychosis Not-Otherwise-Specified" because they could not determine whether his psychosis originated from his recent cannabis use or from a preexisting mental disease. The defendant's wife and his adoptive parents went to visit him on November 2, and he told them that he had seen his biological father in the psychiatric ward. On the evening of November 4, he spoke about the victim to a nurse, telling her: "The little guy is my father. He's been in a time travel. He's been gone for 2,500 years. I'll do that, too, but I can do it in ten." In reality, the defendant's biological father lived in Guatemala and had abused the defendant as a young child.

On November 5, the defendant suffocated the victim with a pillow, punched him repeatedly in the face, smashed his head against the cement floor, and finally stuffed cloth into the victim's nose and mouth. The defendant then washed his hands, gathered his clothes, and went back to his room.

A medical center police officer arrived shortly after the killing and spoke with the defendant. The defendant was lying in bed, with blood on his socks and on his pants legs. The officer recited the Miranda warnings, and the defendant said that he understood them. The officer asked him what had happened, and the defendant said that the victim, whose name he did not know, had threatened to kill him earlier in the day. He said he waited for the nurse to leave the victim's room after she had brought him lunch, then entered the room, grabbed the victim by the neck, and dragged him to the ground. He then began to punch the victim, and later stuffed towels in his mouth and in his nostrils. He said he did not mean to kill the victim; he just wanted to beat him up.

Later that day, two State police troopers arrived to interview the defendant. They again gave him Miranda warnings, which he again said he understood. The defendant admitted to killing the victim, stating that he did so because the victim was his father who had threatened to kill him and was keeping him in the psychiatric ward against his will.

The victim died several days later due to injuries resulting from the defendant's attack.

c. Expert testimony. At trial, the defendant did not deny killing the victim but claimed that he lacked criminal responsibility "because, due to a mental disease or defect, he lacked the substantial capacity at that time . . . to appreciate the wrongfulness of his conduct [or] to conform his conduct to the requirements of the law." Commonwealth v. DiPadova, 460 Mass. 424, 428 (2011), citing Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967).

The defendant's expert, Dr. John Daignault, testified that, at the time of the killing, the defendant "was in the throes of an acute psychotic episode with a diagnosis of schizophrenia, and he perceived the victim as an imminent threat to him; and he believed, in his delusional state, that he was protecting his own life from the threat that [the victim], he believed, posed to him." He noted that the defendant's hallucinations, delusions, and grossly disorganized behavior -- such as believing that a biker gang wanted to kill him and hearing a radio station in his head that relayed imaginary information about his wife committing adultery -- were consistent with a diagnosis of paranoid schizophrenia around the time of the attack. He further cited the defendant's behavior immediately following the crime, such as calmly, coherently, and

cooperatively admitting to the crime to the police while maintaining his strong belief that the victim was his biological father who had come to harm the defendant at the psychiatric ward. The defendant, Daignault reasoned, did not try to hide his culpability or the evidence of his guilt, nor did he express any anxiety for his actions, because he was "floridly psychotic" and not "malingering" at the time of the attack.

Daignault opined that the defendant had a mental disease or defect at the time of the killing: schizophrenia. He also testified that he believed the defendant lacked the substantial capacity to appreciate the wrongfulness of his conduct and that the schizophrenia had "stripped [the defendant] of his ability to conform his behavior to the requirements of the law." Daignault therefore concluded that the defendant lacked criminal responsibility.

As to the defendant's cannabis habit, Daignault testified that the defendant's psychosis on the day of the crime resulted from schizophrenia and not from any withdrawal symptoms due to the defendant's cannabis dependency. He noted that some experts believe that cannabis consumption can trigger schizophrenia and that such consumption may have contributed to the defendant's psychosis; cannabis withdrawal, however, is not associated with delusions and hallucinations. Daignault therefore concluded that while the defendant might have suffered from cannabis

withdrawal syndrome -- which can lead to sleeplessness and aggression -- at the time of the attack, such withdrawal alone could not account for the defendant's serious delusions and hallucinations, which fell far outside the syndrome's normal presentation.

In contrast, the Commonwealth's expert, Dr. Fabian Saleh, opined that, at the time of the killing, the defendant did not suffer from schizophrenia or another delusional disorder, but rather had a "substance-induced psychotic disorder and a cannabis withdrawal condition," which, he stated, did not qualify as a mental disease or defect. In short, he testified that the killing was "clearly cannabis induced . . . in the context of withdrawal."

Saleh testified that the defendant met all of the criteria for cannabis withdrawal: (1) use of cannabis on a daily or almost daily basis, and (2) presence of all of the relevant symptoms, such as anger or aggressiveness, restlessness, sleep disturbance, anxiety, change in mood, depression, and "bodily symptoms." He also noted that cannabis withdrawal peaks within seven days, with signs of withdrawal twenty-four to seventy-two hours after the abrupt cessation of the cannabis. Here, "on day five, he is engaging in this act of aggression."

Saleh further testified that the defendant did not meet the criteria for a diagnosis of schizophrenia under the Diagnostic

and Statistical Manual of Mental Disorders, Fifth Edition. He noted that to diagnose a patient with schizophrenia, "you have to rule out a substance-induced or medical-induced presentation that could account for what's going on here." And contrary to Daignault's view about the symptoms of cannabis withdrawal, Saleh suggested that cannabis withdrawal syndrome can cause delusions and hallucinations and that the defendant's symptoms more closely tracked cannabis withdrawal than schizophrenia. In particular, he explained that the defendant acted violently only on one day, the day of the crime, a pattern consistent with the timeline of cannabis withdrawal but not schizophrenia.

