SJC-12316

COMMONWEALTH vs. PETER CASTILLO.

Suffolk. February 13, 2020. - October 6, 2020.

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

Homicide. Practice, Criminal, Instructions to jury, Capital case. Jury and Jurors. Defense of Others.

Indictments found and returned in the Superior Court Department on June 26, 2012.

The cases were tried before Mitchell H. Kaplan, J.

Robert L. Sheketoff for the defendant.
Ian MacLean, Assistant District Attorney, for the Commonwealth.

GANTS, C.J. Early in the morning on April 28, 2012, a senseless exchange of insults triggered a fight between two different groups of friends, culminating when the defendant,

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

Peter Castillo, shot the victim, Stephen Perez, once in the back, killing him. A Superior Court jury convicted the defendant of murder in the first degree on the theory of extreme atrocity or cruelty, and the trial judge imposed the mandatory sentence of life without the possibility of parole.[2]

The defendant claims that the judge erred in declining to instruct the jury on defense of another, in denying his motion for a required finding of not guilty on the issue of extreme atrocity or cruelty, and in instructing the jury regarding all of the extreme atrocity or cruelty factors set forth in Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983), where the evidence at most supported a finding as to only one of the factors. The defendant also asks that we reconsider our jury instruction regarding the meaning of "extreme atrocity or cruelty," specifically the instruction that a jury may find extreme atrocity or cruelty if the finding is based on one of the Cunneen factors, because that instruction does not provide "a fair measure to distinguish between murder in the first degree and murder in the second degree." Finally, the defendant requests that we exercise our authority pursuant to G. L. c. 278, § 33E, to reduce the jury's verdict to murder in the

[2] The jury also convicted the defendant of possession of a firearm without a license. The judge sentenced the defendant to from five to six years in State prison on this conviction, to run concurrently with the murder sentence.

second degree based on the paucity of evidence of extreme atrocity or cruelty.

We discern no error in the judge's decision not to instruct the jury on defense of another or in his denial of the defendant's motion for a required finding of not guilty on the conviction of murder in the first degree on the theory of extreme atrocity or cruelty. However, we agree that we must revise our jury instructions regarding the Cunneen factors prospectively to more closely comport with the meaning we have always given to the term "extreme atrocity or cruelty." We accordingly include a new provisional jury instruction in an Appendix to this opinion. We also conclude that, based on the meager evidence of extreme atrocity or cruelty in this case, we should exercise our authority under G. L. c. 278, § 33E, to reduce the degree of guilt to murder in the second degree, which is a verdict more consonant with justice in light of the facts in this case.

Background. Where the defendant claims that the evidence is insufficient as a matter of law to support the jury's finding of extreme atrocity or cruelty, we present the facts in the light most favorable to the Commonwealth. See Commonwealth v. Conkey, 443 Mass. 60, 72 (2004).

On Friday, April 27, 2012, the victim and four of his friends went to a nightclub in Boston. Just before 2 A.M. on

Saturday morning, as the group headed back to their car, they asked a bystander to take a photograph of them together. While the bystander took the photograph, a woman in a passing car, Jasmine Montero, shouted, "you fucking white boys," at the group, and the victim responded by shouting back, "fat spic." The car stopped, and the two continued yelling at each other. Montero then got out of the car and angrily approached the victim and his friends. The driver, Hector Lopez, also got out of the car, initially trying to calm Montero down; however, he soon started arguing with the victim, and the two eventually got into a fist fight.

Lopez and Montero had been out that night with a group of their friends: Luis Sepulveda, Sepulveda's girlfriend, Hector Ramirez, Marlon Ramirez, Jonathan Gonzalez, and the defendant. When the fight broke out between Lopez and the victim, this group had been heading back to their minivan in a nearby parking garage. Gonzalez was speaking with Montero on his cellular telephone when he heard "screaming and yelling" on Montero's end. Knowing where Montero had parked, he ran out of the parking garage in her direction to see what was happening and found her having an argument with the victim and his friends, while Lopez and the victim were exchanging blows. He tried to

hold Montero and Lopez back and then called Marlon[3] to help him break up the fight. Marlon ran toward the fight, followed by Sepulveda and the defendant, who first grabbed a loaded handgun from the minivan.

When Marlon reached the scene, he saw Lopez, with his face bloody, surrounded by the victim and his friends. The fighting had calmed down by that point, and the two groups had largely separated, but Marlon reignited the violence by punching one of the victim's friends, Christopher Testa, twice in the face. Testa put his hands up in a defensive posture and said that he had nothing to do with the fight, at which point Marlon switched his attention to the victim. Marlon and Lopez both advanced toward the victim, and Marlon and the victim exchanged several punches. While the two continued to fight, the defendant drew his gun and shot the victim once in the back from a few feet away.

