NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

SJC-12318

COMMONWEALTH vs. CRISTIAN RODRIGUEZ.

Suffolk. December 10, 2019. - May 19, 2020.

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

Homicide. Insanity. Evidence, Hearsay, Medical record, Expert opinion. Witness, Expert. Practice, Criminal, Hearsay, Instructions to jury, Capital case.

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

The case was tried before Christopher J. Muse, J.

Theodore F. Riordan (Deborah Bates Riordan also present) for the defendant.

Kathryn E. Leary, Assistant District Attorney (Ian Polumbaum, Assistant District Attorney, also present) for the Commonwealth.

CYPHER, J. A jury convicted the defendant, Cristian Rodriguez, of murder in the first degree on the theory of extreme atrocity or cruelty for the beating death of his roommate, Roosevelt Harris. The defendant admitted that he had committed the killing but asserted a lack of criminal

responsibility defense. The defendant argues that the trial judge improperly ruled that the statements he made before and after the murder to his doctors regarding his mental health were not admissible for the truth of the matter. He also urges this court to exercise its authority under G. L. c. 278, § 33E, to reduce his conviction to manslaughter, or, alternatively grant a new trial. We affirm the defendant's conviction. After a thorough review of the record, we also decline to exercise our authority under G. L. c. 278, § 33E, to grant a new trial or reduce or set aside the verdict of murder in the first degree.

Background. 1. The Commonwealth's evidence. We summarize the facts that the jury could have found at trial, reserving certain details for our discussion of the legal issues. The victim and the defendant and three others were residents of a rooming house in Boston. During the time they lived in the apartment they shared, the defendant and the victim got along at times but also got into multiple arguments. In the months before the murder, the defendant claimed that the victim owed him money for a stereo he had sold to the victim. He took the stereo out of the victim's room. When the victim's brother spoke to the defendant on the telephone, offering to give the defendant the money and telling the defendant to stay away from the victim, the defendant hung up. In addition, the defendant

punched the victim in the face three times after the victim accused him of stealing food out of their refrigerator.

Two of the victim's roommates testified to the noises they had heard coming from the victim's room on February 9, 2012, at approximately 9 P.M., including the sound of someone falling, and eight to ten banging noises similar to someone beating a rug on a clothesline. One of them heard the victim grunt. Both roommates then heard someone run out of the apartment; one of them saw a person wearing a black shirt or jacket. [1] They discovered the victim lying on the floor of his room, face up, suffering from head trauma and "breathing slightly" with his shirt "saturated with blood."

At approximately the same time, a woman was parking her car and saw the defendant, whom she recognized from the neighborhood and from a scar that was on his face, holding a baseball bat while running toward her. He put the bat inside a trash can, looked at her, and then continued down the street. The woman got out of her car; when the defendant reached the street corner, he turned and looked at her again, and then kept running. The witness returned to the trash can the next

[1] Surveillance video from an apartment building across the street from the defendant's building showed a person wearing a black top leaving the defendant's building and running away at 9:24 P.M.

morning, looked inside it, and saw a metal bat with blood on it.[2] She was later able to pick the defendant out of a photographic array.

The defendant's jacket, shirt, shoe laces, and shoes all preliminarily tested positive for the presence of blood. A deoxyribonucleic acid (DNA) sample from the defendant's jeans was sent for testing, and the DNA sample matched the victim's DNA profile.

The defendant admitted that he used a baseball bat to kill the victim. At trial, the chief medical examiner testified that the victim suffered multiple lacerations and fractures, including four lacerations to the left side of his forehead, multiple fractures of the facial bones on the left side of his face, abrasions and a laceration on his left forearm, a displaced pinky joint, and lacerations on the webbing of his left hand. The victim's left upper chest had a large bruise caused by blunt force, and his right upper chest had two parallel bruises. Four of his teeth on his lower jaw had loosened, and he sustained additional blunt force trauma to the side and back of his head. The medical examiner testified that the injuries were inflicted with a significant amount of force

---

[2] Police did not recover the bat because the trash was collected later the same day. However, the trash collector testified that when he removed the cover from the trash can, he saw a metal baseball bat with something brown on its head.

and caused significant injury to the frontal lobe of the brain, which controls breathing, and that the victim had aspirated blood in his lungs as a result of the injuries. The medical examiner further testified that seconds to minutes could have passed from the time of the victim's most severe head injuries to his loss of consciousness and death. The cause of death was blunt trauma to the head with skull fractures and brain injuries.