Saleh also testified that the defendant's heavy use of cannabis since the age of eighteen had damaged his brain. And he noted that the defendant recognized that his cannabis use "definitely" changed his brain chemistry, citing what the defendant had told the state troopers after the killing: that he heard voices when he was high on cannabis, and that, whenever he smoked, it "set[] off other drugs" that he had done before, including "acid, mushrooms, cocaine," and prescription pills of Percocet and Clonopin.

Saleh opined that the defendant "[c]learly understood that killing somebody was against the law" and that he "[a]bsolutely" had the capacity to conform his conduct to the law. He based this determination on his observations that the defendant's

"behaviors were organized, goal-directed, planned, [and] thoughtful," in that he "had an objective in mind"; he "took the proper steps to get into the victim's room, closed the room, confronted the victim, assaulted the victim, ultimately ended up killing the victim, took a shower, then left the room." "[A]ll of this," he concluded, "suggests that despite the fact that he misperceived the victim as being his father, he knew . . . of the wrongfulness of his conduct and was able to conform his conduct to the requirement of the law."

2. Motion for a new trial. The defendant filed a motion for a new trial under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), or to reduce the verdict, under Mass. R. Crim. P. 25 (b), as amended, 420 Mass. 1502 (1995), which the motion judge (who was not the trial judge) denied. With respect to the motion for a new trial, the defendant argued that he was deprived of his constitutional right to the effective assistance of counsel because his trial counsel failed to object to the judge's instructions regarding the relationship between voluntary intoxication and criminal responsibility, where there was no evidence that the defendant was voluntarily intoxicated at the time of the killing. The motion judge disagreed, declaring that "[o]ur case law interprets voluntary intoxication broadly, suggesting that it can arise subject to a defendant's drug and alcohol addiction." The judge added that "[t]o

construe voluntary intoxication to be so limited so as to be restricted only to immediate or contemporaneous ingestion or inhalation would ignore the science regarding the short and long-term effects of chemical use and misuse on the human body."

With respect to the motion to reduce the verdict, the defendant argued that a verdict of murder in the second degree was more consonant with justice, because there was strong evidence that mental illness was the driving force in the killing in these cases. The judge disagreed, concluding that the weight of the evidence supported the finding of murder in the first degree on the theory of extreme atrocity or cruelty "in light of the brutality of the defendant's acts towards the victim."

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

Discussion. The defendant claims that (1) the evidence was insufficient as a matter of law to permit a rational juror to find beyond a reasonable doubt that the defendant was criminally responsible; (2) in the circumstances of these cases, the judge's instruction to the jury on criminal responsibility created a substantial likelihood of a miscarriage of justice; (3) the judge erred in allowed Saleh to testify about the defendant's prior drug dealing in support of his opinion that the defendant did not suffer from schizophrenia; and (4) the

judge erred in instructing the jury that, in considering the question of criminal responsibility, they may consider that "a great majority of persons are sane and the probability that any particular person is sane." Before we address these four claims, we first summarize our law regarding the defense of lack of criminal responsibility, focusing on the intersection between criminal responsibility and voluntary intoxication.

1. Defense of lack of criminal responsibility. Where a defendant offers a defense of lack of criminal responsibility, the burden rests on the Commonwealth to "prove beyond a reasonable doubt that the defendant was criminally responsible at the time the alleged crime was committed." Model Jury Instructions on Homicide 1. See Commonwealth v. Berry, 457 Mass. 602, 612 (2010), S.C., 466 Mass. 763 (2014), citing McHoul, 352 Mass. at 546-547. Our Model Jury Instructions on Homicide declare that "[a] person is not criminally responsible for his conduct if he has a mental disease or defect, and, as a result of that mental disease or defect, lacks substantial capacity either to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the requirements of the law." Model Jury Instructions on Homicide 2. See McHoul, supra (lack of criminal responsibility defense).

a. Mental disease or defect. If the Commonwealth proves beyond a reasonable doubt that the defendant did not have a

mental disease or defect at the time of the crime, the defense of lack of criminal responsibility fails. Even if the jury were to conclude that the defendant lacked substantial capacity, the defendant must be found criminally responsible if the lack of substantial capacity did not result from a mental disease or defect but derived solely from another source, such as voluntary intoxication.

Our model jury instructions do not define the term "mental disease or defect." Only two bits of guidance are given to jurors: (1) it "is a legal term, not a medical term; it need not fit into a formal medical diagnosis," and (2) "[i]ntoxication caused by the voluntary consumption of alcohol or drugs, by itself, is not a mental disease or defect." Model Jury Instructions on Homicide 3, 5. The absence of further guidance in our model jury instructions "arises not because the term 'mental disease or defect' is so clear on its face that such an explanation would be superfluous. The reason may well be the opposite; the subject is so complex and obscure that any general explanatory formula is likely to mislead and confuse." Commonwealth v. Fuller, 421 Mass. 400, 411 (1995). See Commonwealth v. Sliech-Brodeur, 457 Mass. 300, 328 (2010) ("a judge is not required to define 'mental disease or defect' but has discretion to provide the instructions that are appropriate to the context").

