COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-756

COMMONWEALTH

vs.

DESMOND TAHATDIL.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Charged with murder in the first degree in the stabbing death of his thirty-five year old son Brendon Tahatdil, the defendant, Desmond Tahatdil, was convicted after a jury trial of murder in the second degree.[1] See G. L. c. 265, § 1. On appeal, the defendant contends that the judge erred in declining to instruct the jury on involuntary manslaughter; the model jury instructions on excessive use of force in self-defense are inaccurate and confused the jury; and the judge's answer to a jury question was inadequate. We affirm.

Background. We summarize the evidence presented to the jury, reserving some facts for additional discussion. The

[1] Because the defendant and the victim share the same last name, we refer to the victim by his first name.

Commonwealth relied on the following facts at trial. The defendant lived in a multi-story home with his immediate and extended family. At the time of the killing, the defendant lived in the basement with his son, Brendon, and Brendon's infant son. The defendant and Brendon previously had a good relationship, but their relationship became strained when the defendant moved back into the basement after living in New York for a year. Living in close quarters, the two men argued about Brendon's relationship with his child's mother, whom the defendant believed was a negative influence on Brendon.

Two weeks after one particularly volatile argument,[2] the defendant felt sick and remained in the basement close to the bathroom. When Brendon woke up he began to sing loudly and the two men argued. The Commonwealth's theory at trial was that the defendant, enraged by Brendon's conduct, and bearing the animosity enflamed by previous arguments, went upstairs, got a paring knife, came back downstairs, and stabbed Brendon several times, killing him with a stab wound to the chest. There were no witnesses to the altercation itself.

The defendant's theory was self-defense. Because we consider the evidence in the light most favorable to the

[2] The argument was loud and confrontational, but not physical. Household members intervened to diffuse the situation. One witness stated that the defendant threatened to stab or kill Brendon.

defendant for purposes of evaluating his claims of instructional error, see Commonwealth v. Pina, 481 Mass. 413, 422 (2019), we set out the defendant's version of the evidence in detail.

The defendant claimed that the son was the aggressor, and testified to an increasingly acrimonious relationship. According to the defendant, when the argument started, he shouted at Brendon, "I know why you are doing this to me, it's because of that girl." Brendon replied in a raised voice, "I can do anything what I want in this house because this house don't belong to you." As they argued, the defendant's back was turned to the stairs and Brendon's back was to the bathroom.[3] Brendon then approached the defendant with a "fist full" as if to punch the defendant in the face. The defendant grabbed a paring knife next to him on the table and held it down by his side. Brendon ran past the defendant, ran upstairs, and returned to the basement in "split time" with a bread knife in hand.[4] Brendon "charged" the defendant, who raised his knife in response. Brendon "poke[d]" at the defendant but the defendant

[3] The defendant testified that he did not go upstairs to stop the argument because he felt that he might have to use the bathroom again and planned to stay close to the bathroom.

[4] The defendant testified that he did not run out of the basement when Brendon ran upstairs "[b]ecause it's a split fast time then I hear him first then saw him coming down quickly back." The defendant said he did not yell for help because he was frightened and was not thinking, and did not hide in the bathroom or boiler room because he knew "there's no way out of the basement, only one entrance."

slipped out of the way. Brendon again charged at the defendant, with the bread knife "plunging in front of him." As Brendon advanced with bread knife outstretched, the defendant raised his knife. The defendant claimed that Brendon "charged straight into me and I feel my knife get into my son's body." The struggle continued. Brendon dropped the bread knife and tried to choke the defendant, who testified that he swung his knife, nicking Brendon.

The remaining facts were not in dispute. Brendon fell to the ground and died. The first person to enter the basement after the fight occurred saw Brendon lying motionless at the bottom of the steps. The defendant left the house, went to his nephew's house, and subsequently fled to New York, where he was apprehended a year later.

Brendon sustained four to five stab wounds: to the right cheek, the lower lip on the left side,[5] left cheek, chest, and left side. The stab wound to the chest was the fatal blow; it punctured Brendon's lung and heart. The defendant had a cut on his thumb.

The judge instructed the jury on murder in the first degree, murder in the second degree, self-defense, and voluntary

[5] The medical examiner was unable to determine if the wounds to the right cheek and lower lip were part of the same injury or separate injuries.

manslaughter based on excessive use of force in self-defense and heat of passion induced by sudden combat. The defendant's request for an involuntary manslaughter instruction was denied. The jury returned a verdict of guilty of murder in the second degree.

