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SJC-11589

COMMONWEALTH vs. THOMAS E. TOOLAN, THIRD.

Nantucket. May 4, 2022. - September 23, 2022.

Present: Budd, C.J., Lowy, Cypher, Kafker, & Georges, JJ.

Homicide. Assault and Battery by Means of a Dangerous Weapon. Drug Addiction. Criminal Responsibility. Mental Impairment. Malice. Intoxication. Practice, Criminal, Capital case, Instructions to jury, Request for jury instructions. Words, "Mental disease or defect."

Indictments found and returned in the Superior Court Department on January 10, 2005.

Following review by this court, 460 Mass. 452 (2011), the cases were tried before Gary A. Nickerson, J.

Michelle Menken for the defendant.
Elizabeth A. Sweeney, Assistant District Attorney, for the Commonwealth.

GEORGES, J. This case is before the court on the defendant's direct appeal from his convictions of murder in the first degree and assault and battery by means of a dangerous weapon in the stabbing death of Elizabeth Locktefeld, his former

girlfriend, on October 25, 2004. Locktefeld was found dead on the floor of her home in Nantucket, having been stabbed twenty-three times, a few days after she ended her relationship with the defendant due to what she described as his excessive consumption of alcohol.

In this appeal, the defendant raises a number of challenges to the jury instructions given and the absence of requested instructions. He maintains that the judge should have clarified the legal definition of "mental disease or defect" after the Commonwealth's expert testified inappropriately by referencing a statutory definition, and that the absence of a clarifying instruction created a substantial likelihood of a miscarriage of justice. The defendant argues also that the judge's instructions did not adequately explain the difference between a lack of criminal responsibility and diminished capacity, such that the jury might not have understood that, if they found the defendant had been criminally responsible, they nonetheless could find the defendant had had a diminished capacity at the time of the stabbing. In addition, the defendant contends that it was error to instruct the jury that they could infer malice from the intentional use of a dangerous weapon. The defendant also maintains that the judge abused his discretion in not instructing the jury, as the defendant requested, to consider whether the defendant was incapable of resisting the urge to use

drugs or alcohol, and thus that any knowledge the defendant might have had about the effect of intoxication upon his mental conditions should not have been considered in the determination whether the defendant had had a mental impairment at the time. Finally, the defendant asks us to exercise our extraordinary authority to grant him relief under G. L. c. 278, § 33E.

Having carefully reviewed the arguments and the record, we discern no error warranting a new trial and no reason to exercise our extraordinary authority under G. L. c. 278, § 33E, to order a new trial or to reduce the degree of guilt. Accordingly, we affirm the convictions.

1. Background. a. Facts. The jury could have found the following. In the fall of 2004, the defendant was living in New York City, where he had grown up, and the victim was living in Nantucket, where she had moved from New York earlier that year. On September 4, 2004, a mutual friend introduced the defendant and the victim to each other. Shortly thereafter, they began dating; the relationship deepened very quickly, such that the defendant and the victim were discussing marriage. Over the course of a few days in late October of 2004, however, while the victim was visiting the defendant in New York, the relationship degenerated rapidly, due to the defendant's excessive drinking. On around October 23, 2004, the victim ended the relationship

for that reason, removed her belongings from the defendant's apartment, and returned to her home in Nantucket.

On October 23, 2004, the defendant called a long-time friend, Mark Mitchell, from a bar. The defendant sounded confused, and his speech was slurred. Mitchell was concerned and went to the bar, where he found the defendant drinking vodka. The defendant went to the rooftop of the building and threatened to commit suicide. Mitchell convinced him to come down from the roof and took the defendant to an Alcoholics Anonymous meeting. After the meeting, the defendant purchased two bottles of vodka from different stores. Mitchell took each bottle from him. Mitchell brought the defendant to the defendant's apartment, and there the defendant fell asleep.

The next day, on October 24, 2004, the defendant went to LaGuardia Airport and purchased a one-way ticket to Nantucket. He was detained while going through security before boarding the plane because he had placed a large kitchen knife in a security bin, along with his coat and carry-on luggage, where it was detected by a scanner. Airport security officials noted that the defendant's breath smelled of alcohol, his eyes were glassy, his speech was slurred, and he appeared to be under the influence of alcohol. When asked about the knife, the defendant gave four differing reasons for having brought it with him. The defendant was issued a summons for possessing a knife with a

blade more than four inches in length. He then went to a bar at another terminal.

The following day, October 25, 2004, the defendant returned to LaGuardia Airport and again purchased a ticket to Nantucket. This time, he successfully boarded the plane. When he reached Nantucket, he rented a bright-colored sport utility vehicle (SUV) and drove to a surf shop. He asked a salesperson where the scallop knives were kept. The salesperson told the defendant that the store did not sell any knives, and directed him to a nearby marine store. There, the defendant purchased two scallop knives and a longer, sheathed knife with an orange handle.

