SJC-12555

COMMONWEALTH vs. TARRANE TILLIS.

Middlesex. December 10, 2019. - December 23, 2020.

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

Homicide. Felony-Murder Rule. Armed Home Invasion. Armed Assault with Intent to Rob. Joint Enterprise. Evidence, Joint venturer. Constitutional Law, Assistance of counsel. Practice, Criminal, Capital case, Assistance of counsel, Instructions to jury.

Indictments found and returned in the Superior Court Department on April 3, 2014.

The cases were tried before Bruce R. Henry, J., and a motion for a new trial, filed on September 24, 2018, was heard by him.

Dennis Shedd for the defendant.
Jamie Michael Charles, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. The defendant appeals from his conviction of murder in the first degree and related charges following the

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

shooting death of Cristino Diaz-Arias after a botched robbery attempt by the defendant and his coventurers. The defendant's appeal from the denial of his motion for a new trial was consolidated with his direct appeal.

In sum, four robbers entered an apartment building in Lowell intending to rob the victim. They knocked the apartment door off its hinges, forced their way into the apartment while the victim attempted to push the door closed, and then beat him. The victim managed to escape and yelled for his neighbors to call the police. He chased three of the robbers, including the defendant, down a staircase as they fled out of the building. The fourth robber remained behind and continued to search the victim's apartment for money or drugs. The victim eventually confronted the remaining robber at the top of the staircase. During the struggle, the fourth robber fatally shot the victim. By the time the shots were fired, the defendant was a few blocks away from the apartment building, near the getaway vehicle. A Superior Court jury convicted the defendant of murder in the first degree with armed home invasion as the predicate offense for felony-murder. The jury also convicted the defendant of armed home invasion and armed assault with intent to rob.

The primary issue on appeal concerns the judge's denial of the defendant's request that the jury be instructed on withdrawal from a joint venture. The defendant also raises two

claims of ineffective assistance of counsel. He contends that counsel should have requested a supplemental jury instruction to further explain the Commonwealth's burden to prove that the killing occurred during the course of the underlying felony. In addition, he argues that counsel was ineffective for not objecting to a portion of the prosecutor's closing argument. The defendant also asks this court to exercise its extraordinary authority, pursuant to G. L. c. 278, § 33E, and to reduce the murder conviction to murder in the second degree. For the reasons that follow, we affirm the convictions and the order denying the defendant's motion for a new trial.

1. Facts. We recite the facts the jury could have found, reserving certain facts for later discussion.

On December 18, 2013, the defendant and Roberto Ortiz Lopez visited an apartment in Nashua, New Hampshire, shared by Jonathan Rivera and his girlfriend. The three men then went to the Lowell apartment of the defendant's friend, Kent Grays. They were seeking to find a place to stay in Lowell and "a way to make money." Eventually, the group met up with another one of the defendant's friends, Donte Okowuga.[2]

[2] Jonathan Rivera and Donte Okowuga testified at trial pursuant to cooperation agreements with the district attorney's office. In exchange for Rivera's testimony, he was not charged with murder, and instead pleaded guilty to unspecified charges and received a sentence of seven to nine years' incarceration, with a term of probation to follow upon his release. In

The defendant, Lopez, Rivera, Grays, and Okowuga discussed potential targets for a robbery. At first, Grays discussed the possibility of robbing a drug dealer in Boston. They rejected this idea because they did not want to travel that far and because they believed that the area was dangerous. Grays then suggested robbing the victim, who lived on the third floor of an apartment building in Lowell. The defendant knew that the victim sold large amounts of cocaine. The other men agreed with this plan. In preparation for the robbery, the defendant confirmed that Okowuga had stored two firearms in his vehicle.

Grays proceeded to the victim's apartment in order to determine whether the victim was home and if the "coast was clear." Okowuga drove the defendant, Lopez, and Rivera in a separate vehicle. Grays telephoned the defendant to warn him that there were too many people inside the building. As a result, the four men abandoned the plan and drove toward New Hampshire. A short time later, the defendant received another telephone call from Grays indicating that it would then be

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exchange for testifying, Okowuga agreed to plead guilty to armed home invasion and armed assault with intent to rob; he was sentenced to the agreed term of from twenty-five years to twenty-five years and one day on those charges. In addition, the charge of murder was reduced to manslaughter, and he was sentenced to a period of twenty years of probation on the manslaughter charge.

possible to rob the victim. Okowuga turned around and headed back to the victim's apartment building.