2. The defendant's evidence. At trial, the defendant argued that he lacked criminal responsibility for the victim's murder. In support of his defense, he called several witnesses, including two experts.

In the early morning hours after the murder, the defendant was arrested after attempting to steal a vehicle. A probation officer testified that, while she was conducting an indigency assessment of the defendant prior to his arraignment in court later that morning, she found the defendant washing his hair in what appeared to be urine, and the cell floor smeared with feces. The defendant also put his head in the toilet. When she instructed the defendant to stop, he stopped and did not act up again.

Dr. Rosemary Klein, a State forensic psychologist, was called in to evaluate the defendant's competency pursuant to G. L. c. 123, § 15 (a). When she arrived at the defendant's

cell, she "could see that he was dripping brown liquid from his face. His hair was wet. There was a puddle of brown liquid coming from under the door," and there was a bad smell. She testified that the defendant "wasn't still. He was agitated. He was moving rapidly, speaking rapidly, his eyes were looking around," and it appeared he may have been having an "internal dialogue or internal thought processes." In response to Klein's questions about his mental health, the defendant informed her that at eight years old he had been diagnosed with bipolar illness and had been treated since that time, but that he stopped taking all but one of his medications; he added that he had had a head injury. The defendant also informed her that he was hearing voices in his head, that these voices commanded him to do things, "sometimes dangerous things," and that on the night before he had heard "voices commanding him to do things." After the evaluation, Klein made provisional diagnoses that the defendant was psychotic at the time of the evaluation, i.e., the day after the murder, and that he had schizoaffective disorder. The defendant was transported from the court to Bridgewater State Hospital.

A woman with whom the defendant had had two children testified that in the three to four years before the murder, the defendant's behavior had changed. He "seem[ed] paranoid most of the time," "[h]e was always thinking that people were chasing

him or going to get him," and when her telephone rang he would ask her if it were the "enemy" calling. She testified that he would hear the voice of his mother and the devil in his head.

The defendant called Dr. David Rosmarin as an expert witness. Rosmarin had interviewed the defendant in June 2012 and had diagnosed him with schizoaffected disorder.[3] He opined that the defendant was not criminally responsible at the time he killed the victim. At trial, Rosmarin testified to what the defendant told him in the interview, namely, that the defendant hears voices, which are sometimes "overwhelming," and that the voices sometimes command him to fight and to commit suicide.

Regarding the evening of the murder, the defendant told Rosmarin that he remembered using heroin, "crack" cocaine, and marijuana about thirty minutes to an hour before the victim knocked on the defendant's door requesting to purchase drugs for a friend. The defendant was not hearing voices before the victim knocked on the defendant's door. The defendant said, "I was just using drugs. The drugs made me happy." The defendant said that when he went to the victim's room, the victim was alone and did not have the money to pay for the drugs. When the

---

[3] Dr. David Rosmarin also diagnosed the defendant with poly substance use disorder, neurocognitive disorder from traumatic childhood injury, as well as possibly from fetal distress and interuterine drug exposure, posttraumatic stress disorder from childhood "secondary to rape and physical abuse, and partial remission."

defendant turned to leave, the victim hit him with a baseball bat. The defendant said, "I tried to get the bat away from him. Then I hit him with the bat, not to hurt him but more I was afraid for my own life." The defendant said that he remembered wresting the baseball bat from the victim, that the voices told the defendant that he should hit the victim because he was one of the enemy, and that the defendant's next memory was of opening the door and leaving.