The defendant then drove to the victim's cottage, which was located on the same property as the main house where the landlord lived. He parked across the street, at an angle that partly obstructed passing traffic. He approached the landlord, who was working outside in the yard, and asked whether the victim was home. Although the landlord had just spoken to the victim and had seen her go inside the cottage, the defendant's appearance concerned her, and she replied that she did not know. The defendant headed to the cottage, where the door was standing open and the shades were not drawn. The defendant entered and, during an encounter that left blood on the walls, floor, and furniture in several rooms, stabbed the victim twenty-three

times in the torso, chest, back, nose, arms, and hands. Before he left the cottage, the defendant pulled the shades and closed the door. He discarded a beer bottle and a vodka bottle outside the kitchen door. He drove back to the airport, where he left the rental SUV,¹ and flew to Hyannis, where he rented another vehicle and started driving toward New York.

Shortly after the defendant left the cottage, the victim's landlord noticed that the curtains were drawn and the door was shut, contrary to the victim's usual practice. Concerned, the landlord telephoned the victim's brother. The brother called 911 and asked police to conduct a wellness check. After officers found the victim's bloodied body, the brother assisted them in obtaining the defendant's full name and address, and they issued an alert to look for the defendant's rental vehicle. The defendant was located by Rhode Island State police driving on Route 95 in Rhode Island. While troopers were following the defendant's vehicle to an exit where they had set up a roadblock, the defendant drove appropriately, without crossing any marked lanes and without speeding. When he was stopped at the roadblock, the defendant appeared lethargic and bewildered; he was unable to follow officers' commands to unlock the

¹ Police later found the knife and the victim's wallet in a bush next to the vehicle, and bottles of beer inside the vehicle.

driver's door. The defendant was arrested on suspicion of operating a motor vehicle while under the influence of alcohol and taken to the Hope Valley barracks of the Rhode Island State police.

Troopers found a prescription bottle of ninety Klonopin tablets in the defendant's vehicle.² The prescription had been filled five days earlier, and the bottle contained sixty-two Klonopin pills. The defendant was given a breathalyzer test approximately two hours after his arrest. At that time, the test indicated a blood alcohol level of 0.185.

Troopers from the Massachusetts State police arrived, read the defendant the Miranda warnings, and told him that they were there to discuss the victim. The defendant called a friend and asked the friend to tell the victim to call police and tell them that she was okay. The defendant then continued talking to the officers and said that he had not seen the victim for three

² One of the defendant's experts testified at trial concerning the medications the defendant had been prescribed, their side effects, and their potential interactions. Klonopin is a brand of clonazepam. It can be used to treat seizures, panic disorders, anxiety, and mania. It may cause paranoia and impair memory, judgment, and coordination. Clonazepam is a benzodiazepine and should not be mixed with alcohol. Doing so may slow or suppress breathing, possibly resulting in death. See United States Food and Drug Administration, Klonopin Tablets (clonazepam), https://www.accessdata.fda.gov/drugsatfda_docs/label/2021/017533s061lbl.pdf [<https://perma.cc/CSV9-CZXM>]; National Library of Medicine, Clonazepam, <https://www.ncbi.nlm.nih.gov/books/NBK556010> [<https://perma.cc/T7HK-L73S>].

days. The clothes the defendant was wearing at the time of his arrest subsequently tested positive for the victim's blood. Officers also searched the defendant's apartment and found "a few" empty bottles of vodka, empty beer bottles, and prescription bottles of Zoloft and Klonopin.³

b. Prior proceedings. On January 10, 2005, the defendant was indicted on charges of murder in the first degree, G. L. c. 265, § 1; and assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A. At his first trial in 2007, the Commonwealth proceeded on theories of deliberate premeditation and extreme atrocity or cruelty. The defendant was convicted under both theories.