En route, the defendant, Okowuga, Rivera, and Lopez discussed how they would carry out the robbery. They decided that, after gaining entry, Okowuga and Rivera would detain the victim at gunpoint, while the defendant tied him up. At the same time, Lopez would search the apartment for money or drugs.

Okowuga parked a few blocks away, around the corner from the victim's apartment building. The defendant reached under the front passenger seat, retrieved a bag containing two firearms, and handed it to Okowuga. Okowuga gave one of the weapons to Rivera. He tucked the other inside his coat pocket. Prior to entering the apartment building, Rivera passed the firearm to Lopez. The defendant carried a folding knife in his pants pocket.

At approximately 8 P.M., the defendant, Okowuga, Rivera, and Lopez entered the building and ascended two flights of stairs to the victim's apartment. The defendant had concealed his face with the collar of his jacket and a hat so that the victim would not be able to recognize him. Okowuga wore a mask, and the other men hid their features with hooded jackets. The robbers confronted the victim as he was leaving his apartment. He struggled to shut the door, but Okowuga knocked it off its hinges.

The defendant, Okowuga, Rivera, and Lopez entered the victim's apartment. Okowuga trained his gun on the victim while the defendant and Lopez beat the victim with their fists and hit him with plates and other household items. The victim's next door neighbor heard the noise, opened his door, and saw the beating in progress. One of the men threatened him, and the neighbor returned to his apartment.

The victim was able to escape, and he ran from the apartment into the hallway, yelling, "Call the cops. Call the cops." Rivera noticed that neighbors had begun to gather in the hallway and became "a little scared because" of what the victim was saying. Okowuga announced that he was "effing out of here," and then he ran down the stairs. The defendant and Rivera followed. The victim, who was bleeding from the forehead, chased the three would-be robbers down the stairs and out of the apartment building. He grabbed a shovel near the front entrance and threw it at the fleeing men. Thereafter, a neighbor who lived on the first floor asked the victim if she should telephone the police; the victim answered, "No, I can handle it."

Lopez did not leave with the other coventurers. The victim's next door neighbor saw Lopez, armed with a gun, standing inside the victim's apartment. Lopez left the apartment as the victim returned home. At the top of the

stairs, the victim charged at Lopez, indignantly asking, "You do this to me? You do this to me?" In response, Lopez shot the victim in the face and chest. The next door neighbor then got into a fight with Lopez. During the struggle, Lopez accidently shot himself in the hand; he ran down the stairs and out the front door.

The defendant, Okowuga, and Rivera returned to the getaway vehicle that they had parked a few blocks away. Before they reached the vehicle, Rivera heard gunshots. As they were leaving, Okowuga drove past the victim's apartment building. He picked up Lopez, who was running down the street. Lopez told them that he had shot the victim. Bleeding from a gunshot wound, Lopez demanded to be taken to a hospital. Okowuga refused, and instead drove them all back to New Hampshire.

Lopez gave the gun to the defendant, who placed it back in the bag. A few days later, the defendant contacted Okowuga in order to help him sell the firearm. The defendant met Okowuga in New Hampshire, where Okowuga sold the firearm to an acquaintance of the defendant.

On February 8, 2014, the police obtained a warrant for the defendant's arrest. He was apprehended in upstate New York and transported to Lowell on February 28, 2014. He told investigators that he had heard about the incident, was not involved in the shooting, and wanted to "clear things up." In a

subsequent interview, the defendant admitted to having participated in a plot to steal money or drugs from the victim. He insisted that he never went inside the victim's apartment, and left the building "before there was even a struggle" or "after a little struggle." He fled because it was getting "crazy," with the victim yelling and the neighbors leaving their apartments. "When [the victim] started hollering . . . it was like we exited." When he was about a block away from the apartment building, the defendant heard gunshots.

The defendant initially maintained that he did not know that one of his coventurers had entered the victim's apartment armed with a firearm. The defendant said that he had not seen a firearm before the robbery. After the robbery, he saw Lopez, who had shot himself, entering their vehicle carrying a gun. Pressed by the investigators, the defendant changed his statement and said that Lopez had been "showing off" a small gun inside the vehicle during the drive to the victim's apartment building. The defendant agreed that Lopez must have put that small gun somewhere on his person because he did not "have it out" when they left the vehicle. The defendant also said that he had entered the apartment building with a folding knife in his pocket.