After the shooting, the defendant fled the scene and was picked up by his friends in the minivan. Marlon, meanwhile, apparently unaware that the victim had been shot, chased him through the parking lot, still trying to fight, until he saw Hector, who said that someone was shooting. Marlon and Hector left the scene and were picked up by Montero, Lopez, Gonzalez,

---

[3] Because they share a last name, we refer to Hector Ramirez and Marlon Ramirez by their first names.

and the defendant in the minivan. The group headed to a party in Lynn, where the defendant cleaned the gun. The next day, he threw it into a body of water and booked a ticket to the Dominican Republic, where he was eventually apprehended and extradited back to the United States.

When first responders arrived at the scene, they found the victim collapsed on the ground, struggling to breathe and in apparent pain. As paramedics transferred him to a stretcher, the victim sat up and reached out. Several times in the ambulance, and again in the hospital, the victim opened his eyes, gasped for breath, and tried to grasp for anything within reach. The gunshot wound ultimately caused his death: the bullet had entered the left side of his back and had severed his abdominal aorta, the main large blood vessel carrying blood to the body, causing him to bleed out internally.

The jury in this case were literally able to see the fight because two people at the scene used their cellular telephones to video-record the altercation as it happened, one person from ground level and the other from above within the parking garage. The ground-level video captured the actual shooting: in that video and the still photograph taken from it, the jury could see the defendant firing the sole fatal shot.

Discussion. 1. Defense of another. At trial, the focus of the defense case was that the shooting was justified because

the defendant acted in lawful defense of his friend Marlon, who was fighting the victim when the shot was fired. However, over defense counsel's objection, the judge declined to instruct the jury on defense of another. On appeal, the defendant argues that he was entitled to the instruction and that the judge erred in declining to provide it. We disagree.

Because the defendant objected to the judge's decision not to provide the instruction, we review his claim for prejudicial error. See Commonwealth v. Vargas, 475 Mass. 338, 348 (2016). "The elements of defense of another are well settled: 'An actor is justified in using force against another to protect a third person when (a) a reasonable person in the actor's position would believe his intervention to be necessary for the protection of the third person, and (b) in the circumstances as that reasonable person would believe them to be, the third person would be justified in using such force to protect himself.'" Commonwealth v. Allen, 474 Mass. 162, 168 (2016), quoting Commonwealth v. Young, 461 Mass. 198, 208 (2012). A defendant is entitled to an instruction on defense of another only "if the evidence, viewed in its light most favorable to him, is sufficient to raise a reasonable doubt as to both these elements." Commonwealth v. Adams, 458 Mass. 766, 774 (2011).

Here, even in the light most favorable to the defendant, the evidence does not support an instruction on defense of

another. According to the defendant's own testimony, when he reached the scene, the fighting had settled down, and it was Marlon who "squared up" against the victim and moved closer before the victim punched Marlon in the face. Marlon then "went to approach [the victim] again," and the victim punched him a second time. It was at that point, as Marlon and the victim exchanged additional blows, that the defendant shot the victim. In these circumstances, no reasonable person would believe that Marlon would have been justified in using deadly force to protect himself. See Adams, supra.

A person who initiates a fight cannot generally claim self-defense. Commonwealth v. Barbosa, 463 Mass. 116, 136 (2012), quoting Commonwealth v. Maguire, 375 Mass. 768, 772 (1978) ("the right of self-defense ordinarily cannot be claimed by a person who provokes or initiates an assault"). Only if the initial aggressor "withdraws [from the fight] in good faith and announces his intention to retire" can he then claim self-defense if the other party continues to attack. Commonwealth v. Rodriquez, 461 Mass. 100, 110 (2011), citing Commonwealth v. Naylor, 407 Mass. 333, 335 (1990). And "the privilege to use deadly force 'arises only in circumstances in which the defendant uses all proper means to avoid physical combat.'" Commonwealth v. Pina, 481 Mass. 413, 426 (2019), quoting Commonwealth v. Mercado, 456 Mass. 198, 209 (2010).

Where a reasonable person, seeing what the third party saw, should recognize that the person defended would not be entitled to claim self-defense, the third party cannot claim defense of another. See Barbosa, 463 Mass. at 136, citing Adams, 458 Mass. at 775. Here, the defendant's own testimony suggests that Marlon initiated the fight and made no attempt to withdraw. In fact, Marlon continued to approach the victim and to escalate the fight even after being punched. Under such circumstances, no reasonable person would believe that Marlon would have been entitled to use deadly force in his defense. And because that option was not available to Marlon, it was not available to the defendant. We therefore conclude that the judge did not err in declining to instruct the jury on defense of another.