Although our model jury instructions are spare, it should be clear that a person without a mental disease or defect who gets drunk or high and then robs a convenience store is not entitled to a criminal responsibility defense even if he or she was so intoxicated as to lack substantial capacity. See Berry, 457 Mass. at 617, citing Commonwealth v. Sheehan, 376 Mass. 765, 770 (1978) ("A defendant's lack of criminal responsibility cannot be solely the product of intoxication caused by her voluntary consumption of alcohol or another drug"). See also J. Dressler, Understanding Criminal Law § 24.05[A] (8th ed. 2018) (noting that common law does not recognize defense of "temporary insanity" resulting from "voluntary ingestion of drugs or alcohol"). Nor is a person without a mental disease or defect entitled to a criminal responsibility defense if he or she robs that convenience store in the throes of opioid withdrawal, desperate for the money to purchase the drugs needed to end the pangs of withdrawal. Intoxication from alcohol or the high from drugs is not a mental disease or defect where the loss of capacity ends when the effects of the alcohol or drug wear off; a mental disease or defect is something more enduring, reflecting something about the person's brain chemistry that, although perhaps not permanent, is more than the transient effect of the person's substance use. See id. at § 24.05[B] ("The law distinguishes between mental impairment that does not

extend beyond the period of voluntary intoxication ['temporary insanity'], for which no defense is available, and insanity resulting from long-term use of drugs or alcohol. If the unsoundness of mind, although produced by long-term alcohol or drug abuse, has become 'fixed' or 'settled,' the general, but not universal, rule is that the defendant may assert a traditional insanity defense").[5]

What our case law declares, but our model jury instructions do not, is that if a defendant has a mental disease or defect,

---

[5] A number of our sister States recognize a "settled insanity" defense. See, e.g., People v. Travers, 88 Cal. 233, 239-240 (1891) ("settled insanity produced by a long-continued intoxication affects responsibility in the same way as insanity produced by any other cause. But it must be 'settled insanity,' and not merely a temporary mental condition produced by recent use of intoxicating liquor"); Bieber v. People, 856 P.2d 811, 815 (Colo. 1993), cert. denied, 510 U.S. 1054 (1994) ("The doctrine of 'settled insanity' draws a distinction between voluntary intoxication, universally recognized as not constituting a defense, and 'insanity' arising from the long-term use of intoxicants but separate from immediate intoxication"); People v. Free, 94 Ill. 2d 378, 408, cert. denied, 464 U.S. 865 (1983) ("A voluntary intoxication or a voluntary drugged condition precludes the use of the insanity defense unless the mental disease or defect is traceable to the habitual or chronic use of drugs or alcohol . . . and such use results in a 'settled' or 'fixed' permanent type of insanity" [citations omitted]); White v. Commonwealth, 272 Va. 619, 626 (2006) ("a mental disease or defect caused by chronic abuse of alcohol or drugs will support the defense of insanity . . . We have also commonly referred to this permanent condition as 'settled insanity'" [citations omitted]).

Although we have never used the language of "settled insanity," our guidance in Commonwealth v. Herd, 413 Mass. 834, 840-841 (1992), discussed infra, is substantively similar.

its origins are irrelevant: it does not matter whether the disease or defect arose from genetics, from a childhood disease or accident, from lead poisoning, from the use of prescription medication, or from the chronic use of alcohol or illegal drugs. See Commonwealth v. Herd, 413 Mass. 834, 840-841 (1992). A drug-induced mental disease or defect still constitutes a mental disease or defect for purposes of a criminal responsibility defense. Id. In reaching that conclusion in Herd, we declared:

> "The weight of authority in this country recognizes an insanity defense that is based on a mental disease or defect produced by long-term substance abuse. We see no logical reason for rejecting a drug-induced mental disease or defect as a basis for the application of the McHoul test simply because the disease or defect is caused only by the drug ingestion. We are unwilling, in order to justify a homicide conviction, to permit the moral fault inherent in the unlawful consumption of drugs to substitute for the moral fault that is absent in one who lacks criminal responsibility" (footnote omitted).

Id. Therefore, if the defendant suffered from schizophrenia or a similar psychotic disorder at the time of the killing, he had a mental disease or defect regardless of its cause or the defendant's understanding of its cause.

b. Interaction between a mental disease or defect and the voluntary use of alcohol or drugs. Our model jury instructions become even more challenging where the defendant both has a mental disease or defect and was under the influence of drugs or alcohol at the time of the crime. Our instructions essentially

describe three different scenarios, each with different legal consequences.

Under the first scenario, the defendant, at the time the crime was committed, had a mental disease or defect that by itself caused him to lack the required substantial capacity. Where this is true, the defendant is not criminally responsible even if the defendant was also under the influence of drugs or alcohol and his consumption of these substances made the symptoms of his mental disease or defect worse. Indeed, where this is true, the defendant is not criminally responsible even if the defendant knew that consuming drugs or alcohol would make his symptoms worse. See Model Jury Instructions on Homicide 7.

Under the second scenario, the defendant's mental disease or defect did not, by itself, cause the defendant to lack substantial capacity; however, his consumption of drugs or alcohol triggered or intensified his preexisting mental disease or defect, causing the defendant to lose substantial capacity. See DiPadova, 460 Mass. at 432 ("a defendant's mental disease or defect may interact with . . . drugs in such a way as to push the defendant 'over the edge' from" having substantial capacity into lacking substantial capacity). Where this is true, and where the defendant did not know or have reason to know that his consumption of drugs would trigger or intensify his mental

disease or defect, the defendant is also not criminally responsible. See Model Jury Instructions on Homicide 5-6.