2. Discussion. In this consolidated appeal from his convictions and from the denial of his motion for new trial, the

defendant presses essentially two claims. First, he contends that he was entitled to an instruction on withdrawal from a joint venture. Second, he argues that he was deprived of the effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and art. 12 of the Declaration of Rights of the Massachusetts Constitution.

a. Withdrawal from a joint venture. It was undisputed at trial that the defendant was a few blocks away from the apartment building when Lopez shot the victim. The Commonwealth sought to prove the defendant guilty of felony-murder for his knowing participation in the crime of armed home invasion with the requisite shared intent to commit that crime. See Commonwealth v. Zanetti, 454 Mass. 449, 466 (2009). To prove felony-murder, the Commonwealth was required to prove that the act that caused the victim's death occurred during the commission or the attempted commission of the predicate felony. See Commonwealth v. Gallett, 481 Mass. 662, 673 (2019).

An individual who participates in a joint venture is not guilty of a planned crime if he or she withdraws from the joint venture before that crime is completed. Commonwealth v. Fickett, 403 Mass. 194, 201 (1988). Withdrawal "amounts to an official absolution of guilt already incurred." Moriarty, Extending the Defense of Renunciation, 62 Temp. L. Rev. 1, 4

(1989). In Commonwealth v. Green, 302 Mass. 547, 555 (1939), we held that withdrawal requires "at least an appreciable interval between the alleged termination and [the commission of the crime], a detachment from the enterprise before the [crime] has become so probable that it cannot reasonably be stayed, and such notice or definite act of detachment that other principals in the attempted crime have opportunity also to abandon it." See Commonwealth v. Miranda, 458 Mass. 100, 118 (2010), cert. denied, 565 U.S. 1013 (2011), S.C., 474 Mass. 1008 (2016), quoting Commonwealth v. Cook, 419 Mass. 192, 202 (1994) (same). See also Model Jury Instructions on Homicide 18-19 (2018). Once the defense of withdrawal is properly raised by a defendant, it is the Commonwealth's burden to prove, beyond a reasonable doubt, the absence of abandonment. Commonwealth v. Galford, 413 Mass. 364, 372 (1992), cert. denied, 506 U.S. 1065 (1993).

The defendant requested an instruction on withdrawal from a joint venture, and renewed that request before and after the judge's final charge. The judge declined to give such an instruction.[3] He determined that the evidence did not support

[3] At the defendant's first trial, which began on October 25, 2016, the same judge instructed the jury, over the Commonwealth's objection, on withdrawal from a joint venture. On November 4, 2016, the judge declared a mistrial when the jury were unable to reach a verdict after three days of deliberations. The retrial (the case before us) took place one month later.

the defendant's claim that he effectively withdrew from the joint venture to commit an armed home invasion. Because the defendant preserved his claim, we review to determine whether an error was made and, if so, whether it was prejudicial. See Commonwealth v. Cruz, 445 Mass. 589, 591 (2005).

The trial judge reasoned that the crime of armed home invasion was complete at the time of the defendant's purported withdrawal. The judge's finding was based on substantial evidence that the defendant and his coventurers, while armed with dangerous weapons, entered the victim's apartment and assaulted him. See, e.g., Commonwealth v. Phap Buth, 480 Mass. 113, 120, cert. denied, 139 S. Ct. 607 (2018). (discussing elements of armed home invasion). Viewed in the light most favorable to the defendant, the evidence of a completed home invasion was not so clear cut. In his statement to police, a redacted recording of which was admitted in evidence, the defendant raised the possibility that he and his coventurers had not entered the victim's apartment. He noted that there had been "a lot of people inside the apartment" and that he and his coventurers had been "trying . . . to go in through the threshold where the door was already open . . . but when" they were trying to do so, "the crowd just came out . . . By that time we -- I want to say there [were] too many people coming out of the apartment, so we ran out." See Cook, 419 Mass. at 201

(instruction on withdrawal is required if it is supported by evidence viewed from defendant's perspective).