The defendant appealed on the grounds, *inter alia*, of improprieties in jury selection and the denial of his motion for a change in venue due to extensive pretrial publicity. In

³ Zoloft is a selective serotonin reuptake inhibitor that can be used to treat depression, obsessive-compulsive disorder, posttraumatic stress disorder, and panic disorder. It should not be mixed with alcohol. See United States Food and Drug Administration, Sertraline (marketed as Zoloft) Information, <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/sertraline-marketed-zoloft-information> [<https://perma.cc/P3TR-DWAT>]; National Library of Medicine, Sertraline, <https://www.ncbi.nlm.nih.gov/books/NBK547689> [<https://perma.cc/CY2Z-DBGL>]. There was no testimony at trial as to the dosage of the Klonopin pills in the bottle found in the defendant's rental vehicle or how much he was supposed to take each day. There was testimony as to the amount of Zoloft he was to take per day; in June of 2004, that dosage had been increased from fifty to one hundred milligrams.

addition, the defendant challenged the instructions on mental defect. See Commonwealth v. DiPadova, 460 Mass. 424, 430-433, 439-440 (2011); Commonwealth v. Berry, 457 Mass. 602, 617-618 & n.9 (2010), S.C., 466 Mass. 763 (2014). He also challenged evidence presented to the jury concerning his exercise of his Miranda rights. We vacated the convictions and ordered a new trial. See Commonwealth v. Toolan, 460 Mass. 452, 472-473 (2011). At his second trial, the defendant relied upon a defense of a lack of criminal responsibility due to mental disease or defect and intoxication. He again was convicted of both charges and under both theories of murder.

2. Discussion. The defendant's arguments on appeal relate to specific jury instructions given or to instructions that were requested but not given; all of the challenged instructions involve issues concerning the defendant's mental state. Jury instructions are evaluated as a whole, and as a reasonable juror would have interpreted them. See Commonwealth v. Odgren, 483 Mass. 41, 46 (2019). A reviewing court presumes that the jury understood and followed the trial judge's instructions. See Commonwealth v. Donahue, 430 Mass. 710, 718 (2000).

At trial, the defense relied upon a theory of a lack of criminal responsibility or diminished capacity. 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." Commonwealth v. Dunphe, 485 Mass. 871, 878 (2020), quoting Model Jury Instructions on Homicide 1 (2018). The Model Jury Instructions on Homicide provide 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.

In support of his theory of mental incapacity to have formed the necessary intent, or the existence of a mental impairment, the defendant called three expert witnesses: Dr. Anthony Joseph, a practicing neuropsychiatrist and professor of psychiatry at Harvard Medical School and McLean Hospital; Dr. Donald Davidoff, a neuropsychologist and chief of neuropsychology at McLean Hospital; and Dr. Robert Tittman, a psychiatrist in private practice who also worked at Boston College's counseling service. The Commonwealth called one mental health expert, Dr. Martin Kelly, and also called a physician, Richard Neufeld, who had treated the defendant from 1999 until his arrest in October of 2004. Kelly was a psychiatrist and professor at Harvard Medical School; Neufeld had prescribed the defendant Zoloft, Klonopin, and other

medications for mental health conditions. The defendant had been prescribed fifty milligrams of Zoloft daily; that dosage was doubled to one hundred milligrams in late June of 2004.

Joseph, the neuropsychiatrist, opined that, at the time of the stabbing, the defendant had not been legally sane, and had lacked the capacity to conform his conduct to the requirements of the law due to a mental disease or defect. Joseph described the disease or defect as "a number of processes occurring at that time which rendered [the defendant] unable to conform his behavior to the law, and which also caused substantial disorders of memory, perception, thought, and mood." Joseph described the defendant's prior mental health history as including diagnoses of "polysubstance abuse," depression, and psychosis. Joseph also described potential side effects from taking Klonopin and Zoloft, including agitation, mania, and psychosis, and said that an increase in dose made the potential that an individual would experience such side effects more likely.

In addition to conducting a neuropsychiatric interview of the defendant, Davidoff administered a series of standard neuropsychological tests in order to gain an over-all understanding of the defendant's psychological functioning at the time of the interview in 2007. Davidoff offered no opinion with respect to the defendant's criminal responsibility at the time of the stabbing in 2004. Davidoff determined that, when he

interviewed the defendant in 2007, the defendant's "executive functions were not operating efficiently," and he was experiencing difficulties with memory, processing "visual information," and being able to remember and use facts "in an efficient, productive way." These problems indicated damage to the frontal lobe, likely from damage due to "chronic alcohol abuse."

Tittmann testified specifically as to the effect of multiple medications, including Zoloft and Klonopin, on the brain, and stated that they could cause confusion, increase the risk of suicide, or aggravate psychosis. He also testified that the use of these substances with others, or with alcohol, would have an "additive or synergistic effect" and would exacerbate the effects of the consumption of alcohol alone. He did not offer an opinion with respect to the defendant's mental state or degree of criminal responsibility at the time of the stabbing.

Kelly, the Commonwealth's psychiatric expert, opined that the defendant suffered from a "personality disorder" with "features of narcissistic personality disorder and antisocial personality disorder." Kelly also opined that the defendant had addictions to alcohol and to benzodiazepines. Kelly did not believe that these mental health issues were a mental disease or defect that would interfere with the defendant's ability to understand the wrongfulness of his conduct or to conform his

conduct to the requirements of the law. Kelly pointed to a number of the defendant's actions the day before the stabbing and on the day of the stabbing as indicating an ability to understand wrongfulness; these included hiding a knife in a coat while going through airport security, drawing the curtains at the victim's house, and disposing of items taken from the house before leaving for the mainland.