The third scenario is a variation on the second, the difference being that the Commonwealth proves beyond a reasonable doubt that the defendant knew or had reason to know that his consumption of drugs or alcohol would trigger or intensify a mental disease or defect that could cause the defendant to lose substantial capacity. Where this is true, the defendant "is criminally responsible for his resulting conduct" (emphasis in original). Model Jury Instructions on Homicide 6-7, citing DiPadova, 460 Mass. at 439-440. In effect, if a defendant's mental disease or defect alone did not cause the loss of substantial capacity, and the defendant knew or had reason to know that his consumption of drugs or alcohol would cause him to lose substantial capacity, our law regards it as if the loss of substantial capacity arose solely from voluntary intoxication. See Model Jury Instructions on Homicide 5 ("Where a defendant lacked substantial capacity to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the law solely as a result of voluntary intoxication, then he is criminally responsible for his conduct").

But it is important to understand what this third scenario does not mean. It does not mean that if the defendant knew or had reason to know that chronic consumption of alcohol or drugs

might eventually affect his brain chemistry so as to cause a mental disease or defect, he cannot claim lack of criminal responsibility if he loses substantial capacity as a result of that mental disease or defect. See Herd, 413 Mass. at 843.

So, if a person with alcohol abuse disorder knows or has reason to know that his or her chronic use of alcohol could eventually result in an organic brain syndrome, that person is not barred from claiming a lack of criminal responsibility if he or she committed a crime after losing substantial capacity as a result of an organic brain syndrome. Id. at 839-840 ("a mental disease caused by drug abuse, even if temporary in nature, may nevertheless [permit a lack of criminal responsibility defense] if the condition was not limited to periods of the defendant's intoxication"). Cf. Commonwealth v. Rosario, 477 Mass. 69, 73-74 (2017) (discussing delirium tremens). We regard organic brain syndromes as a mental disease or defect even if it were the foreseeable result of chronic alcohol abuse. See Commonwealth v. Brennan, 399 Mass. 358, 362-363 (1987) (judge in murder trial erred by not allowing expert testimony that organic brain syndrome resulting from alcoholism could form basis of lack of criminal responsibility defense). Similarly, if a person with a substance use disorder knows or should know that chronic use of cannabis increases the risk of schizophrenia, the person is not barred from claiming a lack of criminal

responsibility if the person committed a crime after losing substantial capacity as a result of schizophrenia. We regard schizophrenia as a mental disease or defect even where it is the foreseeable result of chronic drug use.[6]

Implicit in our instructions is that where a person voluntarily chooses to become intoxicated from alcohol or high from drugs, that person is responsible for the decision to get drunk or high and therefore is criminally responsible for his or her subsequent conduct; that is why it is characterized as voluntary intoxication. Similarly implicit in our model jury instruction regarding the third scenario, is that where a person knows or has reason to know that his or her use of alcohol or drugs will interact with his or her mental disease or defect and push the person over a psychological "edge" into a loss of substantial capacity, that person is responsible for the decision to use drugs or alcohol in these circumstances and therefore criminally responsible for his or her subsequent conduct.

---

[6] It is worth noting that while increasing evidence points to a correlation between cannabis use and schizophrenia, a causal relationship between cannabis exposure and the development of schizophrenia remains highly controversial even within the scientific community. See, e.g., Wilkenson, Radhakrishnan, & D'Souza, Impact of Cannabis Use on the Development of Psychotic Disorders, 1 Current Addiction Reports 115, 117 (2014).

With this background, we now address the claims of error raised by the defendant.

2. Sufficiency of the evidence. The defendant claims that, even if we view the evidence in the light most favorable to the Commonwealth, as we must, no rational trier of fact could conclude that the Commonwealth had met its burden of proving beyond a reasonable doubt that the defendant is criminally responsible. See Commonwealth v. Lawson, 475 Mass. 806, 811-812 (2016). We have said that "[i]t will be a rare case where the totality of the evidence regarding the defendant's conduct and the circumstances of the offense will not be sufficient to defeat a defendant's motion for a required finding of not guilty by reason of lack of criminal responsibility." Id. at 817. These cases are not examples of that rare case.

A reasonable jury could have credited Saleh's expert opinion that the defendant did not have a mental disease or defect but instead suffered from delusions and hallucinations solely because of his withdrawal from cannabis. A reasonable jury also could have credited Saleh's opinion that the defendant could "appreciate the wrongfulness of his conduct and . . . conform his conduct to the requirement of the law" at the time of the crime because "[h]is behaviors were organized, goal-directed, planned, thoughtful." The defendant is therefore not

entitled to a judgment of acquittal as a matter of law based on the insufficiency of the evidence of criminal responsibility.

3. Jury instruction on defense of lack of criminal responsibility. The defendant claims that, in the unusual circumstances of these cases, the judge's jury instructions regarding criminal responsibility created a substantial likelihood of a miscarriage of justice. Because the judge's instructions were essentially our model jury instructions, we must consider whether our own instructions, applied in the context of these cases, created a substantial risk of juror confusion regarding the law of criminal responsibility. We conclude that they did. The danger arose not from what the instructions said regarding mental disease or defect and the interaction with the voluntary consumption of alcohol or drugs, but from what they failed to say.