Given the defendant's version of the events, the jury were required to determine whether he entered the victim's apartment itself or a secured common area. See Commonwealth v. Stokes, 440 Mass. 741, 747 n.7 (2004); Commonwealth v. Doucette, 430 Mass. 461, 467 (1999). Accordingly, the judge erred in finding that the defendant had completed the crime of armed home invasion prior to the purported withdrawal. As discussed infra, however, this error is immaterial, because the defendant did not demonstrate a timely and effective withdrawal from what could have been, based on this explanation, an attempted armed home invasion. See Commonwealth v. Morin, 478 Mass. 415, 422-423 (2017).

The crux of the defendant's argument is that, although he was present at the scene, he abandoned the plan to rob the victim of money or drugs. The defendant claims that Lopez "must have noticed" that his three accomplices had left the apartment building. He argues that Lopez, who stayed behind to search the victim's apartment for money or drugs, was engaged in an "independent effort" to steal from the victim, and was acting strictly on his own behalf when he shot the victim.

Our jurisprudence on withdrawal from a joint venture focuses on the interval between the asserted withdrawal and the

commission of the offense, and the extent to which a defendant communicates the fact of withdrawal to a coventurer. See Commonwealth v. Rivera, 464 Mass. 56, 74 (2013) (and cases cited). Here, there was no evidence that the defendant effectively withdrew from the joint venture to commit the predicate offense of armed home invasion.

The defendant did not testify. Considered in the light most favorable to the defendant, the facts largely are derived from his somewhat self-serving statements to police. They establish that the defendant entered the apartment building with the intent to steal money or drugs from the victim; that he was disguised and armed with a knife; that Lopez concealed a handgun somewhere on his person; that the defendant and his coventurers assaulted the victim at the threshold of the victim's apartment; and that the defendant fled because the victim alerted his neighbors.

Having crossed the Rubicon by entering the apartment building to rob the victim while armed and disguised, and having assaulted the victim at the threshold of his apartment, the defendant did not effectively withdraw before the commission of an armed home invasion. See Commonwealth v. Miranda, 458 Mass. at 118 (2010) (evidence did not support withdrawal instruction where there was no "appreciable interval" between alleged withdrawal and the commission of the planned crime);

Commonwealth v. Pucillo, 427 Mass. 108, 116 (1998) (judge properly instructed jury that withdrawal was not timely and effective "if [the] withdrawal comes so late that the crime cannot be stopped"); Cook, 419 Mass. at 202 (evidence was insufficient to suggest timely withdrawal from joint venture where defendant kicked and punched victims but left before fatal stabbing); Model Jury Instructions on Homicide 18 (2018) (withdrawal effective and timely if "the defendant withdraws from the planned crime before the commission of the crime has begun").

The defendant contends that the evidence warranting a withdrawal instruction is stronger than in Fickett, 403 Mass. at 196. We disagree. In that case, the defendant and an intoxicated victim went to several bars. Id. The victim, who paid for all of the drinks with a substantial sum of money, became a target for robbery. Id. The defendant telephoned an acquaintance, and both plotted to steal from the victim. Id. The defendant testified that he abandoned the plan to rob the victim after he received a loan of one hundred dollars from the potential victim. Id. at 196, 200. The defendant told a taxicab driver, who was planning to help with the robbery, that he no longer wanted to steal from the victim. Id. at 200. The defendant called his coventurer and told him that "the victim had just lent him [one hundred dollars]," and that he did not

want anything "to do with what we had discussed." Id. at 201. The defendant agreed to bring the victim to his coventurer's house to discuss it. Id. There, the defendant repeated that he did not want anything to do with a robbery. Id. at 196, 201. The coventurer told the defendant and the victim that he would give them a ride home or to a bar. Id. at 196. En route to a bar, the coventurer stopped his vehicle, killed the victim, and stole his money. Id. at 196, 201. In sum, by contrast to the situation here, the defendant in that case had renounced his involvement in the robbery prior to the actual commission of the offense. See id. at 196, 201.