On cross-examination, Kelly did agree that the defendant previously had attempted suicide and had been committed to psychiatric hospitals on at least three prior occasions with diagnoses of substance abuse disorder and major depressive disorder. Kelly also agreed that, in 2004, the United States Food and Drug Administration had issued warnings about the risks of increased suicidal behavior, as well as the potential for triggering manic episodes, in individuals taking Zoloft, either at the beginning of treatment or when the dosage was increased.

a. Instruction on mental disease or defect. The defendant contends that the judge should have clarified the legal meaning of "mental disease or defect" after Kelly gave both a legal definition and then, after objection by defense counsel and instruction by the judge, his professional, clinical definition of that term. As the defendant did not object at trial to the definition of "mental disease or defect" the jury were provided, we review for a substantial likelihood of a miscarriage of

justice. See Commonwealth v. Niemic, 427 Mass. 718, 720 (1998),
S.C., 451 Mass. 1008 (2008).

Under Commonwealth v. McHoul, 352 Mass. 544, 546-547
(1967), a lack of criminal responsibility is defined as follows:

"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 conduct or
to conform his conduct to the requirements of law"
(citation omitted).

The Model Jury Instructions on Homicide do not define the term

"mental disease or defect." See Dunphe, 485 Mass. at 878-879.

The instructions do clarify, however, that the phrase is a legal
term that "need not fit into a formal medical diagnosis"

(citation omitted). Id.

Kelly initially described a mental disease or defect as
"words in the statute that determine criminal responsibility,
so-called insanity in the state. And these terms were terms
that were written in the early '60's, in which period of time
mental diseases meant serious psychiatric conditions such as
schizophrenia and manic depressive disorder, now bi-polar
disorder." The defendant argues that, absent a curative
instruction or further clarification from defense counsel, the
jury would not have understood that they were not required to
adopt any particular definition, or that experts differ in their
definitions.

When Kelly mentioned "the statute" in describing a mental disease or defect, defense counsel objected on the ground that it was legal analysis. The prosecutor then asked Kelly to testify as to what the term "mental disease or defect" meant as a psychiatrist. Kelly explained that the term had been used in the early Twentieth Century and meant "serious mental conditions such as the model being diseases . . . includ[ing] conditions such as . . . schizophrenia, such as manic depressive disorder And those would be serious conditions that tend to have a biological component." Kelly then stated that, in his opinion, the defendant did not suffer from a mental disease or defect. Defense counsel did not object to this second definition.

Defense counsel later asked the judge to clarify for the jury the legal definition of "mental disease or defect." After the judge read aloud the model jury instruction on mental disease or defect, defense counsel apparently decided that the model instruction would sufficiently clarify the definition, and that his best course would be to comment on the definition in his closing. Thus, in his final charge, the judge instructed, "The phrase 'mental disease or defect' is a legal term, not a medical term. It need not fit into a formal medical diagnosis. . . . It is for you to determine in light of all the evidence whether the Defendant had a mental disease or defect."

If a defense expert has testified concerning the McHoul test, see McHoul, 352 Mass. at 546-547, a Commonwealth expert may testify in rebuttal even if, in that expert's opinion, the defendant was not suffering from a mental disease or defect at the time of the commission of the offense. See Commonwealth v. Laliberty, 373 Mass. 238, 242 n.2 (1977). An expert's definition of "mental disease or defect" may be helpful to the jury, but the jury are not required to adopt any particular definition. Id. at 242. "The sole restriction placed on the admission of an expert's opinion concerning a defendant's mental state is that he [or she] may express an opinion only in accordance with the standard of the McHoul case." Id. at 243. While an expert may frame his or her testimony in terms of the McHoul test, it is preferable that the testimony be given in purely medical or psychological terms. See Commonwealth v. Shelley, 381 Mass. 340, 348 n.4 (1980), S.C., 411 Mass. 692 (1992).

Examining his testimony as a whole, Kelly permissibly defined the term "mental disease or defect." See Laliberty, 373 Mass. at 242. Kelly's testimony fit within Laliberty's sole restriction, as his description and his opinion addressed the defendant's mental state in accordance with the McHoul standard. See id. at 243. Although Kelly should not have mentioned the legal definition ("the statute"), the statement was brief, and

he then reframed the definition in accordance with that used by a psychiatrist. To the extent that defense counsel was concerned that the jury would adopt the Commonwealth's definition, counsel could have asked any of the defendant's three expert witnesses to define the term. Moreover, the judge instructed the jury that the phrase "mental disease or defect" is a legal term that differs from the medical meaning of those words.