The model jury instructions provide:

> "The phrase 'mental disease or defect' is a legal term, not a medical term; it need not fit into a formal medical diagnosis. The phrase "mental disease or defect" does not include an abnormality characterized only by repeated criminal conduct. It is for you to determine in light of all the evidence whether the defendant had a mental disease or defect. If the Commonwealth has proved to you beyond a reasonable doubt that the defendant was not suffering from a mental disease or defect at the time of the killing, the Commonwealth has satisfied its burden of proving that the defendant was criminally responsible."

Model Jury Instructions on Homicide 3. As discussed earlier, this instruction is spare, but, in the absence of evidence of

alcohol or drug consumption, it does not pose a significant risk of confusion, especially where there is likely to be expert testimony on this subject. But where there is evidence that a defendant had a mental disease or defect and consumed drugs or alcohol at or about the time of the offense, our model jury instructions create two potential risks of juror confusion in the circumstances of these cases.

a. Underlying cause or origin of mental disease or defect instruction. Our model jury instructions provide:

> "A defendant's lack of criminal responsibility must be due to a mental disease or defect. Intoxication caused by the voluntary consumption of alcohol or drugs, by itself, is not a mental disease or defect. Where a defendant lacked substantial capacity to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the law solely as a result of voluntary intoxication, then he is criminally responsible for his conduct."

Model Jury Instructions on Homicide 5.

After hearing the expert testimony and the prosecutor's closing argument in these cases, a reasonable jury might have understood this instruction to mean that if the defendant's chronic use of cannabis had caused his mental disease or defect, then the law would not recognize him to have a mental disease or defect. This risk was magnified by Saleh's opinion that, at the time of the killing, the defendant had experienced a temporary episode of "drug-induced psychosis," as opposed to a more prolonged or permanent psychotic disorder, and that this episode

did not amount to a mental disease or defect. Where it was apparent that the defendant had no access to cannabis for at least four days before the killing and that he was therefore not high at the time of the killing, the jury might have understood Saleh's testimony to mean that a mental disease or defect induced by drugs was not, under the law, a mental disease or defect.

The potential for misunderstanding was further intensified by the prosecutor's closing argument, where, in asking the jury to compare Saleh's expert testimony with Daignault's, he asked the rhetorical question, "Did Dr. Daignault . . . possess the medical training to understand the biological aspects of marijuana, as Dr. Saleh explained to you about the blood/brain barrier, about the long-term effects of smoking marijuana on a daily basis and how that affects the brain." The inference the prosecutor invited was that, if the defendant's long-term use of cannabis affected his brain and even caused his schizophrenia, he was criminally responsible. But as explained above, allowing the jury to make this inference would be incorrect: a lack of criminal responsibility defense is not foreclosed where the defendant's long-term drug use caused his mental disease or defect.

This risk of confusion could be diminished by adding the highlighted sentences to the model jury instruction:

> "A defendant's lack of criminal responsibility must be due to a mental disease or defect. You need not consider the cause or origin of a mental disease or defect. All that you need to determine as to this issue is whether the Commonwealth has proved beyond a reasonable doubt that the defendant did not have a mental disease or defect at the time of the alleged offense. Intoxication caused by the voluntary consumption of alcohol or drugs, by itself, is not a mental disease or defect. But a mental disease or defect might be caused by or result from a defendant's earlier chronic use of alcohol or drugs. Where a defendant lacked substantial capacity to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the law solely as a result of voluntary intoxication, and not from a mental disease or defect, then he is criminally responsible for his conduct."

b. "Knew or had reason to know" instruction. Our model jury instructions address what we have described as the third scenario, where there is evidence that the defendant knew or should have known that his consumption of drugs or alcohol would trigger or intensify a preexisting mental disease or defect and thereby cause a loss of substantial capacity, with the following instruction:

> "A defendant who lost the substantial capacity I have just described after he consumed drugs or alcohol, and who knew or had reason to know that his consumption would trigger or intensify in him a mental disease or defect that could cause him to lack that capacity, is criminally responsible for his resulting conduct. In deciding whether the defendant had reason to know about the consequences of his consumption of drugs or alcohol, you should consider the question solely from the defendant's point of view, including his mental capacity and his past experience with drugs or alcohol. But you must keep in mind that where a defendant, at the time the crime is committed, had a mental disease or defect that by itself caused him to lack the required substantial capacity, he is not criminally responsible for his conduct regardless of whether he used or did not use alcohol or drugs. That is true even if he

> did use alcohol or drugs and the alcohol or drug use made the symptoms of his mental disease or defect worse, and even if he knew they would make his symptoms worse").
>
> Model Jury Instructions on Homicide 6-7.

This instruction does not apply under the facts of these cases. To be sure, there was evidence that the defendant knew that he hallucinated when he was high on cannabis, but where he had not had access to cannabis for four days, there was no evidence that he was high at the time of the killing. Nor did the Commonwealth present any evidence that the defendant knew or should have known that he could lose substantial capacity as a result of his withdrawal from cannabis.