The defendant also told Rosmarin about his personal and family history. The defendant said that he had moved to the United States from the Dominican Republic at age seventeen, that two of his sisters have psychotic disorders, and that one of his brothers committed suicide because of a psychotic disorder.[4] The defendant said that after he fell out of a tree at age thirteen, he was in a coma, suffered broken ribs, had a cast on his leg,

[4] Rosmarin testified that he was able to review independent records to confirm that one of the defendant's sisters had major depressive disorder with auditory hallucinations and another of his sisters had "a longstanding depressive disorder as part of a bipolar disorder with visual hallucinations, panic disorder, and is on Social Security disability." Rosmarin opined that the independent records supporting the fact that the defendant's family members have mental health diagnoses "supports the idea that he, too, has a psychotic disorder because there's a shared genetic risk among siblings."

and had tubes placed in his ears.[5] Rosmarin could not obtain medical records from the Dominican Republic.

Rosmarin testified that, in addition to the information provided by the defendant, he reviewed the defendant's medical records. He testified regarding the contents of the records from Bridgewater State Hospital and opined, inter alia, that there was no indication in those records that any treatment provider, psychiatrist or psychologist, determined that the defendant was malingering or feigning his symptoms.

Rosmarin next testified about the medical records from a facility where the defendant received addiction and psychiatric care from May 2010 to January 12, 2012. Those records showed that the defendant reported to his providers that he had tried to kill himself in 1997 with a knife, and that he had tried to kill himself in 2006 or 2007 by overdosing. He also reported that he had auditory hallucinations. The records also contained entries from group therapy attended by the defendant, during which he reported hearing voices and thinking people were watching him.

Rosmarin also testified that records from the house of correction showed that the defendant attempted to hang himself

---

[5] Rosmarin testified that having tubes placed in his ears meant that the defendant had "a tear or . . . a temporal bone fracture."

in jail in May 2012, but Rosmarin acknowledged on cross-examination that the report indicated that the defendant may have done so in order to get a different bed. The defendant told Rosmarin that the "voices had instructed him to kill himself."

In rebuttal, the Commonwealth called Dr. Martin Kelly, a psychiatrist. Kelly also interviewed the defendant and reviewed the defendant's medical and other records relating to the case. Kelly testified that he disagreed with Rosmarin's diagnosis. Kelly opined that the defendant did not "show true symptoms of a psychotic disorder," and that at the time surrounding and including the homicide, the defendant had antisocial personality disorder and suffered from substance abuse.

The jury convicted the defendant of murder in the first degree on the theory of extreme atrocity or cruelty.

Discussion. 1. Judge's ruling and jury instructions on the defendant's statements. At trial, the judge ruled, and instructed the jury, that the defendant's statements to Klein and Rosmarin were not admissible for their truth and could be considered only as information on which the experts relied in reaching their opinions. The defendant argues first that the judge improperly ruled that the defendant's statements to Klein and Rosmarin about his mental health were not admissible substantively and that the judge's instruction to the jury that

they could not consider such statements for the truth of the matter was incorrect as a matter of law. We agree with the Commonwealth that the judge correctly ruled that the defendant's statements to Klein, Rosmarin, and Kelly could be considered only "for how they may have affected the opinions and conclusions of those medical witnesses," as these statements were made for purely legal purposes and not for diagnosis or treatment.

The defendant contends that his argument is supported by the holding in Commonwealth v. Comtois, 399 Mass. 668 (1987), and Mass. G. Evid. § 803(4) (2020). In Comtois, we stated that "[i]t has long been the rule in the Commonwealth that physicians may testify as to statements of past pain, symptoms, and conditions made to them when they were consulted by a declarant for purposes of diagnosis or treatment." Id. at 675, citing Barber v. Merriam, 11 Allen 322, 324-325 (1865). Section 803(4), a proposed version of which was cited in Comtois, supra, provides an exception to the hearsay rule, regardless of the declarant's availability, for "[s]tatements made for the purpose of medical diagnosis or treatment describing medical history, pain, symptoms, condition, or cause, but not as to the identity of the person responsible or legal significance of such symptoms or injury." See Mass. G. Evid. § 803(4), supra.