In sum, the expert's brief testimony concerning the legal definition of a mental disease or defect did not rise to the level of a substantial likelihood of a miscarriage of justice.

b. Instruction distinguishing between lack of criminal responsibility and diminished capacity. The defendant argues that the judge abused his discretion by not providing the jury a supplemental instruction distinguishing between a lack of criminal responsibility and diminished capacity. The defendant maintains that the failure to distinguish these concepts might have confused the jury and could have caused them to disregard evidence of diminished capacity if they first found that the defendant's mental condition did not rise to the level of a mental disease or defect. Because defense counsel requested such a supplemental instruction, we review for prejudicial error. See Commonwealth v. Biancardi, 421 Mass. 251, 253-254 (1995).

Judges have broad discretion in framing jury instructions, including determining the appropriate degree of elaboration. See Commonwealth v. Kelly, 470 Mass. 682, 688 (2015). Here, the judge asked defense counsel whether he believed that the 2013 Model Jury Instructions on Homicide adequately distinguished between a lack of criminal responsibility and diminished capacity. In response, counsel requested that the judge instruct the jury more clearly how they could distinguish between these concepts. The judge ultimately did not provide the requested supplemental instruction.

In his final charge, the judge instructed, based on the then newly adopted 2013 Model Jury Instructions on Homicide, that it was the Commonwealth's burden to prove

"One, that at the time of the alleged crime, the Defendant did not suffer from a mental disease or defect, or;

"Two, that if the Defendant did suffer from a mental disease or defect, he nonetheless retained the substantial capacity to appreciate the wrongfulness or criminality of his conduct and to conform his conduct to the requirements of the law, or;

"Three, that if the Defendant lacked the substantial capacity to appreciate the wrongfulness or criminality of his conduct, and to conform his conduct to the requirements of the law, his lack of such capacity was solely the result of voluntary intoxication by alcohol or other drugs, or;

"Four, that if the Defendant lacked the substantial capacity I have just described due to a combination of mental disease or defect and his voluntary consumption of alcohol or other drugs, then he knew or should have known that his use of the substances would interact with his

mental disease or defect and cause him to lose such capacity.

"If one of those four circumstances have been proved beyond a reasonable doubt, then the government has satisfied its burden beyond a reasonable doubt to establish the Defendant's legal sanity."

The judge then went on to explain that a mental disease or defect is a legal term, and that the Commonwealth was required to prove that the defendant had not been suffering from a mental disease or defect at the time of the stabbing.

The judge later instructed on mental impairment as follows:

"In deciding whether the Defendant intended to kill the victim . . . and whether he formed that intent with deliberate premeditation, you may consider any credible evidence that the Defendant suffered a mental impairment or was affected by his consumption of alcohol or drugs. A Defendant may form the required intent and act with deliberate premeditation even if he suffered from a mental impairment"

The judge also explained that the jury could consider evidence of the defendant's mental impairment in determining whether he had acted with deliberate premeditation or extreme atrocity or cruelty.

While perhaps less than pellucid, the judge's instructions adequately distinguished between the concepts of mental disease or defect and mental impairment. Considering the instructions as a whole, these two concepts were presented to the jury as two different factors they should consider. The jury were told that, to prove the defendant was criminally responsible, the

Commonwealth bore the burden of proving, beyond a reasonable doubt, that the defendant did not have a mental disease or defect. They later were instructed that the defendant's mental impairment could have affected his ability to form the required intent.

It is possible that the jury confused these two concepts, as the distinction between them is elusive. See Commonwealth v. Bishop, 461 Mass. 586, 600 (2012). To the extent that the jury did confuse these issues, any such confusion was unlikely to rise to the level of prejudicial error. The Commonwealth's case was very strong, and throughout the trial, the jury heard extensive evidence concerning the defendant's premeditated intent. On the day before the stabbing, for instance, the defendant tried to fly to Nantucket with a large kitchen knife, and proffered four different explanations, none of them reasonable, when airport security asked why he had had the knife.⁴ The jury also heard that, on the day of the stabbing, immediately after arriving on Nantucket, the defendant drove to a surf shop and purchased several knives; he had obtained directions to that shop from another store, which did not sell knives. Moreover, the jury heard that, before going to the

⁴ The defendant variously said that he brought the knife to cut a cake, that he was taking it to go fishing or to cut fish, that he forgot he had the knife with him, and that his sister had asked him to bring a knife to cut a turkey.

cottage, the defendant approached the victim's landlord and inquired whether the victim was at home, and then headed toward the cottage notwithstanding the landlord's equivocal response. In addition, the nature of the twenty-three stab wounds covering the victim's torso, nose, arms, and hands, and the deoxyribonucleic acid match between the victim and the blood found on one of the knives the defendant had purchased, would have allowed the jury to infer an intent to kill, as they were instructed they could do, from the use of a dangerous weapon in this manner.