Accordingly, notwithstanding that the judge improperly gave an instruction on withdrawal at the defendant's first trial, the defendant was not entitled to such an instruction on retrial. See Cook, 419 Mass. at 202 (judge was not required to instruct on withdrawal where theory was unsupported by evidence).

b. Ineffective assistance of counsel. The defendant sought a new trial on the basis of ineffective assistance of counsel. He faults counsel for not having requested a supplemental instruction concerning the connection between the predicate felony and the killing. The defendant also contends that counsel was ineffective for not objecting to a portion of the prosecutor's closing argument, in which the prosecutor urged

the jury to do [their] job." After a hearing, the motion judge, who was also the trial judge, denied the motion.

In reviewing a claim of ineffective assistance of counsel in a case of murder in the first degree, we apply the more favorable standard of review for a substantial likelihood of a miscarriage of justice. See Commonwealth v. Vargas, 475 Mass. 338, 358 (2016), G. L. c. 278, § 33E. "We consider whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion." Id., quoting Commonwealth v. Lessiur, 472 Mass. 317, 327, cert. denied, 577 U.S. 963 (2015).

i. Supplemental jury instruction. The defendant argues that his trial counsel was ineffective for failing to request a supplemental instruction regarding the Commonwealth's burden to prove that the act that caused the victim's death occurred during the commission or attempted commission of the predicate felony. The judge instructed the jury that felony-murder required the Commonwealth to prove:

> "that the act which caused the death occurred during the commission or the attempted commission of the underlying felony. As noted above, the underlying felony for this charge of felony murder in the first degree is armed home invasion. The Commonwealth must prove beyond a reasonable doubt that the act that caused the death of the decedent occurred in connection with that felony and at substantially the same time and place. A killing may be found to be connected with the felony if the killing

> occurred as part of the effort to escape responsibility for the felony by the defendant or by another participant in the commission or the attempted commission of the underlying felony."

See Commonwealth v. Holley, 478 Mass. 508, 520 (2017), citing Commonwealth v. Ortiz, 408 Mass. 463, 466 (1990); Model Jury Instructions on Homicide 67 (2018).

The defendant argues that his trial counsel should have requested a supplemental jury instruction based on Commonwealth v. Dellelo, 349 Mass. 525, 529 (1965), and Green, 302 Mass. at 555. He argues that this instruction would have informed the jury that "a murder is not committed in the commission of a felony if the felony was completely over before the murder, and that the felony was completely over if there was an appreciable interval between the termination and the killing." See Dellelo, supra (whether attempted crime was "completely over," so that it may not serve as basis for felony-murder liability, is question of fact for jury); Green, supra (defendant was required to have abandoned joint venture within "appreciable interval" of fatal act).

According to the defendant, "everyone but Lopez" thought that the home invasion had been completed before the fatal shooting. It therefore was for the jury, guided by an appropriate instruction, to decide whether the predicate felony of armed home invasion had been "completely over" before the

shooting. The absence of such an instruction, he argues, created a substantial likelihood of a miscarriage of justice.[4]

In an affidavit submitted with his motion for new trial, trial counsel asserted that he did not consider asking the judge to supplement the felony-murder jury instructions. The judge ruled that, based on the evidence at trial, the defendant was not entitled to a supplemental jury instruction. Relying on Morin, 478 Mass. at 422, the judge concluded that the Commonwealth was not required to prove that the killing occurred during the course of the predicate felony.

The requested supplemental instruction would not have enhanced the jury's understanding of the Commonwealth's burden to prove the third element of felony-murder, i.e., "that the act that caused the death occurred during the commission or attempted commission of the underlying felony." Model Jury

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[4] During deliberations, the jury asked the judge the following questions: (1) "Is it possible to have a definition for joint venture?" and (2) "Can a joint venture be terminated and when?" The judge responded to the first question by directing the jury to refer to specific pages of his written instructions. As to the second question, the judge wondered whether the jury was asking about withdrawal from the joint venture before it concluded or the defendant's escape from the apartment building. He asked the jury for clarification by writing on the note: "Can you be more specific as to what it is you are asking in the second question?" Although trial counsel argued that the answer to the second question was "Yes," he agreed that the second question could use "more specificity." The jury returned a verdict an hour later without seeking further guidance from the court.