Discussion. 1. Involuntary manslaughter instruction. The defendant first contends that it was reversible error to decline to instruct the jury on involuntary manslaughter. At trial, defense counsel postulated that if the jury did not find that the defendant acted in self-defense, the jury could find that the defendant's act of engaging in a knife fight was wanton and reckless conduct that led to an unintentional killing. The judge ruled that the instruction was not warranted and that an involuntary manslaughter instruction risked jury confusion. Defense counsel timely objected. We review for prejudicial error. Commonwealth v. Kelly, 470 Mass. 682, 687 (2015).

"A manslaughter instruction is required if the evidence, considered in the light most favorable to a defendant, would permit a verdict of manslaughter." Commonwealth v. Martin, 484 Mass. 634, 646 (2020), cert. denied sub nom. Martin v. Massachusetts, 141 S. Ct. 1519 (2021), quoting Pina, 481 Mass. at 422. "Involuntary manslaughter is an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to

amount to wanton or reckless conduct" (quotation and citation omitted). Commonwealth v. Lopez, 485 Mass. 471, 484 (2020). "[W]here a defendant is charged with murder, an instruction on involuntary manslaughter is appropriate if any 'reasonable view of the evidence would [permit] the jury to find wanton and reckless conduct rather than actions from which a plain and strong likelihood of death would follow.'" Commonwealth v. Tavares, 471 Mass. 430, 438 (2015), quoting Commonwealth v. Braley, 449 Mass. 316, 331 (2007). "[W]anton and reckless conduct is intentional conduct that create[s] a high degree of likelihood that substantial harm will result to another person" (quotation and citation omitted). Commonwealth v. Pagan, 471 Mass. 537, 547, cert. denied sub nom., Pagan v. Massachusetts, 577 U.S. 1013 (2015).

We conclude the judge properly denied the defendant's request for an instruction on involuntary manslaughter. The fatal wound was the wound to the chest, inflicted when, according to the defendant, he raised his knife as Brendon charged him. Viewed in the light most favorable to the defendant, a reasonable jury could have acquitted the defendant because he acted in justifiable self-defense. A jury also could have found the defendant guilty of voluntary manslaughter, if they concluded that by raising the knife the defendant used excessive force, and a reasonable person in the defendant's

position would have known that a raised knife created a plain and strong likelihood of death. See Commonwealth v. Walker, 443 Mass. 213, 218 (2005). However, the defendant's version of events (i.e., that he just held the knife) is not consistent with recklessness.[6] See Commonwealth v. Sowell, 22 Mass. App. Ct. 959, 963 (1986) (deep stab wound to victim's upper thigh "would not warrant a finding by the jury of reckless as distinguished from intentional conduct"). The risk of harm here was risk of death. See Pagan, 471 Mass. at 547 (involuntary manslaughter instruction not warranted where punching and stabbing victim posed "an obvious risk of harm consistent with second or third prong malice and not just a risk of substantial harm that would warrant an involuntary manslaughter instruction"); Commonwealth v. Fryar, 425 Mass. 237, 249 cert.

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[6] This case is unlike those where a defendant wielded a weapon blindly or wildly resulting in death. See Commonwealth v. Kinney, 361 Mass. 709, 712 (1972) (error to decline involuntary manslaughter instruction where defendant fired gun while being beaten by group of people); Commonwealth v. Iacoviello, 90 Mass. App. Ct. 231, 245 (2016) (involuntary manslaughter instruction warranted where there was evidence defendant pointed gun in air or at ground, or evidence the defendant engaged in wanton or reckless conduct for purposes of scaring others); Commonwealth v. Sullivan, 29 Mass. App. Ct. 93, 94 (1990) (judge provided accurate instructions on murder and involuntary manslaughter where defendant stated he swung knife "blindly" in defense of himself and his wife); Commonwealth v. A Juvenile, 17 Mass. App. Ct. 988, 989 (1984) (juvenile entitled to involuntary manslaughter instruction where he swung knife to repel attack). The defendant here testified that he did swing the knife later in the encounter, but the uncontested evidence established that that action did not cause his son's death.

denied sub nom. Fryar v. Massachusetts, 522 U.S. 1033 (1997) (involuntary manslaughter instruction not required where defendant, who claimed jury could infer he used knife to deter rather than stab victim, stabbed victim in chest); Sowell, supra. An involuntary manslaughter instruction was not warranted.