In closing argument, however, the prosecutor suggested that the defendant could be found criminally responsible under this third scenario if the jury found that he knew that his prior chronic cannabis use made him paranoid and delusional. The prosecutor argued:

> "The defendant had some problems, but it doesn't absolve him of his responsibility for deliberately killing another person. And these problems he brought upon himself from his daily use of marijuana. The defendant had a drug problem . . . that he knew made him paranoid and delusional. His withdrawal made him a killer."

Later in his argument, the prosecutor declared:

> "The defendant knew that smoking marijuana daily was bad for him. He learned it in school. He learned it from his parents. Yet, still, he smoked it every day. And what did he say to the police? 'Whenever I smoke pot, it sort of sets off other drugs that I have done before."

A jury who credited Daignault's opinion that the defendant had the mental disease or defect of schizophrenia at the time of the killing could have understood from the prosecutor's argument and this instruction that the defendant was still criminally responsible if he knew that his prior use of cannabis over the years made his schizophrenia more severe. But just as our case law does not care what caused a defendant's mental disease or defect, it also does not care what may have, over the course of time, intensified or worsened that mental disease or defect. This instruction does not focus on a defendant's past drug or alcohol use, but only on his or her present use and the intoxicating effects from that present use.

The risk of confusion on this point could be diminished if we amended our model jury instruction as follows, with the underlined revisions:

> "A defendant who lost the substantial capacity I have just described <u>when voluntarily intoxicated by</u> drugs or alcohol, and who knew or had reason to know that his <u>intoxication</u> would trigger or intensify in him a mental disease or defect that could cause him to lack that capacity, <u>is</u> criminally responsible for his resulting conduct. In deciding whether the defendant had reason to know about the consequences of his <u>voluntary intoxication from</u> drugs or alcohol, you should consider the question solely from the defendant's point of view, including his mental capacity and his past experience with drugs or alcohol. But you must keep in mind that where a defendant, at the time the crime is committed, had a mental disease or defect that by itself caused him to lack the required substantial capacity, he is not criminally responsible for his conduct regardless of whether he used or did not use alcohol or drugs. That is true even if he did use alcohol or drugs

> and the alcohol or drug use made the symptoms of his mental disease or defect worse, and even if he knew they would make his symptoms worse."[7]

We conclude that, given the unusual facts of these cases, there is a significant risk that the jury misunderstood our model jury instructions to mean that the defendant was not criminally responsible if his mental disease or defect was caused by his prior chronic cannabis use or if he knew or should have known that his prior chronic cannabis use either caused his

---

[7] In his concurrence, Justice Lowy argues that we should not limit this instruction to voluntary intoxication but should provide it whenever there is evidence that (1) the defendant has a mental disease or defect, (2) the defendant recently consumed drugs or alcohol, and (3) the defendant knew or had reason to know that this consumption could trigger or intensify his mental disease or defect so as to cause him to lack substantial capacity. The facts of these cases illustrate the risk that would arise from adopting that as the general rule.

There was evidence that the defendant knew that his use of cannabis would "set off other drugs" he had taken before, but only when he was "high" on cannabis. There was no evidence that he knew that cannabis would have this effect when he was no longer high or when he went into withdrawal. The instruction that the jury received, and which Justice Lowy would leave intact, would permit the jury to conclude that the defendant was criminally responsible because he knew or had reason to know that his "consumption" of cannabis would trigger or intensify in him a mental disease or defect that could cause him to lack substantial capacity, even though the defendant did not know that this could happen when he was no longer high.

We leave open the possibility that a judge could revise this instruction if there was evidence that the defendant knew or had reason to know that his recent use of drugs or alcohol could send him "over the edge" even if he were not high or intoxicated. But, as here, in the absence of such evidence, the risk of confusing the jury is far less if we limit this instruction to voluntary intoxication.

mental disease or defect or increased its severity. In view of the substantial evidence in these cases that the defendant had a mental disease or defect and that he lacked substantial capacity at the time of the killing, we conclude that there was a substantial likelihood of a miscarriage of justice arising from the risk of such a misunderstanding, and that justice demands that the defendant's convictions be vacated and the cases be remanded for a new trial.

4. Other claims of error. We reach the other claims of error in the event they arise at a new trial. See Commonwealth v. Pleasant, 366 Mass. 100, 103 (1974).

a. Admission of evidence of defendant's drug dealing. The defendant contends that the judge abused his discretion by admitting evidence of the defendant's drug dealing over the defendant's objection. Saleh testified that the defendant told him that he had supported himself and his wife with earnings he made by selling cannabis, and that, prior to his admission to the psychiatric ward, he sold several pounds of cannabis for $6,000. Saleh then offered the opinion that a person who "truly" has schizophrenia would not be able to transact with other drug dealers to buy drugs, sell drugs, or consume drugs. The judge instructed the jury that the evidence of the defendant's drug dealing could be considered as a factor that Saleh used to formulate his opinion, and was not offered "to

reflect on the character of the defendant." The defendant did not object to the judge's limiting instruction.