In sum, while the judge chose not to provide an additional instruction distinguishing between mental impairment and mental disease or defect, the judge did define both of those terms in language consistent with the Model Jury Instructions on Homicide. There was no error.

c. Inferring malice from the use of a dangerous weapon.

The defendant argues that the judge should not have instructed the jury that they could infer malice from the intentional use of a dangerous weapon. Specifically, the defendant contends that the instruction impermissibly elevated the element of malice above other elements of murder in the first degree, and that it relieved the Commonwealth of its burden to prove malice. The defendant also maintains that the instruction subverted testimony by his expert that, at the time of the stabbing, the

defendant was incapable of understanding the consequences of his actions. Because the defendant objected to the provision of this instruction, we review for prejudicial error. See Odgren, 483 Mass. at 46.

Under our existing jurisprudence, a jury may infer an intent to kill from the use of a dangerous weapon against another, even where there is evidence of a defendant's intoxication or mental impairment. See id. See also Commonwealth v. Miller, 457 Mass. 69, 74-75 (2010). The instruction on such an inference must tell the jury that they may infer malice, and may not instruct the jury that they must draw such an inference. Odgren, supra at 47.

Here, the judge instructed the jury on the elements of murder in the first degree, on theories of premeditation and extreme atrocity or cruelty. The judge then instructed on the three prongs of malice and the elements of murder in the second degree. Before instructing on the inference that they could draw from the use of a dangerous weapon, the judge explained:

"If the Commonwealth has proved beyond a reasonable doubt the two elements necessary for second degree murder and has proved beyond a reasonable doubt the Defendant's legal sanity, then you may convict. If the Commonwealth has failed to prove any of those matters beyond a reasonable doubt, then you may not convict of second degree murder."

The judge then gave the disputed instruction regarding the inference that the jury could draw from the intentional use of a

dangerous weapon against another, in language that hewed closely to the wording that then had been newly modified in the 2013

Model Jury Instructions on Homicide:

"As a general rule, ladies and gentlemen, you are permitted, but are not required[,] to infer that a person who intentionally uses a dangerous weapon on another person intends to kill that person or cause him grievous bodily harm or intends to do an act which in the circumstances known to him a reasonable person would know creates a plain and strong likelihood that death would result."

The judge also later instructed the jury that they could consider manslaughter if the Commonwealth failed to prove murder in the first degree and murder in the second degree. He described the elements of voluntary manslaughter and explained that the Commonwealth had to prove each of those elements, and the defendant's legal sanity, beyond a reasonable doubt.

There was no error in the instruction that the jury could, but need not, infer an intent to kill from the intentional use of a dangerous weapon in the circumstances here. The instruction essentially quoted the then-applicable Model Jury Instructions on Homicide concerning the use of a dangerous weapon. See Model Jury Instructions on Homicide 92 (2013). We previously have noted with approval the inference that may be drawn from the use of a dangerous weapon, even where there is evidence of a defendant's intoxication or mental impairment. See, e.g., Odgren, 483 Mass. 47-49; Miller, 457 Mass. at 74; Commonwealth v. Oliveira, 445 Mass. 837, 842-845 (2006).

Beginning in 2013, the introduction to the supplemental instruction on the inference the jury might draw from the use of a dangerous weapon against the person of another added a requirement that, before instructing on such an inference, the judge had to determine from the evidence at trial that "the nature of the dangerous weapon used and the manner of its use reasonably supports" the inference. The 2013 Model Jury Instructions on Homicide also noted that, before giving the instruction, the judge should consider "the type of dangerous weapon and the manner in which it was used in the circumstances of the case, and should only give this instruction where the nature of the weapon and the manner of its use reasonably supports the inference." See Commonwealth v. Colas, 486 Mass. 831, 842-843 (2021), citing Commonwealth v. Tu Trinh, 458 Mass. 776, 784 nn.12, 13 (2011) ("As a general rule, the jury are permitted to infer an intent to kill from the use of a dangerous weapon. . . . The reasonableness of this inference depends, as set forth in the model jury instructions on homicide, upon 'the nature of the dangerous weapon and the manner of its use'" [citation omitted]).