2. Extreme atrocity or cruelty. At the close of the Commonwealth's case, defense counsel moved for a required finding of not guilty on the ground that the Commonwealth had not presented sufficient evidence of premeditation to sustain a conviction of murder in the first degree. The judge denied the motion. Defense counsel renewed the motion, without specifying the theory being challenged, at the close of all the evidence, and the judge again denied it. The judge instructed the jury on two theories of murder in the first degree: premeditation and extreme atrocity or cruelty. Over the objection of the defendant, the judge gave an instruction on extreme atrocity or

cruelty that laid out all seven of the factors specified in Cunneen, 389 Mass. at 227. On appeal, the defendant raises three claims related to the issue of extreme atrocity or cruelty: (1) that the judge erred in denying his motion for a required finding of not guilty; (2) that there was no evidentiary support for six of the seven Cunneen factors and that it was therefore error to instruct the jury on those factors; and (3) that we should require a finding that the defendant intended to commit an extremely atrocious or cruel killing for a jury to find the defendant guilty of murder in the first degree on the theory of extreme atrocity or cruelty. We consider each of these in turn.

a. Sufficiency of the evidence. In reviewing the denial of a motion for a required finding of not guilty, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979).

To convict the defendant of murder in the first degree on the theory of extreme atrocity or cruelty, the Commonwealth was required to prove beyond a reasonable doubt that "the defendant committed an unlawful killing with malice aforethought and with extreme atrocity or cruelty." Commonwealth v. Szlachta, 463

Mass. 37, 45 (2012). "Malice is defined in these circumstances as an intent to cause death, to cause grievous bodily harm, or to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would follow." Id. at 45-46, quoting Commonwealth v. Chhim, 447 Mass. 370, 377 (2006). There was overwhelming evidence of malice here. The defendant admitted that he believed he was the only person at the scene with a gun, that he knew the gun was loaded, and that he pointed it at the victim and fired. There is no question either that he intended to kill or seriously injure the victim, or that, in the circumstances known to the defendant, a reasonable person would have known that his conduct created a plain and strong likelihood of death.

To find that the defendant committed the murder with extreme atrocity or cruelty under our existing common law, the jury had to find evidence of at least one of the factors enunciated in Cunneen, 389 Mass. at 227: "indifference to or taking pleasure in the victim's suffering, consciousness and degree of suffering of the victim, extent of physical injuries, number of blows, manner and force with which delivered, instrument employed, and disproportion between the means needed to cause death and those employed." See Commonwealth v. Hunter, 416 Mass. 831, 837 (1994).

At trial, the Commonwealth presented evidence that, after being shot, the victim was struggling to breathe. The paramedic testified that on several occasions in the ambulance and in the emergency department, the victim opened his eyes, gasped for breath, sat up for a bit, and tried to grasp for anything within reach, including the paramedic's hands and wrist. Based on these facts, a reasonable jury could have found that the Commonwealth had proved beyond a reasonable doubt one of the required Cunneen factors -- consciousness and degree of suffering of the victim -- and therefore that the killing was unusually cruel or atrocious under our existing case law. Because the jury reasonably could have found that the defendant was guilty of murder in the first degree on the theory of extreme atrocity or cruelty, there was no error in the judge's denial of the defendant's motion for a required finding of not guilty.

b. Jury instruction. With regard to the jury instruction on extreme atrocity or cruelty, the defendant claims that the only basis for the jury to find extreme atrocity or cruelty was the victim's suffering and that it was error for the judge to instruct the jury on the other six factors, for which there was no factual support. We disagree.

"It is well established in this Commonwealth that a verdict cannot stand unless it appears that the jury reached their

verdict on a theory for which there was factual support." Commonwealth v. Plunkett, 422 Mass. 634, 635 (1996). If each of the Cunneen factors were distinct elements or separate theories of culpability, the judge's instruction would be erroneous. But we have repeatedly concluded that the Cunneen factors are not elements of the crime or separate theories of culpability; they are simply "'evidentiary considerations' that guide the jury's determination as to whether the Commonwealth has proved beyond a reasonable doubt the element of a killing with extreme atrocity or cruelty." Commonwealth v. Kolenovic, 478 Mass. 189, 197-198 (2017). See Commonwealth v. Obershaw, 435 Mass. 794, 809 (2002); Commonwealth v. Hunter, 427 Mass. 651, 657-658 (1998) (Hunter II). Therefore, the jury did not need to be unanimous as to the particular Cunneen factor or factors they found; it suffices that each individual juror found beyond a reasonable doubt one of the Cunneen factors. See Obershaw, supra. The jury needed to be unanimous only in finding the required element that the killing was committed with extreme atrocity or cruelty.