We conclude that the judge did not abuse his discretion in admitting this evidence with a limiting instruction, where the evidence was offered to support Saleh's opinion that, at the time of the killing, the defendant did not have schizophrenia or any mental disease or defect. It "did not lie 'outside the bounds of reasonable alternatives,'" see L.L. v. Commonwealth, 470 Mass. 169, 184 (2014), quoting Adoption of Mariano, 77 Mass. App. Ct. 656, 660 (2010), for the judge to conclude that the probative value of the evidence was not outweighed by the danger of unfair prejudice. See Commonwealth v. Upton, 484 Mass. 155, 170 (2020), citing Commonwealth v. Crayton, 470 Mass. 228, 249 (2014).

b. Presumption of sanity. In his final instructions, the judge instructed the jury that "[y]ou may consider the fact that a great majority of persons are sane and the probability that any particular person is sane." In Lawson, 475 Mass. at 815 n.8, three years after these cases were tried, we considered a comparable jury instruction and concluded that, "given the meager weight of this inference and the risk of juror confusion regarding the burden of proof, judges should not instruct juries regarding this inference." We noted that, "[a]lthough it is probable that an individual selected randomly would be

criminally responsible for his or her acts, that same probability would not attach to the tiny subset of the population who are criminal defendants with a long history of mental illness who proffer a defense of lack of criminal responsibility." Id. at 814. This instruction should not be given at the retrial.

Conclusion. We vacate the judgments of conviction and remand the cases to the Superior Court for a new trial consistent with this opinion.

So ordered.

LOWY, J. (concurring). I agree that we must reverse the defendant's conviction because of the error in the judge's instructions to the jury regarding voluntary intoxication. I also agree with the bulk of the court's reasoning about the conditions under which a defendant may and may not assert the criminal responsibility defense. The court states that if "the defendant knew or had reason to know that his consumption of drugs or alcohol would trigger or intensify a mental disease or defect that could cause the defendant to lose substantial capacity," either to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the requirements of the law or if he knew or had reason to know that the drug or alcohol consumption pushed the defendant over the edge into lacking substantial capacity, then he "is criminally responsible for his resulting conduct" (quotations omitted). Ante at , quoting Model Jury Instructions on Homicide 6-7 (2018). See Commonwealth v. DiPadova, 460 Mass. 424, 432 (2011). I agree.

It is the next step of the court's reasoning with which I disagree. Inexplicably, in reversing the defendant's conviction, the court removes the category of circumstances just discussed under which defendants may not successfully claim a lack of criminal responsibility defense: defendants who, while no longer high or intoxicated, recently consumed drugs or alcohol knowing or having reason to know that that recent

consumption would trigger or intensify a mental disease or defect that pushed them over the edge into losing substantial capacity. See ante at . The court modifies our case law and changes our model jury instructions to prohibit the lack of criminal responsibility defense only under circumstances "when [the defendant was] voluntarily intoxicated by drugs or alcohol." Id. This modification would entitle a defendant to a defense of lack of criminal responsibility in circumstances when he is neither intoxicated nor high when he committed the crime, no matter what he knew or should have known about how his recent consumption would trigger or intensify a mental disease or defect that would push him over to edge into losing substantial capacity at the time of the crime.

Under our precedent and contrary to the court's opinion, however, we are concerned not only with a defendant's behavior when he is intoxicated, or "drunk or high," at the time of the crime, ante at , but also when the intoxicating effects of that recent consumption cause the defendant to lose substantial capacity.[1] The court agrees that the defendant cannot claim the

[1] Indeed, we have distinguished between intoxication, which requires a level of drug use that substantially impairs an individual's judgment, see Commonwealth v. Brennan, 399 Mass. 358, 359 (1987) (defendant consumed "beer, wine, and a 'couple dozen rum and cokes,' took valium and smoked" cannabis on day of murder), and consumption, which need not impair the defendant's judgment so long as it triggers or intensifies a defendant's mental disease or defect. See Commonwealth v. DiPadova, 460

lack of criminal responsibility defense where the source of the lack of substantial capacity is drug use, not a mental disease or defect. See id. at . But the source of the lack of substantial capacity is only half of the equation; we also must look at the defendant's knowledge when drug use and mental diseases or defects interact. See DiPadova, 460 Mass. at 437. A defendant who consumes drugs close in time to his commission of the crime, and who knew or had reason to know that his recent drug use would send him over the edge either by causing or intensifying a mental disease or defect that would lead him to lose substantial capacity, should be criminally responsible, no matter whether he is still intoxicated or high at the time of the crime. See id. at 439 (Appendix).

A hypothetical example will help explain my concern with the court's decision. Imagine a defendant who knows that if he consumes any opiates, he will lose substantial capacity, and not

---

Mass. 424, 427 (2011) (conflicting evidence whether defendant consumed drugs before or after murder); Commonwealth v. Sheehan, 376 Mass. 765, 767 (1978) (no evidence of drug use on day of crime, but "blacked out" from resulting effects of heavy drug use that occurred during five days preceding crime); Commonwealth v. McGrath, 358 Mass. 314, 320 (1970) (instruction regarding defendant's consumption "on the day of the crimes or the few days before the crimes" was proper). See also People v. Travers, 88 Cal. 233, 239-240 (1891) ("settled insanity produced by a long-continued intoxication affects [criminal] responsibility in the same way as insanity produced by any other cause. But it must be 'settled insanity,' and not merely a temporary mental condition produced by recent use of intoxicating liquor" [emphasis added]).