While the judge did not make an explicit finding to this effect, the nature of the twenty-three penetrating stab wounds all over the victim's torso, nose, hands, and arms, the blood on walls, floors, and surfaces throughout the cottage, and the

newly purchased knife that was discarded in the bushes near where the defendant left his rental vehicle fully support a determination that the circumstances warranted giving this instruction. At a sidebar discussion concerning the judge's final charge, the attorneys and the judge discussed at some length the changes in this instruction, favorable to defendants, to remove the use of the word "malice," which had appeared in the prior version of the instructions.

As the defendant points out, courts in some jurisdictions have discontinued the use of such an inference. See, e.g., State v. Burdette, 427 S.C. 490, 504-505 (2019) ("Regardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon"). In reaching this decision, the South Carolina Supreme Court explained, "When the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." Id. at 502. The Appeals Court similarly has held that "the court in all cases should be scrupulously careful not to invade the province of the jury by undertaking to decide on the weight or effect of evidence." Commonwealth v. Cote, 5 Mass. App. Ct. 365, 369-370 (1977) (judge "shall not charge

juries with respect to matters of fact" or "direct what inferences the jury should draw from certain evidence" [citation omitted]).

Of course, the instruction on the inference that may be drawn does not direct the jury to make such an inference. And here, the evidence of malice was overwhelming, and there was no need to draw an inference from the use of a knife that the defendant intended to kill the victim. The twenty-three wounds to the victim's torso, nose, arms, and hands, leaving blood on walls, floors, and fixtures throughout the cottage, in conjunction with the defendant's efforts to obtain the knife on arrival, to delay discovery of the victim's body by closing up the cottage, to dispose of the weapon after the attack, and to flee the scene all supported a finding of an intent to kill.

The defendant also argues that certain instructions differed impermissibly from the instructions given in Miller. In Miller, 457 Mass. at 70, 72, the defendant was being tried on a charge of murder in the first degree and pursued a defense of intoxication and mental impairment. Because the victim had been killed with a hammer, the judge also instructed on the inference the jury could draw from the use of a dangerous weapon. Id. at 71-74. Following that instruction, the judge told the jury, "I reiterate, whenever the Commonwealth must prove that the defendant intended to do something . . . , you may consider any

credible evidence of mental impairment . . . in determining . . . the defendant's intent or knowledge beyond a reasonable doubt."

The defendant contends that the judge should have provided a similar instruction in this case, which would have directed the jury to consider mental impairment and intoxication whenever the Commonwealth was required to prove intent. We do not agree. Prior to instructing on the elements of murder, the judge gave an instruction, following the 2013 Model Jury Instructions on Homicide, that the jury "may consider any credible evidence that the Defendant suffered a mental impairment or was affected by his consumption of alcohol or drugs." We previously have affirmed the use of such an instruction. See Oliveira, 445 Mass. 845-846. Moreover, immediately prior to, and immediately following, the instruction on the possible inference to be drawn from the use of a dangerous weapon, the judge instructed the jury that the Commonwealth was required to prove the defendant's mental state beyond a reasonable doubt.

Accordingly, there was no error in the instruction on the inference of an intent to kill that the jury could draw from the use of a dangerous weapon.

d. Instruction that defendant was incapable of resisting urge to consume drugs and alcohol. The defendant also contends that the jury should have been instructed to consider whether he

was incapable of resisting the urge to consume drugs or alcohol, regardless of whether he was aware of negative interactions between his consumption of drugs or alcohol and his mental state. The defendant maintains that such an instruction should have been given when the jury were instructed that he was criminally responsible if he knew that substances such as drugs and alcohol would interact with his mental disease or defect and would cause him to lose the capacity to conform his conduct to the law. See DiPadova, 460 Mass. at 439-440 (Appendix) (establishing so-called DiPadova instruction). In the alternative, the defendant argues that the DiPadova instruction should have been omitted entirely. We do not agree.

As the defendant did not request a DiPadova instruction, and did not object to the instruction given, we review to determine whether the absence of the requested instruction created a substantial likelihood of a miscarriage of justice. See Commonwealth v. The Ngoc Tran, 471 Mass. 179, 183-184 (2015).

For almost fifty years, we have held that drug addiction, by itself, does not qualify as a mental disease or defect that could support a finding of a lack of criminal responsibility. See Commonwealth v. Sheehan, 376 Mass. 765, 767-769 (1978). A drug-induced or exacerbated mental disease or defect, however, ultimately may result from the use of a prescription drug, an

illegal drug, the chronic abuse of alcohol, a physical illness, or a genetic disorder. See Dunphe, 485 Mass. at 880-881. The origins of the disease or defect are irrelevant. See id. Moreover, where a defendant has a mental disease or defect such that the defendant lacks the capacity to conform his or her conduct to the law, the consumption of alcohol or drugs does not preclude the defense of a lack of criminal responsibility. See Commonwealth v. Muller, 477 Mass. 415, 428 (2017).