We agree with the defendant that the evidence supported only one Cunneen factor: "consciousness and degree of suffering of the victim." The Commonwealth argues that two additional Cunneen factors support the verdict: the extent of the injuries suffered and the nature of the weapon used to inflict those injuries. We are not persuaded. In Commonwealth v. Brown, 386

Mass. 17, 19 (1982), the defendant killed his mother by firing a single rifle shot, which passed through her chin to her head. We noted that where "her body showed no other signs of injuries, the judge correctly instructed the jury that they could not find that her murder was committed with extreme atrocity or cruelty." Id. at 28 n.11. A single gunshot through the victim's back, without more, is no different, except that death here was not instantaneous and the victim consciously suffered before his death.[4]

Because there was evidence only of this one Cunneen factor, the judge would not have erred had he chosen to instruct the jury that they must find the factor of "consciousness and degree of suffering of the victim" in order to find the element of extreme atrocity or cruelty. There is no requirement that judges instruct on all of the factors. See Commonwealth v.

---

[4] This is not to say, however, that a single blow can never lead to a finding of extreme atrocity or cruelty. A single strike or blow may implicate "indifference to or taking pleasure in the victim's suffering," the "extent of physical injuries," the "manner and force with which delivered," and the "disproportion between the means needed to cause death and those employed." See, e.g., Commonwealth v. Glass, 401 Mass. 799, 802-803 (1988) (defendant stabbed victim and twisted blade to inflict greater injury); Commonwealth v. Golston, 373 Mass. 249, 260 (1977), cert. denied, 434 U.S. 1039 (1978) (single blow with baseball bat showed "evidence of great and unusual violence in the blow, which caused a four-inch cut on the side of the skull"); Commonwealth v. Eisen, 358 Mass. 740, 746 (1971) (victim "died as the result of an extensive head wound inflicted by a heavy, blunt instrument, perhaps an axe, applied with moderate to severe force").

Doucette, 391 Mass. 443, 454 (1984) ("we do not interpret our decisions discussing the factors to be considered on the issue of extreme atrocity or cruelty as imposing a mandatory burden on a judge to recite each and every factor"). But, where there was sufficient evidence for a jury to find the defendant guilty of murder in the first degree on the theory of extreme atrocity or cruelty based on one Cunneen factor, the judge did not err in instructing the jury on all of the Cunneen factors.

c. Refinement of the Cunneen factors. Before we consider whether we should revise our model jury instruction regarding the element of extreme atrocity or cruelty, we look at the origin of that phrase, its original meaning, and the evolution of its interpretation.

i. Evolution of "extreme atrocity or cruelty." At common law, murder was defined as "the killing of any person . . . with malice aforethought, either express or implied by law" (emphasis in original). Commonwealth v. Webster, 5 Cush. 295, 304 (1850). "There was only one degree [of murder], and it was punishable with death." Commonwealth v. Tucker, 189 Mass. 457, 489 (1905).

In 1858, the Legislature enacted St. 1858, c. 154, which codified the common law of murder but revised it by dividing murder into two degrees of guilt: murder in the first degree and in the second degree. Under St. 1858, c. 154, "murder committed with deliberately premeditated malice aforethought, or

in the commission of an attempt to commit any crime punishable with imprisonment for life, or committed 'with extreme atrocity or cruelty,' was declared to be murder in the first degree and punishable with death." Tucker, 189 Mass. at 490. "Murder not appearing to be in the first degree was declared to be murder in the second degree, and punishable with imprisonment for life." Id. See St. 1858, c. 154, §§ 2, 5. This definition, now codified as G. L. c. 265, § 1, has remained undisturbed since 1858, except that murder in the first degree is "punishable with death or imprisonment for life."[5] See St. 1951, c. 203.

Until the passage of St. 1858, c. 154, our case law did not consider the meaning of "extreme atrocity or cruelty" because there was no need to: all murders committed with "malice aforethought" were punished with death, regardless of the extent of their atrocity or cruelty. But in enacting St. 1854, c. 154, the Legislature intended "largely to mitigate the harshness of the common law rule imposing a mandatory death penalty on all murderers." Commonwealth v. Dickerson, 372 Mass. 783, 803 (1977) (Quirico, J., concurring). Consequently, only the presence of an aggravating element -- deliberate premeditation, commission during the course of a felony punishable with death

[5] This court declared the death penalty unconstitutional in Commonwealth v. Colon-Cruz, 393 Mass. 150, 171-172 (1984).

or life imprisonment, or extreme atrocity or cruelty -- would justify capital punishment. See St. 1858, c. 154.