In Commonwealth v. Piantedosi, 478 Mass. 536, 542 (2017), however, we addressed "the admissibility of testimony by an expert witness, on direct examination, concerning facts upon which the expert's opinion is based, and that are independently admissible, but that have not been introduced in evidence." We reaffirmed that "[a]lthough an expert may formulate an opinion based on facts or data not admitted in evidence, but that would be admissible with the proper witness or foundation, 'the expert may not testify to the substance or contents of that information on direct examination.'" Id. at 543, quoting Commonwealth v. Chappell, 473 Mass. 191, 203 (2015). See Commonwealth v. Goddard, 476 Mass. 443, 448 (2017). The defendant requests that we reconsider our decision in Piantedosi in light of Comtois, 399 Mass. at 675, and Mass. G. Evid. § 803(4), and hold that Rosmarin "should have been permitted to recite the defendant's statements of 'past pain, symptoms, and conditions' that were made to him and other doctors" during the course of their diagnosis of the defendant and that the statements should have been admitted for the truth of the matter.

In the present case, before Rosmarin testified, the judge ruled that the defendant's statements to Rosmarin during the interview would be admissible on direct examination, but subject to a limiting instruction. Before Rosmarin began his testimony regarding the defendant's personal history, the judge instructed

the jury, in part, that they may hear statements that the defendant made during the course of his psychiatric interviews and that "[i]f you believe that the statements were made, you may not consider them as proof of what [the defendant] said . . . you may consider those statements only for how they might have affected the opinions and conclusions of the various medical witnesses." Then, when Rosmarin began testifying about the defendant's version of events in relation to the murder, the judge instructed the jury, in part, that "I'm going to remind you that just because the defendant says something to Dr. Rosmarin, doesn't mean that that, in fact happened . . . . If you believe that the statements were made . . . you may not consider it as proof of whatever [the defendant] said. You may consider those statements only for how they might have affected the opinions and conclusions of this medical expert . . . ."

In the final instructions, the judge instructed the jury, in part, that, "During the trial you heard testimony that this defendant made certain statements during interviews with Dr. Klein, Dr. Rosmarin, and Dr. Kelly. If you believe that the statements were made, you may not consider them as proof of whatever [the defendant] said. You may consider those statements only for how they may have affected the opinions and conclusions of those medical witnesses. For example, if [the defendant] told a doctor that X happened, this is not evidence

that X indeed did in fact occur. It is only evidence that [the defendant] made the statement which the doctor may have considered in his or her evaluation." The defendant did not object to the judge's ruling or to the judge's jury instructions.

The judge did not err in ruling that the statements the defendant made to the doctors during the forensic interviews were not admissible for the truth of the matter or in instructing the jury to that effect. Piantedosi, 478 Mass. at 543. See Commonwealth v. Jaime, 433 Mass. 575, 578 n.1 (2001). We clarify here that the hearsay exception for statements made for "purpose[s] of medical diagnosis or treatment" does not apply where a defendant made his or her statements in the course of a court-ordered forensic interview or a forensic interview to determine criminal responsibility. Mass. G. Evid. § 803(4). See Comtois, 399 Mass. at 675. The reason for these forensic interviews is to assess the defendant for a legal purpose: to determine whether the defendant meets the legal definition of a "mental illness or mental defect" and therefore cannot be held criminally responsible for the crime charged. See G. L. c. 123, § 15 (a). Therefore, the statements made during the course of these assessments do not carry the same inherent reliability as statements made to a professional for purposes of medical treatment or diagnosis. See Mass. G. Evid. § 803(4).

The defendant also argues that the judge erred in instructing the jury that the statements of the defendant contained in his medical records from the facility where he had received treatment for addiction and psychiatric care before the murder could not be considered for the truth. The Commonwealth stipulated to the admission of these records under G. L. c. 233, § 79. We conclude that no error occurred where the medical records were admitted for their full substantive value.