while he is just intoxicated or high, but also while his recent consumption of drugs still affects him physiologically and psychologically. Imagine further that the defendant knows that such consumption will cause him to become violent because the opiate use "triggers or intensif[ies]" his mental disease or defect even after the intoxicating effects of the opiates have dissipated. DiPadova, 460 Mass. at 439 (Appendix). The defendant decides to consume the opiates nonetheless, resulting in his predictable loss of substantial capacity that outlasts the intoxicating effects of his consumption by hours or even days. He thereafter kills someone while no longer intoxicated or high, but while still lacking substantial capacity due to his recent consumption of opiates. Under this scenario, why does it matter whether an individual is no longer "voluntarily intoxicated" at the moment of the crime if he knew or had reason to know that his recent consumption of opiates would trigger or intensify a mental disease or defect and he thereafter lost substantial capacity for precisely that reason? That the defendant was no longer "intoxicated" at the time of the alleged crime should not insulate him from criminal responsibility

simply because the lack of substantial capacity outlasted the intoxicating effects of the recent consumption.[2] See id.[3]

The court recognizes the importance of recent consumption when it notes, in defining the contours of voluntary intoxication, that "a person without a mental disease or defect [is not] entitled to a criminal responsibility defense if he or she robs [a] convenience store in the throes of opioid withdrawal," ante at , and by acknowledging that the "know or have reason to know" instruction applies to "the intoxicating effects" of drug use, id. at . But by limiting the instruction to "present [drug or alcohol] use," id. at , the court precludes the Commonwealth from proving the criminal responsibility of a defendant who continues to lack substantial

---

[2] I agree with the court that the criminal responsibility defense should be available to a person whose lack of substantial capacity results from a "drug-induced mental disease or defect" because, in that scenario, the defendant's mental disease or defect causes the lack of substantial capacity, not the intoxicating effects of his past drug use. See ante at ("it does not matter whether the disease or defect arose from genetics, from a childhood disease or accident, from lead poisoning, from the use of prescription medication, or from the chronic use of alcohol or illegal drugs."). See Commonwealth v. Herd, 413 Mass. 834, 840-841 (1992).

[3] I do not lay out in detail the parameters of what constitutes "recent consumption," but the consumption here, in the light most favorable to the Commonwealth, may well fall within the meaning of the term. There was evidence that the defendant was still dealing with the residual effects of drug use. See Herd, 413 Mass. at 840 (voluntary intoxication "refer[s] to the intoxicating effects of the consumption of drugs").

capacity after recently consuming drugs even after the "voluntary intoxication" wears off, and who knew or had reason to know that the lack of substantial capacity would result.

I agree with the court that "[a] drug-induced mental disease or defect still constitutes a mental disease or defect for purposes of a criminal responsibility defense."[4] Ante at , citing Commonwealth v. Herd, 413 Mass. 834, 840-841 (1992). I have no interest in punishing addiction or holding a defendant criminally responsible because of some perceived moral shortcoming resulting from his prior drug use. I also am not suggesting that our law should bar a person with a substance use disorder from asserting a criminal responsibility defense if he knows or has reason to know that chronic use of certain drugs increases the risk of certain psychological conditions. And like the court, I am certainly not suggesting that somebody who uses drugs or alcohol, knowing that it may cause him to have a mental disease or defect sometime in the future, could not assert a lack of criminal responsibility defense.[5] Rather, I am

[4] If, however, the defendant's voluntary intoxication or recent consumption caused the defendant to lose substantial capacity, and not the defendant's drug-induced mental disease or defect, the defendant is not entitled to a lack of criminal responsibility defense. See Sheehan, 376 Mass. at 770.

[5] The "knows or have reason to know" (or knew or had reason to know) instruction does not deal with such conditional examples where a person has abstract or general knowledge that drug use causes brain damage or could lead to a mental disorder.

simply stating that, consistent with our existing case law, a defendant who consumes drugs close in time to his commission of the crime, and who knew or had reason to know that that recent drug use would push him over the edge and would cause him to lose substantial capacity, should be criminally responsible. See Herd, 413 Mass. at 843 ("one who starts taking a drug or continues using it, knowing that it will [trigger or intensify in him] a mental disease or defect, is not entitled to" lack of criminal responsibility defense).

As for the facts of these cases, it may be, even in the light most favorable to the Commonwealth, that there was not enough evidence for a jury instruction concerning the defendant's recent consumption. Considering, however, that the Commonwealth's expert testified that the defendant suffered from "a substance-induced psychotic disorder and a cannabis withdrawal condition," that the cannabis remained in his system at time of the alleged crime, and that the defendant comprehended that cannabis use brought about hallucinations and delusions and that the use altered his brain chemistry and personality, the issue is at least a close one and may reemerge

---

The knowledge assessed by the jury must be tied to the specific lack of substantial capacity at issue. See, e.g., DiPadova, 460 Mass. at 428 (2011) (defendant knew drug use led to auditory hallucinations that told him to kill victim); Herd, 413 Mass. at 842 (defendant knew cocaine use would lead to violence that occurred).

at retrial. Whether it will be appropriate to provide the recent consumption instruction on retrial will be a decision for the judge to make, and it will depend on whether the Commonwealth can prove that the defendant's recent consumption of cannabis, and not any drug-induced mental disease or defect, caused the defendant to lack substantial capacity. Nevertheless, the facts and posture of these cases do not support the court's decision to eliminate the Commonwealth's ability to hold accountable a defendant who, although no longer intoxicated, knew or had reason to know that his recent consumption of drugs would trigger or intensify a mental disease or defect that causes him to lose or to lack the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. See DiPadova, 460 Mass. at 437.