In 1879, in Commonwealth v. Devlin, 126 Mass. 253, 255 (1879), this court first articulated the meaning of extreme atrocity or cruelty:

> "The crime of murder always implies atrocity and cruelty in the guilty party; but there are degrees of criminality in that respect, even in the felonious and malicious taking of human life; and, in order to justify a finding of murder in the first degree, it requires that something more than the ordinary incidents of the crime shall exist -- something implying more than ordinary criminality, and manifesting a degree of atrocity or cruelty which must be considered as peculiar and extreme. The nature of the question is such that it must be largely left to the determination of the jury; and, when there is sufficient evidence to justify it, their finding must be conclusive."

And in all of the early cases in which this court affirmed convictions of murder in the first degree on the theory of extreme atrocity or cruelty, the defendant's conduct in killing the victim manifested "a degree of atrocity or cruelty which must be considered as peculiar and extreme." See, e.g., Commonwealth v. Bartolini, 299 Mass. 503, 516, cert. denied, 304 U.S. 565 (1938) ("many blows of extreme violence upon a living body"); Commonwealth v. Feci, 235 Mass. 562, 571 (1920) ("defendant either alone or assisted by others killed the deceased by stabbing and wounding him in many parts of his body"); Devlin, supra (prostrate victim stomped upon and kicked to death over course of several hours); Commonwealth v.

Desmarteau, 16 Gray 1, 10 (1860) (rape, brutal beating, and subsequent drowning of eight year old child). The focus in these cases was on the means used to kill the victim and whether "the means used were extreme as compared with ordinary means of producing death." Devlin, supra.

In determining whether the defendant's conduct in killing the victim was extreme, we often considered "the resulting effect on the victim, in terms of the extent of physical injury and the degree of suffering endured." Commonwealth v. Lacy, 371 Mass. 363, 367 (1976). And we also considered whether the defendant was indifferent to the pain he or she was inflicting on the victim or took pleasure from its infliction. See Commonwealth v. Gould, 380 Mass. 672, 684 (1980), and cited cases. But the focus remained on the defendant's conduct: on whether the defendant's method or means of killing the victim was reasonably likely to substantially increase or prolong his or her conscious suffering, on whether the means used by the defendant were excessive and out of proportion to what would be needed to kill a person, and on the extent to which the defendant was indifferent to or took pleasure in the victim's pain.

In 1983, in Cunneen, 389 Mass. at 217, the defendant had slit the throat of the thirteen year old victim with "multiple blows of marked force inflicted by a strong cutting instrument."

We rejected the defendant's argument that the jury should have been instructed that, to find extreme atrocity or cruelty, they first needed to find that the defendant knew that his acts were atrocious or cruel. Instead, we adhered to our long-standing view that "proof of malice aforethought is the only requisite mental intent for a conviction of murder in the first degree based on murder committed with extreme atrocity or cruelty." Id. at 226-227. We then "delineated a number of factors which a jury can consider in deciding whether a murder was committed with extreme atrocity or cruelty," including the "consciousness and degree of suffering of the victim," which have come to be known as the Cunneen factors. See id. at 227.

These factors were not originally meant to be an exhaustive list; nor were the jury required to find one or more of the factors. But in 1989, in Commonwealth v. Freiberg, 405 Mass. 282, 289-290, cert. denied, 493 U.S. 940 (1989), the court concluded that our definition of extreme atrocity or cruelty was not void for vagueness and noted in support of that conclusion that jurors considered the Cunneen factors in determining whether a murder was committed with extreme atrocity or cruelty. Then, in 1994, in Hunter, 416 Mass. at 837, we declared that a jury could not find extreme atrocity or cruelty without finding at least one of the Cunneen factors.

This requirement was intended to protect defendants by ensuring that a jury's finding of extreme atrocity or cruelty was based on a particular finding of fact. And in most cases, it would be protective of defendants because six of the seven factors delineated in Cunneen, 389 Mass. at 227 -- "indifference to or taking pleasure in the victim's suffering, . . . extent of physical injuries, number of blows, manner and force with which delivered, instrument employed, and disproportion between the means needed to cause death and those employed" -- pertain to the defendant's conduct and bear directly on whether a murder was committed with extreme atrocity or cruelty.

But the seventh factor -- "consciousness and degree of suffering of the victim" -- if it were allowed to stand alone as sufficient to support a finding of extreme atrocity or cruelty, permits a defendant to be found guilty of murder in the first degree in some circumstances even if his conduct were not extremely atrocious or cruel. For instance, a jury applying the Cunneen factors could find a defendant guilty of murder in the first degree on the theory of extreme atrocity or cruelty if he shot a victim in the leg, precisely because he did not want to kill the victim, where the victim nonetheless died a painful death. In fact, the extent of a victim's conscious suffering may bear on matters of chance or on whether the defendant was a poor shot, rather than on whether the conduct of the defendant

was unusually atrocious or cruel. A victim's substantial degree of conscious suffering may support a finding of extreme atrocity or cruelty where it is the reasonably likely consequence of the defendant's actions, as it would have been in Cunneen, but not where it stands alone as a factor, divorced from the egregiousness of the defendant's conduct.