Instructions on Homicide 67 (2018). We previously have determined that the Commonwealth need not prove that the killing occurred during the course of the predicate felony. Morin, 478 Mass. at 422 "For purposes of felony-murder, the homicide and the predicate felony need only to have occurred as part of one continuous transaction, and the connection is sufficient as long as the predicate felony and the homicide took place at substantially the same time and place. The killing may occur after the completion of the predicate felony, so long as the killing is "within the res gestae of the felonious conduct" (quotations and citations omitted). Id. See Commonwealth v. Alcequiecz, 465 Mass. 557, 566-567 (2013) (evidence was sufficient where entire span of events -- from illegal entry to fatal stabbing -- occurred in less than nine minutes as part of "a single transaction consisting of an unbroken sequence of events"); Commonwealth v. Rogers, 459 Mass. 249, 251, 255-256, cert. denied, 565 U.S. 1080 (2011), quoting Dellelo, 349 Mass. at 530 ("the killing is referable to the robbery" if committed as part of predicate felony or incident to crime such as an act of escape or flight).

Here, the judge properly instructed the jury that the killing must have occurred "at substantially the same time and place" as the underlying felony. See Model Jury Instructions on Homicide 67 (2018). This instruction was adequate to explain

"the required connection between the predicate felony and the killing." See Alcequiecz, 465 Mass. at 566-567. A failure to object to this language, or to request "additional instructions for clarification," does not constitute ineffective assistance of counsel. Id.

ii. Prosecutor's closing argument. The defendant's second claim of ineffective assistance of counsel concerns a portion of the prosecutor's closing argument. The prosecutor ended his closing argument by urging the jury to "do your job." He argued:

> "Ladies and gentlemen, it's football season, and I don't know whether you're a football fan or not, but I'm sure you've heard the name of Bill Belichick, the coach of the Patriots. And one thing he always says year after year after year, 'I tell my players do your job.' And I ask you, if you do your job, and look at the case and look who's responsible, that you find the defendant guilty on all three indictments."

In denying the motion for a new trial, the judge determined that it was improper for the prosecutor to argue that it is the jury's job to convict. See Commonwealth v. Adams, 434 Mass. 805, 822 (2001) (improper to argue that jury's "job" or "duty" is to return guilty verdict); Commonwealth v. Degro, 432 Mass. 319, 328-329 (2000) (it was not permissible advocacy to suggest that jury's job is to convict). The judge determined, however, that the error was not prejudicial. "[T]he focus of the prosecutor's closing argument had been on what the evidence at

trial had been and how that evidence pointed to the defendant's guilt." The jurors were instructed that their verdict must be based only on the evidence, and nothing but the evidence; they also were reminded that closing arguments are statements of opinion, and not evidence. "The prosecution's case at trial was strong."

We agree with the trial judge. The statement, considered in the context of the entire closing argument, as well as the jury instructions, did not create a substantial likelihood of a miscarriage of justice. See Commonwealth v. Washington, 459 Mass. 32, 44 (2011); Commonwealth v. Montez, 450 Mass. 736, 750 (2008).

c. Relief pursuant to G. L. 278, c. § 33E. Finally, the defendant asks this court to exercise its extraordinary authority under G. L. c. 278, § 33E, to reduce the verdict on the murder conviction. He argues that he is entitled to relief on two grounds. First, a verdict of murder in the second degree would be more consonant with justice because he merely participated in the "remote outer fringes" of the joint venture. See Commonwealth v. Brown, 477 Mass. 805, 823-824 (2017), quoting Commonwealth v. Rolon, 438 Mass. 808, 824 (2003). Second, Lopez, the individual who pulled the trigger, was convicted of murder in the second degree.

We have reviewed the entirety of the record and discern no basis upon which to disturb the verdict. The defendant's contention that he played a minor role in the armed home invasion is unavailing. The jury would have been warranted in finding that the defendant played a central role in the crime that led to the victim's death. The defendant's active participation in the joint venture included identifying a drug dealer to target, coordinating with an accomplice conducting reconnaissance, planning the robbery, and entering the apartment building while armed with a knife. Furthermore, a disparity in sentences returned by a separate jury for a more culpable accomplice is not enough, standing alone, to warrant relief under G. L. c. 278, § 33E. See, e.g., Commonwealth v. Burke, 414 Mass. 252, 268 n.14 (1993); Commonwealth v. Todd, 408 Mass. 724, 729-730 (1990).

3. Conclusion. The judgments of conviction and the order denying the motion for a new trial are affirmed.

So ordered.