A lack of criminal capacity, arising from the long-term abuse of alcohol, has been recognized as establishing a lack of criminal responsibility. See Dunphe, 485 Mass. at 880-881, and cases cited. In addition, where a defendant has a mental disease or defect that, by itself, does not render the defendant incapable of understanding the wrongfulness of his or her conduct, and conforming that conduct to the law, the consumption of drugs or alcohol in conjunction with the mental disease or defect may result in the defendant being unable to do so. When the consumption of drugs or alcohol exacerbates a mental condition such that the interaction of the drugs or alcohol with the condition causes a defendant to lack the substantial capacity, and the defendant does not know, or have reason to know, that the consumption of drugs or alcohol would trigger the exacerbation in his or her mental condition, the defendant is not criminally responsible. See id. at 882. By contrast, if

the Commonwealth were able to prove, beyond a reasonable doubt, that a defendant knew or had reason to know that the consumption of alcohol or drugs would so exacerbate his or her mental condition, then the defendant would be criminally responsible. See id.

In response to the defendant's request, the judge here gave the DiPadova instruction, including the following:

"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."

This instruction properly informed the jury of their ability to determine the defendant's degree of criminal responsibility by considering his mental disease or defect and its interaction with his consumption of drugs and alcohol. The defendant points to no case, in the Commonwealth or in any other jurisdiction, where the requested instruction -- that the jury consider whether the defendant was incapable of resisting the urge to use substances -- has been given, and we are aware of none. Rather, the defendant's requested instruction in some respects contravenes this court's holding in Sheehan, 376 Mass. at 767-769, that drug addiction, standing alone, and being "blacked out" from drug addiction does not establish a mental disease or

defect that would warrant a finding of not guilty by reason of insanity.

In support of his argument that the additional instruction should have been given, the defendant points out that the science relied upon in Sheehan is outdated and no longer reflects current scientific understanding. In Sheehan, 376 Mass. at 766-767, the defendant argued that drug addiction was a mental disease that, without more, would warrant a finding of not guilty by reason of a lack of criminal responsibility. Rejecting this argument, the court explained:

"The essential consideration is not whether the medical profession characterizes drug addiction as a mental disease or defect but rather whether our society should relieve from criminal responsibility a drug addict who at the time of the commission of the crime was unable to conform his conduct to the requirements of law because of his addiction."

Id. at 769. The court noted that, in some circumstances, an individual with a substance use disorder may be relieved of responsibility for criminal conduct, such as when the user's lack of criminal capacity is not a result of the addiction. Id. But the court rejected the view that addiction alone is sufficient to support a finding that the consumption of the drugs was involuntary. Id. at 771. In support, the court pointed to research by Herbert Fingarette. See Fingarette, *Addiction and Criminal Responsibility*, 84 Yale L.J. 413, 443 (1975). Fingarette's findings regarding addiction subsequently

have been widely denounced. See, e.g., Roberts, Herbert Fingarette, *Contrarian Philosopher on Alcoholism*, *Dies* at 97, *N.Y. Times*, Nov. 15, 2018.

As the defendant emphasizes, a number of decisions by this court and the Appeals Court since Sheehan was issued have recognized addiction as a disease that "may affect an individual's urge to use substances." Commonwealth v. Eldred, 480 Mass. 90, 94 n.6 (2018). See, e.g., Dunphe, 485 Mass. at 880-883, and cases cited; Commonwealth v. Peno, 485 Mass. 378, 388 (2020); Commonwealth v. Plasse, 481 Mass. 199, 205-208 (2019), and cases cited. The defendant's argument that there was a substantial likelihood of a miscarriage of justice because the requested instruction was not given, however, is unavailing.

Regardless of whether the science relied upon in Sheehan is outdated, there was ample evidence before the jury to support a finding that the defendant's conduct was knowing and intentional, and undertaken after substantial planning, notwithstanding his evident intoxication at the time of the attack. On this record, the jury could have found that the defendant's level of intoxication, in conjunction with his mental health issues, did not negate his ability to plan and carry out a premeditated attack on the victim, attempt to conceal the evidence of the attack, and then drive a vehicle on a State highway with no apparent impairment in his ability to

comply with the traffic laws. The judge did not err in instructing the jury consistently with DiPadova, and certainly did not create a substantial likelihood of a miscarriage of justice in relying upon instructions we recently affirmed.

e. Review under G. L. c. 278, § 33E. The defendant also asks that we exercise our authority under G. L. c. 278, § 33E, to grant him extraordinary relief. Having carefully reviewed the record, we discern no reason to order a new trial or to reduce the degree of guilt.

Judgments affirmed.