The discordance of allowing a finding of extreme atrocity or cruelty to be based solely on the degree of the victim's conscious suffering is best seen by considering what our model jury instruction says about extreme atrocity or cruelty before it addresses the Cunneen factors:

> "The third element is that the killing was committed with extreme atrocity or cruelty. Extreme atrocity means an act that is extremely wicked or brutal, appalling, horrifying, or utterly revolting. Extreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of a human life. You must determine whether the method or mode of a killing is so shocking as to amount to murder with extreme atrocity or cruelty. The inquiry focuses on the defendant's action in terms of the manner and means of inflicting death, and on the resulting effect on the victim." (Footnotes omitted.)

Model Jury Instructions on Homicide 54-55 (2018). The entire focus of this instruction is on the defendant's "actions," his "manner and means of inflicting death." But under our current jurisprudence, the jury are permitted to find extreme atrocity or cruelty based only on "the consciousness and degree of suffering of the deceased." See id. at 56.

The defendant asks us to remedy this anomalous situation by requiring the jury to find that the defendant intended to commit an extremely atrocious or cruel murder. We have declined to require this finding many times before. See, e.g., Commonwealth v. Judge, 420 Mass. 433, 442 (1995); Commonwealth v. Sinnott, 399 Mass. 863, 879 (1987); Commonwealth v. Golston, 373 Mass. 249, 260 (1977), cert. denied, 434 U.S. 1039 (1978); Commonwealth v. Appleby, 358 Mass. 407, 415 (1970). And we decline to do so again. As we said in Cunneen, 389 Mass. at 227, "proof of malice aforethought is the only requisite mental intent for a conviction of murder in the first degree based on murder committed with extreme atrocity or cruelty." See Commonwealth v. Monsen, 377 Mass. 245, 254 (1979) ("we think that the Legislature intended to exact the greater punishment . . . solely on the basis of the shocking, unnecessary, and often painful manner in which the death has been caused. Although the inference that the actor possesses a particularly brutal state of mind might be warranted by the objective circumstances of the killing, no such inference is necessary in order to convict").

But insofar as our current common law diverges from the Legislature's original purpose of reserving capital punishment only for the most heinous murders, we agree with the defendant that the factors the jury may consider should be connected to

the extreme nature of the defendant's conduct. "Extreme atrocity means an act that is extremely wicked or brutal, appalling, horrifying, or utterly revolting" (emphasis added). Model Jury Instructions on Homicide, supra. "[E]xtreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of human life" (emphasis added). Commonwealth v. Noeun Sok, 439 Mass. 428, 437 (2003). Indeed, we have always defined extreme atrocity or cruelty with reference to the extreme nature of the defendant's conduct and, as noted, we do so in our model jury instructions. So, to the extent that the Cunneen factors may, in some instances, permit a jury to find extreme atrocity or cruelty based only on the degree of a victim's suffering, without considering whether the defendant's conduct was extreme in either its brutality or its cruelty, we now revise them and set forth a new provisional jury instruction in an Appendix to this opinion.

To find that the Commonwealth has proved beyond a reasonable doubt that a defendant caused the death of the deceased with extreme atrocity or cruelty, future juries must consider the following three evidentiary factors. The first is whether the defendant was indifferent to or took pleasure in the suffering of the deceased. See Cunneen, 389 Mass. at 227. The second is whether the defendant's method or means of killing the

deceased was reasonably likely to substantially increase or prolong the conscious suffering of the deceased. See, e.g., Commonwealth v. Linton, 456 Mass. 534, 546-547 (2010) (defendant's use of strangulation, "a method of killing that is by its nature slow and painful," increased victim's conscious suffering). The third is whether the means used by the defendant were excessive and out of proportion to what would be needed to kill a person. See Cunneen, supra. In considering this final factor, juries may consider the extent of the injuries to the deceased; the number of blows delivered; the manner, degree, and severity of the force used; and the nature of the weapon, instrument, or method used. Id. A jury cannot make a finding of extreme atrocity or cruelty unless it is based on one of these three factors, although, as we have stated previously, the jury need not unanimously agree on which of the factors underlie their verdict. See Hunter II, 427 Mass. at 658. This revision of the factors, we believe, better distinguishes the conduct that warrants a conviction of murder in the first degree from the conduct that should result in a conviction of murder in the second degree.

ii. Retroactivity of revised factors. These revised factors are to be applied only in murder trials that commence after the date of issuance of this opinion. Indeed, we do not apply them retroactively even here; rather, as discussed infra,

we reduce the defendant's conviction pursuant to our duty under G. L. c. 278, § 33E, "to consider broadly the whole case on the law and the facts to determine whether the verdict is 'consonant with justice,'" not based on any errors in the proceedings below. Gould, 380 Mass. at 680, quoting Commonwealth v. Davis, 380 Mass. 1, 15 n.20 (1980).