The defendant bases his argument on an exchange that occurred when Rosmarin began his testimony about the records from that facility. Defense counsel asked, "within those records did you review independent references by healthcare professionals who received information that [the defendant] had attempted suicide?" The prosecutor objected based on the source of the information and the judge asked, "What's the source of the information? Was it personal history or was it some other reference?" Rosmarin answered, "These are what [the defendant] told social workers in 2010 and 2011." The judge then stated, "I'm trying to stay as far away from the question as possible, but I just want to make sure that you direct the questions in consideration of the limiting instruction I gave. So if it's clear that this was something that people saw, a suicide attempt, that's one thing. If it's something that he says he did, that's another. And I think it's important that you direct

[the witness] so we don't have the problem with the limiting instruction."

This exchange did not serve either to instruct Rosmarin or the jury that they had to limit their consideration of the defendant's statements in the medical records. It merely reminded the defense attorney to direct her questions in a way that would reduce the risk of running afoul of his limiting instruction. In addition, as discussed supra, in the final jury instructions, after the instruction to the jury about the use of the defendant's statements during his forensic interviews, the judge explained, "This limiting instruction applies only to [the defendant's] statements during interviews with [Rosmarin, Kelly, and Klein]. If you find that he made statements to other persons, you can consider those statements as you would any other evidence." This instruction served to clarify any misunderstanding the jury may have had regarding their use of the defendant's statements in the facility records. We discern no error in the judge's ruling or the judge's instructions to the jury regarding the evidentiary value of the defendant's statements.[6]

[6] The defendant argues that it appeared that the judge instructed Rosmarin about what Rosmarin could consider for the truth of the matter in reaching his expert opinion, and that the judge should not have done so. We agree with the Commonwealth that the judge was seeking to clarify Rosmarin's testimony. After the prosecutor asked Rosmarin whether a certain factor

2. Review under G. L. c. 278, § 33E. After a thorough review of the record, we find no reason to exercise our authority under G. L. c. 278, § 33E, to grant a new trial or either to reduce or set aside the verdict of murder in the first degree.[7]

---

would affect how much Rosmarin would "buy into" the defendant's account of the victim and the defendant struggling over the baseball bat, the judge interjected to ask, inter alia, "Are you quote unquote buying into the claim of it or are you simply reporting what he says? . . . Are you taking a position on the . . . truthfulness or the accuracy of that statement or any other statement that's not otherwise verifiable?" The judge then referenced his limiting instruction to the jury regarding the use of the defendant's statements to Rosmarin, and asked Rosmarin, "[M]y question to you is, are you for purposes of your . . . analysis, accepting [the defendant's] statement to be true?" Rosmarin stated: "I accept it as more likely than not." In this exchange, the judge appeared to be clarifying Rosmarin's statements and the prosecutor's question about "buy[ing] into" the defendant's statements. Contrary to the defendant's assertions, the judge was not "scold[ing]" Rosmarin and he was not instructing Rosmarin as to what he could consider in reaching his opinion.

[7] As required at the time of the defendant's trial, the judge instructed the jury on the inference of sanity: "with regard to criminal responsibility, you may consider the fact that a great majority of persons are sane and the probability that any particular person is sane. It is for you, the jury, to decide whether to draw that inference." See Commonwealth v. Keita, 429 Mass. 843, 846 (1999). After the defendant's trial, we held in Commonwealth v. Lawson, 475 Mass. 806, 815 n.8 (2016), that the presumption of sanity instruction should not be given. The defendant is entitled to the benefit of Lawson because his appeal was pending on direct appeal when the case was released. See Commonwealth v. Waweru, 480 Mass. 173, 187 (2018). Defense counsel did not object at trial to this instruction, and we discern no substantial likelihood of a miscarriage of justice. The judge instructed the jury multiple times that the Commonwealth bore the burden of proving criminal responsibility beyond a reasonable doubt, and there was

Judgment affirmed.

substantial evidence of the defendant's guilt. See Commonwealth v. Muller, 477 Mass. 415, 431 (2017); Commonwealth v. Griffin, 475 Mass. 848, 863 (2016).