2. Excessive use of force instruction. a. Model instruction. The defendant next contends "[t]he model instruction on [excessive use of force in self-defense] is wrong because it fails to clearly define the jury's factfinding task, mischaracterizes the burden of proof, and leaves the jury confused." The defendant asserts that the instructions confused the jury by telling them the Commonwealth must not only prove use of excessive force to obtain a voluntary manslaughter conviction, but must also prove the absence of an excessive use of force in self-defense to obtain a murder conviction.

The defendant's argument is unpersuasive because, although faceted, the model instructions on excessive use of force in self-defense are an accurate statement of law and provided a detailed roadmap for the jury to follow in their deliberations. See Model Jury Instructions on Homicide § 2.4.1, 2-15 (Mass. Cont. Legal Educ. 3d ed. 2018). The instructions, a copy of which the judge gave to the jury, state repeatedly that the Commonwealth has the burden to prove beyond a reasonable doubt

that the defendant did not act in self-defense. The instructions likewise state that it is the Commonwealth's burden to prove the excessive use of force in self-defense for purposes of a conviction of a voluntary manslaughter. There was no error. See generally Commonwealth v. Glacken, 451 Mass. 163, 166-167 (2008).

b. Request for use of the word "substantially." The defendant claims the judge erred in declining to modify the excessive use of force in self-defense instructions to state the defendant used "substantially" more force than was reasonably necessary under the circumstances. See Model Jury Instructions on Homicide § 2.4.1 at 2-16 (stating, "The defendant used more force than was reasonably necessary under all the circumstances"). As the issue is preserved, we review for prejudicial error. Martin, 484 Mass. at 646.

The judge adhered to the language of the model instructions on the excessive use of force in self-defense. See Walker, 443 Mass. at 218. It is for the Supreme Judicial Court, not this court, to modify the Model Jury Instructions on Homicide.

Nor do we think the evidence warranted a case specific deviation from the model instructions in this case. The defendant contends that the self-defense instructions lowered the Commonwealth's burden of proof. The facts of the case do not lend themselves to the distinction the defendant hopes to

draw. On the defendant's version of the facts, there is little to be said about the degree of force used; he stood while his son impaled himself on the knife and did not flail or strike. The judge did not abuse his discretion in declining to modify the model instructions on these facts. See Kelly, 470 Mass. at 688 ("Trial judges have considerable discretion framing jury instructions, both in determining the precise phraseology used and the appropriate degree of elaboration" [quotation and citation omitted]).

The defendant also contends that the instructions did not establish for the jury in his case a uniform standard to distinguish between manslaughter and an acquittal. The defendant was not convicted of manslaughter, and this case is therefore distinguishable from those in which a defendant, convicted of voluntary manslaughter, claims that the absence of the word "substantially" erroneously stood between him and an acquittal -- a matter as to which we express no opinion.[7] Finally, by convicting him of murder in the second degree, the jury not only rejected the defendant's argument that he acted in

[7] We note that the Supreme Judicial Court has allowed direct appellate review in a case which raises, among other issues, a challenge to the refusal to add the word "substantially" to the model instructions on excessive use of force in self-defense, where the defendant was convicted of voluntary manslaughter. See Commonwealth vs. Correia, Mass. Supreme Jud. Ct., No. 13223 (December 20, 2021).

self-defense, but found that he acted with malice. See Commonwealth v. Fahey, 99 Mass. App. Ct. 304, 307 (2021) (defining malice). We discern no error in the judge's instruction, and even if there were error, we discern no prejudice.

3. Jury questions. The defendant maintains that the judge's response to jury questions regarding self-defense and mitigating circumstances was ambiguous, and that the jury's apparent confusion was not ameliorated by the instructions.

In response to the jury's questions, the judge provided a complete and correct instruction, stating, "The Commonwealth has the burden of proving beyond a reasonable doubt that the defendant did not act in proper self-defense. The defendant has no burden of proof. However, the mitigating circumstance of excessive use of force in self-defense means that the defendant acted in justifiable self-defense, except for the fact that in doing so, he used excessive force." See Commonwealth v. Deconinck, 480 Mass. 254, 271-273 (2018). Additionally, the

jury were provided with copies of the judge's instructions.

There was no error.

Judgment affirmed.

By the Court (Milkey,
Sullivan & Ditkoff, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: June 27, 2022.

[8] The panelists are listed in order of seniority.