In enacting St. 1858, c. 154, the Legislature "did not change the common law definition of murder as recognized by our courts, but simply manifested the intention of the Legislature to consider murder as a crime 'the punishment of which may be more or less severe according to certain aggravating circumstances, which may appear on the trial.'" Tucker, 189 Mass. at 490, quoting Commonwealth v. Gardner, 11 Gray 438, 444 (1858). See Green v. Commonwealth, 12 Allen 155, 170 (1866) ("the statute establishing degrees of murder did not create any new offence or change the definition of murder as it was understood at common law"); Desmarteau, 16 Gray at 9 ("The court, upon the trial of the present case, properly instructed the jury that the technical definition of murder in this commonwealth was the common law definition of murder as recognized by the court prior to the St. of 1858, c. 154 . . ."). As we have noted in previous cases, even after passage of St. 1858, c. 154, "the elements of murder liability continued to rest in the domain of the common law." Commonwealth v.

Brown, 477 Mass. 805, 828 (2017) (Gants, C.J., concurring), cert. denied, 139 S. Ct. 54 (2018). And "where we revise our substantive common law of murder, we are free to declare that our new substantive law shall be applied prospectively, much like the Legislature may do when it revises substantive criminal statutes." Commonwealth v. Martin, 484 Mass. 634, 645 (2020).

Likewise, the contours of these aggravating factors have always been a matter of common law. In Gould, 380 Mass. at 685-686, this court held that "the jury should no longer be 'restricted to considering only the defendant's course of action, but [should be] permitted to consider the defendant's [mental impairment] as an additional factor to be weighed in determining whether the murder was committed with extreme atrocity or cruelty.'" Commonwealth v. Breese, 389 Mass. 540, 546 (1983), quoting Gould, supra. But although this decision changed the scope of extreme atrocity or cruelty, we did not give it retroactive effect. Breese, supra at 550. Likewise, in Commonwealth v. Semedo, 422 Mass. 716, 726 (1996), we held that our decision in Hunter, 416 Mass. at 837, which made evidence of at least one of the Cunneen factors a mandatory prerequisite for a jury finding of extreme atrocity or cruelty, was not retroactive. See Commonwealth v. Arriaga, 438 Mass. 556, 573 (2002); Commonwealth v. James, 424 Mass. 770, 790 (1997). Where we once again merely alter the factors bearing on extreme

atrocity or cruelty, we once again declare that the rule shall be applied only prospectively.

3. Review under G. L. c. 278, § 33E. The defendant asks that we exercise our authority under G. L. c. 278, § 33E, to reduce his conviction to murder in the second degree. "Our duty under G. L. c. 278, § 33E, is to consider broadly the whole case on the law and the facts to determine whether the verdict is 'consonant with justice.'" Gould, 380 Mass. at 680, quoting Davis, 380 Mass. at 15 n.20. And although we recognize that our authority under § 33E "is to be exercised sparingly," Commonwealth v. Seit, 373 Mass. 83, 95 (1977), we are convinced that, here, a conviction of murder in the first degree would not be consonant with justice.

The defendant's conduct -- firing a single shot into the victim's back -- was stupid, senseless, and cowardly. Indeed, where it tragically caused the death of a young man, it was atrocious and cruel. See Devlin, 126 Mass. at 255 ("The crime of murder always implies atrocity and cruelty in the guilty party . . ."). But "extreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of human life" (emphasis in original). Noeun Sok, 439 Mass. at 437. Nothing about the facts of this case suggests that the defendant's conduct met that standard. Under our common law of murder at the time of the verdict, the

jury were permitted to find extreme atrocity or cruelty based solely on the victim's conscious suffering before his death. Having now prospectively revised our common law and having now reviewed the entirety of the trial record, we conclude that a verdict of murder in the second degree, with its life sentence with the possibility of parole, is the more just verdict in this case.

Conclusion. The verdict of murder in the first degree and the sentence imposed are vacated and set aside. The matter is remanded to the Superior Court, where a verdict of guilty of murder in the second degree is to be entered and the defendant is to be sentenced accordingly. The verdict of illegal possession of a firearm, which is not challenged on appeal, is affirmed.

So ordered.

Appendix.

Extreme atrocity means an act that is extremely wicked or brutal, appalling, horrifying, or utterly revolting.[1] Extreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of a human life.[2] You must determine whether the method or mode of a killing is so shocking as to amount to murder with extreme atrocity or cruelty.[3] The inquiry focuses on the defendant's action in terms of the manner and means of inflicting death, and on the resulting effect on the victim.[4]

In deciding whether the Commonwealth has proved beyond a reasonable doubt that the defendant caused the death of the

---

[1] See, e.g., Commonwealth v. Linton, 456 Mass. 534, 546-547 (2010); Commonwealth v. Perry, 432 Mass. 214, 219-220, 224-227 (2000).

[2] See Commonwealth v. Noeun Sok, 439 Mass. 428, 437 (2003) ("judge correctly impressed on the jury that '[e]xtreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of human life'" [emphasis in original]).

[3] See, e.g., Commonwealth v. Hunter, 416 Mass. 831, 837 (1994), quoting Commonwealth v. Connolly, 356 Mass. 617, 628, cert. denied, 400 U.S. 843 (1970) ("mode").

[4] See, e.g., Commonwealth v. Barros, 425 Mass. at 581, quoting Commonwealth v. Gould, 380 Mass. 672, 684 (1980) ("inquiry focuses both on the defendant's actions, in terms of the manner and means of inflicting death, and on the resulting effect on the victim").

deceased with extreme atrocity or cruelty, you must consider the following factors:[5]

1. Whether the defendant was indifferent to or took pleasure in the suffering of the deceased;[6]

2. Whether the defendant's method or means of killing the deceased was reasonably likely to substantially increase or prolong the conscious suffering of the victim;[7] or

3. Whether the means used by the defendant were excessive and out of proportion to what would be needed to kill a person.[8] In considering whether the means used by the defendant were excessive and out of proportion to what would be needed to kill a person, you may consider:

---

[5] Commonwealth v. Castillo, 485 Mass. , (2020) (revising factors articulated in Commonwealth v. Cunneen, 389 Mass. 216, 227 [1983]).

[6] See, e.g., Commonwealth v. Roy, 464 Mass. 818, 825 (2013) (defendant mimicked victim's pleading while describing how he "choked her out"); Commonwealth v. Anderson, 445 Mass. 195, 202 (2005) (defendant bragged about brutal murder after crime); Commonwealth v. Noeun Sok, 439 Mass. at 431.

[7] See, e.g., Commonwealth v. Linton, 456 Mass. at 546–547 (defendant's use of strangulation, "a method of killing that is by its nature slow and painful," increased victim's conscious suffering); Commonwealth v. Glass, 401 Mass. 799, 802–803 (1988) (defendant stabbed victim and twisted blade to inflict greater injury).

[8] See, e.g., Commonwealth v. Moses, 436 Mass. 598, 601 (2002) (after victim raised arms in act of surrender, defendant shot at victim seven times, hitting him four times; two wounds were potentially fatal).

a. the extent of the injuries to the deceased;[9]

b. the number of blows delivered;[10]

c. the manner, degree, and severity of the force used;[11] and

d. the nature of the weapon, instrument, or method used.[12]

You cannot make a finding of extreme atrocity or cruelty unless it is based on one or more of the three factors I have just listed.[13] [Where there is evidence of only a single blow] A murder committed by a single blow may be extremely cruel or

---

[9] See, e.g., Commonwealth v. Barbosa, 457 Mass. at 802-803 (photograph depicting depressed skull fracture highly probative on extent of injury victim sustained).

[10] See, e.g., Commonwealth v. Miller, 457 Mass. 69, 71 (2010) (evidence consistent with twenty-five blows from hammer to victim's head).

[11] See, e.g., Commonwealth v. Roy, 464 Mass. at 825 (victim was hit in back of head with hard, flat object); Commonwealth v. Carlson, 448 Mass. 501, 502-503 (2007) (defendant "stomped on [victim's] abdomen, kicked her in the groin, and slammed her head on the floor ten times"; autopsy revealed "'massive contusions' in the abdomen and genitalia that required a degree of force that might occur in an automobile accident").

[12] See, e.g., Commonwealth v. Garuti, 454 Mass. 48, 55 (2009) (defendant used sport utility vehicle to strike former wife and then drive back over her).

[13] See Commonwealth v. Castillo, 485 Mass. at .

atrocious where there is evidence of one or more of these three factors.[14]

[14] See, e.g., Commonwealth v. Glass, 401 Mass. 799, 802–803 (1988) (defendant stabbed victim and twisted blade to inflict greater injury); Commonwealth v. Golston, 373 Mass. 249, 260 (1977), cert. denied, 434 U.S. 1039 (1978) (single blow with baseball bat showed "evidence of great and unusual violence in the blow, which caused a four-inch cut on the side of the skull"); Commonwealth v. Eisen, 358 Mass. 740, 746 (1971) (victim "died as the result of an extensive head wound inflicted by a heavy, blunt instrument, perhaps an axe, applied with moderate to severe force").